PUBLIC LAW BOARD NO. 7633

Brotherhood of Maintenance
of Way Employes Division - IBT

and

Union Pacific Railroad
(Former Missouri Pacific Railroad)

Case No. 77
Award No. 77

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier withheld Mr. M. Witchet from returning to service after a receiving full medical release from his physician on December 28, 2015 (System File UP504JF16/1652225 MPR).

2. As a consequence of the violation referred to in Part 1 above, Claimant M. Witchet shall now be compensated for all lost wages from December 28, 2015 and continuing."

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 September 12, 2011. He was in service as a truck operator. The Carrier's "Medical Comments History" ("MCH") documents that on October 19, 2015 Claimant telephoned the Carrier to report that "*he had a 'mild stroke' on 10/16/15. [Claimant] wants to be sure UP understands that 'this event did not occur on the job.' [He] states he had numbness in his left arm on 10/16/15 and went to the ED. [He] was admitted to hospital and discharged on 10/18/15 with no residual deficits.*"

On November 17, 2015, Carrier's Health and Medical Services ("HMS"), received a Carrier "Medical Progress Report" ("MPR") (a/k/a "Return to Work") form dated November 10, 2015, on which Claimant's Dr. Zaidi stated: "Diagnosis: Lumbar Radiculopathy; Prognosis: Full Recovery; Treatment Plan: Patient referred to have MRI done and also referred to a cardiologist and neurologist; Current Level of Functional Abilities: able to return with no restrictions; Anticipated Return to Work Date: 11-30-15, Full Duty." HMS' MCH documents that this form was received without supporting medical documentation, and that Claimant requested Dr Zaidi provide same to Carrier. On November 20, 2015, Carrier Dr. Charbonneau documented in the MCH that:

> *This EE [Employee] has a myriad of serious medical conditions and we do not have all of the records for any of them. He has not provided his hospitalization records, sleep study results, neurology FU clinic notes, the results of multiple MRI Scans, any results of treatment for lumbar radiculopathy, and the results of the cardiac work-up to this point. It appears that he was admitted to a hospital in October after at least two episodes of focal neurologic symptoms/deficits. Again, he has not provided the hospitalization records and we have only EMR derivative notes from multiple neurology FU visits (there are no details of his symptoms and clinical exam findings, and no MRI Scan results). Here are the diagnoses that appear in our limited information: 1 Stroke; 2 Brain Lesion (type not specified); 3 Possible MS; 4 Persistent dizziness; . . . Action: 1 NOT FFD; 2 We need all of the results mentioned above: A Hospitalization notes; B Results of all of the diagnostic studies, including Echo's, MRI's, etc.; C Sleep study results and FU; D Full Neurology Clinic notes, not just the Dx's and orders; E Cardiology records; 3 At this point, the final neurologic diagnoses are not clear. It appears that he has had at least a stroke and possibly MS or other brain lesion. This will determine the length of time off work required, but his significant cardiac disease may also impact his ability to RTW.*

On December 7, 2015 Claimant provided 48 pages of medical documentation. On the same date, Dr. Charbonneau documented in the MCH that:

> *This EE was admitted from 10/16 to 10/18/15 for a right parietal CVA and acute on chronic CHF. He presented with persistent left upper extremity numbness after having left lower extremity symptoms the week before. He has had the following during his*

> *hospitalization: 1 Normal Brain CT; 2 Brain MRI showed a very small right parietal CVA; 3 Carotid US was normal; . . . On 12/1/15, one of his physicians released him to RTW for lower back pain. We have no notes. Action: 1 The EE is NOT FFD; 2 We still need FU cardiology information (post-hospitalization cardiology clinic notes, ETT results and repeat ECHO report). If he has not been seen in FU, he needs to be. With CHF, he will be restricted to light level work until we get the FU information outlined; 3 We still need FU neurology notes; Again, if he has not been seen, he needs to be; 4 This EE will need sudden incapacitation restrictions for at least one year from the event, possibly longer depending upon the content of the information to come. At this time, however, we do not have sufficient information to release him to restricted duty.*

