PUBLIC LAW BOARD NO. 4244

Award No. 264
Case No. 270

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
Burlington Northern Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:
1. The Carrier violated the Agreement on July 6, 2001 when it issued the Claimant, Mr. W. D. Sullivan a 20-day Suspension for allegedly failing to comply with instructions by seeking medical care without first contacting your roadmaster.
2. As a result of the violation referred to in part (1), the Carrier shall remove the discipline mark from the Claimant's personnel record and make him whole for any time lost." [Carrier's File 14-01-0157. Organization's File 20-1311-014.CLM]

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction over the dispute herein.

The Claimant, Mr. W. D. Sullivan, was employed by the Carrier in its Maintenance of Way Department in 1989. While he was working as a Laborer on April 19, 2001, he suffered an on-duty injury and received medical treatment in an emergency room He thereafter sought medical treatment from his personal physician on April 21. As the consequence, he was charged with failure to comply with Roadmaster David Hanneman's instructions to advise him if he needed additional medical attention.

An investigation was afforded the Claimant on June 15, 2001, following two agreed-upon postponements. Thereafter, on July 6, 2001, the Carrier's Division Engineer wrote the Claimant:

"This letter will confirm that as a result of our formal investigation on June 15, 2001, in connection with your failure to comply with instructions from Roadmaster Hanneman when he instructed you to advise him if you needed additional medical attention, you are issued a record suspension of twenty (20) days for violation of Maintenance of Way Operating Rules 1.13, Reporting and Complying with Instructions. In assessing discipline consideration was given to your personal record."

That decision was appealed to the Carrier's highest designated officer to handle such matters, and is now before this Board. The transcript of evidence taken at the investigation is in the record. The transcript contains the testimony of Roadmaster Hanneman and the Claimant.

When he was treated at the emergency room on Thursday, April 19, the Claimant, according to Mr. Hanneman's testimony, was given Demerol intravenously, and an injection of Valium. The quantity was not known by either of them. Demerol is an analgesic with sedative qualities. Valium is an anti-anxiety drug used also for the relief of skeletal muscle spasms. A back injury, with consequent pain, was referred to in the transcript, and these drugs' administration appears consistent with that type injury.

The Claimant was also given a prescription for pain medication, but the specific drug was not identified in the record. Mr. Hanneman told the Claimant to let him know if he needed more medication for pain. He also stated that he told the Claimant, four times, before releasing him to go home, that if he needed further medical attention for his injury, to let him know.

On Saturday, April 21, the Claimant visited his personal physician. He said that he needed more medication for pain, and wanted his family physician, in whom he places trust, to examine him and express his opinion about his injury.

On Sunday, April 22, the Claimant called Mr. Hanneman to advise him that he would not be able to work on Monday, and told him of his visit to his own physician. This departure from the instructions assertively given him by Mr. Hanneman caused the investigation to be held.

The Claimant stated that he did not understand that he could not seek additional medical attention from his personal physician. He stated that upon his release from the emergency room, he was instructed to "see a doctor within 2 or 3 days." He recalled some conversation with Mr. Hanneman, who transported him from the hospital back to his personal vehicle at the workplace, but he testified he was under the impression he should contact him in case his condition worsened, warranting emergency treatment again. The Claimant's representative attempted to prove that the Claimant's drugged condition following the administration of Demerol and Valium caused him not to understand or comprehend the instructions given him by Mr. Hanneman. The Claimant responded, "My mind was all over the place." However confused his thoughts, he did understand he was to call Mr. Hanneman under some perceived circumstance, that is, if his condition worsened, he said.

After returning to his vehicle, the Claimant attempted to drive himself home, but stopped en route, and called his wife to meet him and drive him home. Mr. Hanneman, however, thought that the Claimant understood his instructions about calling him, and felt he was competent to drive himself home.

The record shows that the Claimant called Mr. Hanneman on his (Mr. Hanneman's) cellular telephone on Sunday, and the Claimant admitted that he could have, but did not, call him to inform him that he was going to see his personal physician.

A number of somewhat emotional issues were raised in the Claimant's defense. One issue was the state of the Claimant's mind following the administration of Demerol and Valium, both controlled substances, whose use would be prohibited an on-duty employee, unless taken by a doctor's direction, and in accordance with prescribed directions. While the possibility clearly exists, we cannot say with certainty that the Claimant's mind was rendered unable to assimilate the directions given him by Mr. Hanneman.

