

PUBLIC LAW BOARD NO. 7633

Brotherhood of Maintenance
of Way Employees Division - IBT

and

Union Pacific Railroad
(Former Missouri Pacific Railroad)

Case No. 69
Award No. 69

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s medical disqualification and removal from service of Mr. Z. Conrad on July 15, 2015 and continuing was inappropriate, arbitrary and unwarranted (System File UP647BT15/1632496 MPR).
2. As a consequence of the violation referred to in Part 1 above, Claimant Z. Conrad shall ‘... be compensated for any and all straight time as well as any and all overtime worked by gang 4165 during this continuing period as well as any additional expenses incurred by the Claimant because of the Carrier violation. Even if the Claimant should be disqualified as a flagging foreman, which we don’t agree with, at the very least he should have been allowed to return to work in another capacity, even if it meant at a lower rated position such as a track laborer and at the very least should be paid as such an (sic) a continuing basis until this matter is taken care of and Mr. Conrad is returned to work. At the very least the Claimant should be compensated at the trackman rate of pay beginning on July 15, 2105 (sic) and continuing until he is returned to work at the trackman rate of pay for at least 40 hours per week.’ (Employees’ Exhibit ‘A-1’).”

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.

Claimant was hired on April 15, 2013. On April 13, 2014, while on furlough status, Claimant was injured in a non-work-related ATV accident, during which he sustained multiple

skull fractures and Traumatic Brain Injury (“TBI”), for which he was hospitalized. On June 5, 2014 Claimant returned to work without informing the Carrier of the accident/injury, and without a Fitness for Duty review. In April of 2015, the Carrier obtained first knowledge of the accident/injury during Claimant’s DOT renewal process. The Carrier thereupon obtained and conducted a review of Claimant’s medical records pertaining to the accident/injury. On May 8, 2015 the Carrier placed work restrictions on Claimant, pending receipt of Claimant’s complete medical records from this accident/injury. Claimant was referred to the Carrier’s vocational rehabilitation accommodations group to help him find other potential positions within the Company. On May 26, 2015 the Carrier placed permanent sudden incapacitation work restrictions on Claimant.

In the Carrier “Medical Comments History” entry dated July 13, 2015, the Carrier’s Chief Medical Officer (“CMO”), Doctor Holland, of the Carrier’s Health and Medical Services (“HMS”), documented his review of Claimant’s medical records from this accident/injury. He wrote, in pertinent part, that:

Based on these injuries this should be classified as Severe Traumatic Brain Injury (“TBI”). There is substantial evidence in the scientific medical literature that persons how have had Severe TBI have a permanent increased risk for future seizures due to the severity of the injury to the brain. This risk exists even if a seizure had not yet occurred, and the risk of future seizures does not decrease with time. Use of anti-epilepsy drugs or other treatments cannot reduce the risk of seizures to an acceptably low level. A worker in a Safety Critical Position, such as Mr. Conrad, who has had a Severe TBI requires permanent work restrictions for sudden incapacitation risk due to risk for future seizures. These work restrictions are consistent with evidence-based recommendations of medical advisory groups of the Federal Motor Carrier Safety Administration (FMCSA), which state an individual who has had a Severe TBI should be permanently disqualified from driving commercial vehicles. The scientific evidence used by FMCSA is equally applicable to other workers who are not commercial drivers, but who function job demands and safety risks are substantially similar (such as, railroad workers).

In summary, Mr. Conrad has suffered a severe TBI, and based on this he has a permanent unacceptable risk for Sudden Incapacitation (i.e., greater than 1% per year occurrence rate),

due to his increased risk for future seizures. There is no medical treatment that will reduce this risk to an acceptable level. Therefore, he is given the permanent work restrictions below.

Claimant presented the Carrier with a doctor's letter dated September 24, 2015 which concluded that despite the TBI incurred 17 months earlier, Claimant "can work without restriction". However, this was insufficient to change the Carrier's decision.

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 employees, their co-workers and the general public. In this case, the Board finds that 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 finds that the issues of seizure medication, and Claimant's allegedly medically uneventful return to service, are not outcome determinative on the facts and circumstances of this record. 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 have "*a permanent unacceptable risk for Sudden Incapacitation (i.e., greater than 1% per year occurrence rate), due to his increased risk for future seizures. There is no medical treatment that will reduce this risk to an acceptable level*" as a result of the severe TBI he sustained in the ATV accident on April 13, 2014.

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.

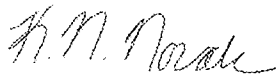
AWARD:

Claim denied.

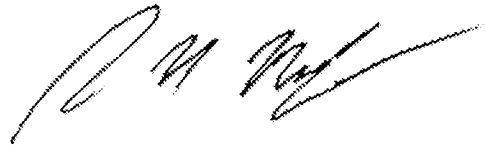


Robert Grey
Neutral Member

Dated: May 11, 2018



Katheirne Novak
Carrier Member



Andrew Mulford
Labor Member