On December 10, 2015 Claimant provided a Brain MRI report. On the same date, Dr. Charbonneau documented in the MCH that:

> *The EE has had a new Brain MRI which does not show a definite CVA but that does not mean that he did not have one. The original MRI showed a small parietal white matter CVA and one of his discharge diagnoses was CVA. He also had a new onset of CHF. We still do not have post-hospitalization Neuro notes. There is a note from a spine surgeon, Pierre LeBaud, MD on 12/3/15 which states that he cannot RTW because he cannot sit or stand for long periods. Action: 1 Remains NOT FFD; 2 We need the post-hospitalization neuro, cardiology and spine surgery clinic notes; 3 We will be needing a [neurological] review by Dr. Wilson so I recommend that you seek authorization for that now.*

On December 28, 2015 HMS received an MPR form dated December 22, 2015, on which Claimant's Dr. LeBaud stated: "Diagnosis: Sprain of ligaments of Lumbar; Prognosis: Full Recovery Expected; Treatment Plan: N/A; Able to return to work full duty 12-28-15." On the same date, Dr. Charbonneau documented in the MCH that:

> *The new information supplies significant information regarding two of the three remaining issues: 1 Cardiac. . . .This closes the cardiac issue; 2 Spine care FU shows an MRI of the lumbar spine on 12/16/15. It demonstrated primarily degenerative facet joint disease. A Medical Progress Report of 12/22/15 releases him to Full Duty. The EE dad not provide the accompanying clinic note. We need it. There is no new clinical information on the neurologic issue of CVA. We still need it. Action: 1 Remains NOT FFD; 2 We*

> *need the Neurology Clinic notes. If the EE will not be providing them, we will get the neurology file review without them; 3 I think that we need a neurology file review either way, so please again request authorization from the DCS; 4 Please request the 12/22/15 spine care clinic note.*

On January 6, 2016 Claimant authorized HMS to speak with his neurologist, Dr. Rehman. On the same date, Dr. Charbonneau telephoned Dr. Rehman. However, Dr. Rehman was unavailable because he was on-call at the hospital. On January 7, 2016 Dr. Rehman telephoned Dr. Charbonneau. Dr. Rehman stated to Dr. Charbonneau that the final diagnosis was a TIA rather than a stroke, and that he would send his notes for review, which he did. On January 8, 2016 Dr. Charbonneau documented in the MCH that: "*I have reviewed the records. Dr Rehman told me that the EE had a TIA and he advised me to review his records. That diagnosis does not appear in the neuro notes. I still believe that we need a neuro file review. Please ask the DCS for authorization.*" On January 19, 2016 the MCH documents that: "*Per DCS: File review not approved, she will discuss case with CMO fro FFD determination.*" On January 22, 2016 Dr. Charbonneau documented in the MCH that: "*I have reviewed this EE's case with the CMO and DCS. The file review by Dr. Wilson is now authorized. I have previously sent the referral letter to you. . . Please proof read the referral letter, attach the appropriate documents and then send the letter and attachments to Dr. Wilson for review.*" On January 25, 2016 Dr. Charbonneau documented in the MCH that: "*I reviewed this case late yesterday with the CMO & DCS. The neuro file review report is not yet available. It will go directly to the CMO. We will follow-up after the report is available.*" On February 4, 2016 Dr. Wilson's file review was completed and sent to Carrier's CMO. On February 10, 2016 Dr. Charbonneau documented in the MCH that:

> *I reviewed this case late yesterday with the DCS and CMO. This EE is a Truck Driver and he has had a parietal stroke. This will require a 5 year period of sudden incapacitation restrictions. The restrictions can be reviewed then if the EE remains neurologically stable and seizure-free. He will need a complete clinical neurologic examination at the end of that time, with any necessary neurologic diagnostic studies left to the dicretion of his treating neurologist. Action: A This EE is NOT FFD for his Full Duty. B The employee is given the following work restrictions: 1. Not to operate company vehicles, on-track or mobile equipment, or fork-lifts. . . . 6. If a new job assignment is considered, outside of the Engineering Department, Health and Medical Services must*

