

Award No. 3
Case No. 3

PUBLIC LAW BOARD NO. 6778

PARTIES) Union Pacific Railroad Company
TO)
DISPUTE) United Transportation Union (UP Western Lines)

COMPANY FILE: 1394371-D
UTU File No. 04060RV

STATEMENT OF CLAIM:

Request of Brakeman Jaime ~~A.~~^{B.} Alvarez ("Claimant"), Roseville Service Unit, for removal of a Level 5 discipline assessment from his personal record, return to service with seniority unimpaired, and for replacement of his wage loss and vacation credits resulting from his removal from service on or about December 29, 2003 and subsequent dismissal on February 4, 2004 until returned to service. Also requesting lost wages resulting from his attendance at the formal investigation held on January 21, 2004. Claim includes payment for all wage equivalence to which claimant is entitled, such as medical and dental benefits and for any monetary loss for such coverage for such service earnings.

OPINION OF BOARD:

This case is the third in a series of three cases currently before this Board involving Claimant J.D. Alvarez for failure to comply with written instructions from Roseville Service Unit Superintendent D. Shudak. By letter dated April 14, 2003, the claimant was granted a leave of absence under the Family & Medical leave Act (FMLA). The leave was authorized to be taken intermittently beginning January 1 through December 31, 2003 at the frequency of up to three days per week.

A review of the claimant's work record uncovered a number of layoffs for FMLA on weekend dates from July through October 2003. On November 14, 2003 Superintendent Shudak sent a letter to the claimant asking him to "provide me with

copies of documentation that substantiates and validates your use of Family & Medical Leave Act on various Saturdays and/or Sundays from July through October 2003.” The letter instructed the claimant to provide documentation by November 24, 2003. On November 19, 2003 the claimant replied to the superintendent’s letter. In his letter he stated:

“This is in response to the letter sent November 14th, 2003 requesting documentation for use of Family and Medical Leave on various Saturdays and Sundays. I have this medical leave to care for my wife who has a medical condition that requires me to drive her to various appointments. I also need to care for my children during these times”

On November 25, 2003 a second letter was sent by Superintendent Shudak that informed the claimant that his letter of November 19, 2003 failed to properly respond to his letter dated November 14, 2003. This letter again directed the claimant to provide documentation by December 5, 2003 and told him whom to contact if he had any questions.

On December 5, 2003 the claimant was notified to attend an investigation in which he was charged with failing to comply with instructions contained in Superintendent’s Shudak’s November 14, 2003 letter. On December 11, 2003 the claimant was sent the following letter:

This is in reference to my letters to you dated November 14 and November 25, 2003, regarding your use of the Family and Medical Leave Act.

“To date, you have failed to properly respond to either of by above-mentioned letters. Therefore, I am directing you to provide me with copies of documentation that substantiates and validates your use of the Family and Medical Leave Act on various Saturdays and/or Sundays from July through October 2003. Your response must be received in my office, at the above address, no later than

December 23, 2003. Your failure to properly respond to my request may result in a Level Five (5) investigation for insubordination.

If you have any questions, please contact Linda Wallace, Administrative Assistant at (916) 789-6013.”

On December 14, 2004 the claimant sent a letter to Linda Wallace, Administrative Assistant, that stated in part:

“Per your request I have sent 2 letters and this being my third. Please note, I have medical documentation, **ON FILE**, that substantiates and validates my use of the Family and Medical Leave. I don’t believe this is a Monday through Friday leave. It is needed to care for my wife who is unable to drive due to a serious medical condition. I need to drive her to various appointments which do fall on a Saturday or Sunday, not just Monday through Friday.”

Although the claimant did not provide documentation showing specific appointments on Saturdays and Sundays, he did finish his letter by stating;

“If additional documentation is required from my physician, please mail me the form needed for him to fill out.”

Claimant was notified by letter dated December 29, 2003 to attend an investigation in which he was charged with the following:

“Information has been received that while you were employed as Brakeman at Stockton, California, you allegedly failed to comply with instructions issued to you in a letter dated December 11, 2003, from Daniel J. Shudak, General Superintendent, requesting documentation to substantiate and validate your use of FMLA. This is a possible violation of Rule 1.13, as contained in the General Code of Operating Rules, effective April 2, 2000.”

This was the second letter of charges sent to the claimant on December 29, 2003. The first being the charge letter for the investigation held in Case No. 2. A formal

investigation was held at 0030 hours January 21, 2004 following the investigations held for Cases 1 and 2 on January 20, 2004. By a letter dated February 4, 2004, Claimant was advised that evidence adduced at that proceeding established his responsibility for rules violations as charged. Since this was his third violation of Rule 1.13, he was informed that the Upgrade Progressive Discipline Table required the assessment of a Level 5 discipline status and permanent dismissal.

The Organization stated that all three cases were for the same rule violation (1.13 Reporting and Complying with Instructions) and all stemmed from the same issue. The Organization noted that the rule violation by itself required a Level 2 Discipline assessment, a written reprimand. They stated that the problem in this case was that the Union Pacific's Upgrade Policy requires that if an employee is found guilty of violating the same rule three times in a two year period the penalty is permanent dismissal, no matter how minor the rule violation is. The Organization felt the Carrier abused the Upgrade Policy by having three separate investigations based on the same issue on the same day, just to stack minor discipline assessments which require no time off by themselves, in order to dismiss Mr. Alvarez.