Another issue is whether the Carrier may regulate the employee's right to consult his personal physician with regard to an on-duty injury. That raises difficult questions with regard to treatment. Suppose the employee's personal physician instituted a course of treatment which followed a different regimen than that prescribed by a Carrier physician? Because the Carrier has some potential liability in the instance of an on-duty injury, its Medical Department must have a commensurate role to play in the treatment of such injury. Yet, we are not prepared to say that the Carrier can prohibit an employee from seeking the opinion of his personal physician. The record does not indicate that the Carrier would have prohibited the Claimant from consulting his own physician, but rather preferred its Medical Department to be aware of the Claimant's visit. (Q. & A. No. 22). In any event, both the employee and the Carrier have a paramount interest in restoring the employee to his previous condition of health and ability.

There is a real possibility that the Claimant did not fully understand Mr. Hanneman's direction to call him before seeking further medical attention. He may have been affected by the drugs, he may have been preoccupied by concern for his injury, he may have been in pain. In retrospect, he probably should not have attempted to drive home. The record does not indicate whether he was offered transportation to his home by the Carrier. He did begin the journey, but sought help while en route, which indicates something about the state of his mind.

Maintenance of Way Operating Rule 1.13 was read into the record:

"1.13 Reporting and Complying with Instructions

> Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties."

The Claimant stated that he complied with what he believed to be Mr. Hanneman's instructions, i.e., advise him if his condition worsened:

"75. Q. Did Mr. Hanneman state to you what the requirements would be once you left the job site?

A. My answer to that is I remember him saying, the, the way I took it and I, I, I'm, I can't help what date or Mr. Hanneman said to me or what he thought I understood. What I got it was if I started like had an emergency that I had, I mean, like I had to get another ambulance or something or urinating blood or something that was just, Oh, my God, get a hold of him like after it was done. I, I don't, I don't really remember him telling me this several times and I'm sure, if it, if it had been in a piece of paper or something. Maybe if it'd been on a piece of paper I could've referred back to it. Cause I had my papers from the hospital. Maybe if it'd been written down. I, I mean that's the truth.

76. Q. Okay. So...

A. It would've, it would've not come to this.

77. Q. So...

A. I would've called him.

78. Q. So, you got you, you, you did have conversation with him on your ride back to your vehicle or?

A. I'm sure I did. I'm sure I did. I'm sure he didn't ignore me.

79. Q. Uh-huh. And, and, and your feeling is that if it was in a written form you might, you, you would've, you would have notified him if you had to seek further, further...?

A. This is the truth. I mean if there's been a lot of paperwork on me since this happened. I mean and, and if this is come to like an investigation on, on verbal, I mean this is obviously important. And if I had understood it or interpreted it that way or understood it to be that way and maybe if I had a piece of paper I'd go look, Anita, I'd got to call Dave before I go see a, Dr. Todd (sp). I'd a done it. I have no qualms about calling Dave. I didn't take it that way. I didn't, that's the only thing that I remember that I remember from that is that was, that I took it was if it gets real bad or something. Tell him that you're in the hospital or you're, you know, you're at the doctors or something like that. . . ."

The Claimant's representative objected to the entry of Rule 1.13 into the record. The Board has addressed this issue before. We have said that employees are deemed to have

knowledge of the rules which govern their employment. If unrelated rules are raised for the first time during the course of the investigation, there might be merit to the objection, but such is not the case in this particular instance. See, e.g., Award No. 262.

The totality of the Claimant's testimony leads the Board to believe that he did not realize the potential consequences of obtaining medical treatment without the Carrier's knowledge and concurrence in the case of an on-duty injury. The Board is faced with the unpleasant task of attempting to balance the Carrier's need to exercise oversight of therapy for on-duty injury with its potential liability, and an individual's inherent right to select his own physician. Such potential liability affords the Carrier a greater degree of oversight, medically, than would be the case if the employee's illness or injury were not job-related.

The Board is persuaded by the record that the Claimant's failure to comply with Mr. Hanneman's instruction about reporting to him before seeking further medical attention was something less egregious than insubordinate defiance of orders. Nevertheless, he could have told Mr. Hanneman on Saturday that he intended to visit his own physician -- he thought it of sufficient significance to mention when he called Mr. Hanneman on Sunday. Because his failure appears to be more careless or the product of confusion, rather than insubordinate, the Board believes that a less severe disciplinary action is more appropriate. The Board concludes that the 20-day suspension should be expunged, and a Letter of Reprimand be placed in the Claimant's personal record.

AWARD

Claim sustained in accordance with the above Opinion..

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

Thomas M. Rohling, Carrier Member

8-20-02
Date