> *review the job requirements and determine if the employee can safely perform the essential functions of the job. C These work restrictions are ongoing, but can be reassessed in 5 years from the date of the employee's stroke, at which time a thorough medical evaluation should be done by the employee's neurologist. The appropriate diagnostic studies will be determined by the employee's neurologist. D We will continue to review any additional medical information submitted by the employee. . . .*

On February 11 and 12, 2016 Dr. Charbonneau discussed the above via telephone with Claimant, who maintained that he did not have a stroke. On February 12 Dr. Rehman faxed a letter to HMS, dated February 12, 2016, stating that:

> *This patient was seen in our office first time on October 20, 2015 because of dizziness and left arm numbness. Subsequently he had MRI brain that did not show stroke. He also had MRI of the cervical spine that did not show any cord lesion but it did show minimal foraminal stenosis at C3-4 and C4-5 level. He was followed up on November 9, 2015. On November 10, 2015 had EMG nerve conduction study that showed mild left carpal tunnel syndrome but no cervical radiculopathy. This patient was initially seen at Tyler Mother Frances hospital when his problem started. This patient is neurologically stable at this time to return to his work.*

On February 17, 2016 Dr. Charbonneau documented in the MCH that:

> *Yesterday, I reviewed this case with the CMO. We reviewed the letter from Dr. Rehman. Unfortunately, Dr. Rehman did not cite the in-hospital structural study which demonstrated a small area of parietal ischemia and the diagnosis of stroke. He only referenced the FU structural study and his opinion that the EE did not have a stroke or MS, simply noting the ongoing symptoms and attributing them to carpal tunnel syndrome. We discussed the conflicting information provided to this point.*

Also on February 17, 2016, Dr. Charbonneau further documented in the MCH his previous telephone call with Claimant. In pertinent part, this entry states:

> *I started to summarize Mr. Witchet's course of medical illness during the episode of recent illness which included documentation that he was diagnosed with a stroke. He immediately interrupted me to state that he had never had a stroke. He went to great*

> *lengths to state emphatically that he had never had a stroke. He repeated many times that he had never been diagnosed with a stroke. I read to him from the hospital discharge note and the in-hospital brain structural studies, indicating stroke/ischemic area in the parietal area. Mr. Witchet again interrupted to state that he had never had a stroke. . . . I started to explain that we had had the file reviewed by an expert consultant, but was never able to complete that statement. It was obvious that Mr. Witchet would not listen to or accept any opinion but his own. . . . Mr. Witchet told us that he would be seeing Dr. Rehman on Monday, 2/15/16. I invited him to send those records, and to address his position regarding whether or not Mr. Witchet had had a stroke, in his opinion. I admonished Mr. Witchet that his doctor simpling stating once again that Mr. Wichet had not had a stroke would be inadequate, in light of the hospital structural study and medical records stating clearly that Mr. Wichet had had a stroke.*

On April 8, 2016 Claimant was released by the Carrier to return to work, with the above referenced sudden incapacitation work restrictions. On April 13, 2016 Claimant was referred to the Carrier's accommodations process to help him find other potential positions within the Company.

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 Board finds that the Carrier had legitimate concerns about Claimant's ability to safely perform his job following an alleged stroke (a/k/a "CVA"). As a consequence thereof, the Carrier placed reasonable work restrictions on the Claimant.

The Board notes that the Return to Work release provided by Claimant on December 28, 2015 concerned only his back issues, not his brain issues. It did not address the issue of a stroke

in any way whatsoever. Claimant's neurologist's Return to Work letter, which did address the stroke issue, was not provided until February 12, 2016.

The Board recognizes that there is a difference of medical opinion whether Claimant did or did not have a stroke. The Board finds that the Carrier took reasonable and expeditious steps to determine the issue. The Carrier's Chief Medical Officer Dr. Holland, as well as Dr. Charbonneau, and outside neurological consultant Dr. Wilson each reviewed Claimant's medical record and found evidence of stroke, despite Claimant's neurologist's letter stating there was no stroke.

Under the facts and circumstances of this record, the Board finds that the Carrier's determination was not unreasonable, arbitrary or excessive.

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