The Organization stated that the Carrier used the same initial letter and two subsequent letters from Superintendent Shudak to base their charges against the claimant. They noted that two of the three Investigation Notices were dated the same day, December 29, 2003. It was their position that the records of the three investigations revealed that they delved into the same event and the testimony in the three investigations revolved around the same issue. The Organization requested that these three cases be

considered by the Board as one case as they rightly should have been by the Carrier at the onset of these three investigations

The Organization argued that the Carrier was incorrect in the charge letter when it stated that the claimant “failed to properly respond to either of my above mentioned letters”. The Organization pointed out that Mr. Alvarez did respond to Superintendent Shudak’s letters, three times, the final letter being dated December 14, 2003. The Organization stated that the Carrier charged the claimant with violating Rule 1.13 since he did not furnish them with documentation from a doctor stating that Mr. Alvarez took his wife to an appointment on Saturdays or Sundays. The problem is that they never explained to Mr. Alvarez that is what they expected from him. The Organization noted that the claimant in his response to Superintendent Shudak told him if the reply was insufficient to mail him what he wanted and that he would take it to his doctor and have him fill it out. The Organization argued that the claimant was not being unresponsive as the Carrier charged and was certainly not in violation of Rule 1.13.

The Organization concluded that the problem in this case was a lack of clear communication. Mr. Alvarez thought he was answering Mr. Shudak’s letters properly, Mr. Shudak felt the responses were inadequate. The Organization stated that the whole problem could have been solved if Superintendent Shudak had simply informed the claimant what documentation was required, such as copies of a doctor’s notice, a bill or receipt to validate your medical leave use on Saturdays or Sundays. They stated that would have been easier to understand than what he wrote, which was vague.

The Organization concluded that the facts in this case did not support permanent dismissal. Even if Mr. Alvarez was guilty of violating Rule 1.13, which the facts in this case did not support, he did not violate it three separate times. They argued that the discipline assessed in these three cases was harsh and excessive.

The Carrier stated that the claimant failed to comply with written instructions from the Superintendent. They argued that failing to comply with instructions is a violation of the Carrier's Rules and Regulations as well as the basic employer-employee relationship. They stated that the record proved that the claimant failed to provide documentation for his Saturday and Sunday FMLA absences as instructed in the December 11, 2003 letter from Superintendent Sudak.

They noted that the claimant stated that the purpose of his Family Medical leave was to provide his wife transportation to various appointments and to provide childcare. The Carrier stated that the claimant should have been able to produce evidence of these appointments that occurred on weekend dates. The Carrier concluded that the claimant failed to do so after a third request from the Superintendent and this was clearly in violation of Rule 1.13

The Carrier argued that an employer may require confirmation from an employee that the leave being taken qualifies for FMLA purpose. They stated that Superintendent Shudak's directive was clear on what was required: documentation of the appointments claimant allegedly attended on the identified weekends. The Carrier argued that if the claimant had any questions about the needed documentation he could have called the

Administrative Assistant to clear up his misunderstanding. They also stated that the claimant's response that he had already provided documentation was an inadequate response to the Superintendent's request. They concluded that the claimant elected not to comply with the request or he could not provide the required documentation.

The Carrier further argued that it is the claimant's responsibility, as an employee to keep his employer advised of any inability to work. They stated that proper permission must be obtained at all times before absenting oneself from employment. They concluded that the claimant was given specific instructions to provide documentation regarding his absence and failed to comply with these instructions.

The Board would agree with the Carrier's actions if the record proved that the claimant was unresponsive and was deliberately trying not to answer the Carrier's request. The record in this case does not prove that the claimant was unresponsive. A reading of the transcript of the investigation in this case as well as the two companion cases makes it patently clear that the claimant did not understand what information the Carrier was requesting. While this Board previously ruled that the claimant had the affirmative duty to inquire what information the Carrier was seeking, in the present case the claimant in his December 14 letter did ask the Carrier to send him forms to fill out that would satisfy the Carrier's request. This is not being unresponsive.

It is also clear from the record that, as the Organization has stated, the problem in this case was a lack of clear communication between the claimant and the Carrier. The

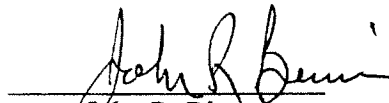
claimant had a duty to ascertain what information the Carrier wanted. The Carrier had the right to require confirmation from the employee that the time off being taken qualifies as leave for FMLA purposes. However, the Carrier also had the duty to succinctly state what information it was seeking, i.e. copies of a doctor's notice, a bill or receipt to validate the claimant's medical leave use on Saturdays or Sundays.

This is especially true when the record indicated the claimant was still working up until the time he was held out of service. The Carrier could have cleared this matter up by communicating directly with the claimant on a workday and verbally instructing him what information was needed. The Carrier did not do so and both parties were at fault. This is not a case where an employee was using FMLA to avoid work completely but rather a case where the claimant was possibly abusing FMLA to be off on weekends.

While the Board was able to distinguish Case No.1 from Case No.2, it is difficult to separate Case No. 2 from Case No. 3. In both cases the charge letters were issued on the same date and the investigations were held on the same day. While this Board found the claimant responsible in Case No.2, it is difficult to find him responsible in Case No. 3 as no time passed from the holding of the investigations let alone the issuance of discipline in Case No.2. The claimant clearly did not have time to correct his actions before another investigation was held and further discipline was issued. This is especially disturbing where three minor disciplines were coupled together to form the basis for permanent dismissal. The Board finds that the Carrier's actions


in this case were arbitrary. The claimant should be restored to service and paid for all time lost.

Findings: Claim sustained.


John R. Binau
Neutral Member


Frank A. Tamisiea
Carrier Member

4/19/2005


J. Kevin Klein.
Organization Member