PUBLIC LAW BOARD NO. 7633

Brotherhood of Maintenance
of Way Employes Division - IBT Rail Conference

and

Union Pacific Railroad Company
(Former Missouri Pacific Railroad Company)

Case No: 055
Award No: 055

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier continued to withhold Mr. M. Minor from work beginning June 30, 2015 and continuing (System File UP520JF15/1631185 MPR).

2. As a consequence of the violation referred to in Part 1 above, Claimant M. Minor shall be provided eight (8) hours per each day at his respective straight time rate of pay of twenty-eight dollars and sixty-eight cents ($28.68) per hour beginning June 30, 2015 and continuing in addition to any and all other compensation lost as a result of the violation."

FINDINGS:

Public Law Board No. 7633, upon the whole record and all the evidence, finds the parties involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction of the dispute herein; the parties were given due notice of hearing before this Board and they participated therein.

On March 28, 2015 Claimant, a 6+ ton system truck operator, was injured in an off-duty, non-work-related motorcycle accident, during which he sustained a Traumatic Brain Injury ("TBI") requiring hospitalization and rehabilitation. On April 14, 2015 Claimant's Medical Leave of Absence ("MLOA") was initiated. On June 2, 2015 it was extended through June 28, 2015. On a Carrier "Medical Progress Report" dated June 15, 2015 Claimant's neurosurgeon Dr. Germann "cleared Claimant to return to work with no restriction on 6-28-15." On June 26, 2015 Doctor Holland of the Carrier's Health and Medical Services ("HMS") reviewed Claimant's medical

history and memorialized that: "I concur with the FFD [Fitness for Duty] Determination of Dr. Charbonneau. The employee meets diagnostic criteria for severe Traumatic Brain Injury, and as part of this he has a permanent unacceptable risk for future seizures, and needs permanent work restrictions for this." Among the many permanent restrictions, Claimant is prohibited from operating essentially any Carrier vehicles, including trucks, on-track or mobile equipment, and forklifts. Because Claimant's restrictions could not be accommodated in his former position, he was referred to the Carrier's Disability Prevention and Management group to help him find other potential positions within the Company, if possible.

The Organization appealed the Carrier's determination and the Carrier denied the appeals. The dispute was not resolved during a settlement conference and progressed to arbitration. This matter is now before the Board for final and binding resolution. The Board has carefully reviewed the entire record in this case, including the arguments and awards provided in support of the parties' respective positions, whether or not specifically addressed herein.

It is axiomatic that Carriers have a duty of care for the safety of employes, their co-workers and the general public. In this case, the Carrier had legitimate concerns about Claimant's ability to safely perform his job following his severe TBI. As a consequence thereof, the Carrier placed reasonable work restrictions on the Claimant.

The Board notes that Claimant's own neurosurgeon signed a "Physician's Orders" document on "Brain Injury Transitional Services – THFW Therapy Services" letterhead, dated June 9, 2015, which states: "MICHAEL MINOR sustained a **severe TBI** with SDH, SAH and DAI due to MCA on 3/28/2015." [Emphasis added]. On August 20, 2015, in response to Claimant's reconsideration request, Dr. Holland wrote: "Mr. Minor has documented severe Traumatic Brain Injury, with significant permanent objective neurological damage. All persons who have severe TBI also are at a permanent unacceptably increased risk for seizures, and therefore require permanent Sudden Incapacitation restrictions. . . . The work restrictions are permanent."

The Board finds that the issue of seizure medication is not outcome determinative on the facts and circumstances of this record. Moreover, assuming, *arguendo*, that Claimant was, is and remains seizure-free, that does not negate the fact that he has been medically determined, in accordance with industry-standard Federal Motor Carrier Safety Act ("FMCSA") protocol to be "at a permanent unacceptably increased risk for seizures increased risk of seizures" as a result of the "severe TBI" he sustained in the motorcycle accident on March 28, 2015.

The Board finds that the Carrier's use and application of industry-standard FMCSA protocol for severe TBI was reasonable. Contrary to the Organization's position, the Carrier was not without justification, or arbitrary, excessive or harsh in so doing.

Therefore, the claim must be denied.

AWARD:

Claim denied.

Robert Grey
Neutral Member
Dated: March 20, 2018

Katherine Novak
Carrier Member

Andrew Mulford
Labor Member