PUBLIC LAW BOARD NO. 5969

Carrier File No. CTJ 96-10-12AA
Organization File No. T-7641
Award No. 4
Case No. 2

Parties to Dispute: UNITED TRANSPORTATION UNION

-and-

BURLINGTON NORTHERN SANTA FE RAILWAY

Statement of Claim: Claim is made on behalf of W. A. Halvorson [for] reinstatement to the service, with seniority and all other rights unimpaired with payment for all time lost including time attending investigation and all notations removed from his personal record as a result of being improperly dismissed from service. Claim is also made for all wage equivalents to which entitled with all Medical, Surgical, Life and Dental Benefits restored and for reimbursement of any monetary loss for such coverage while discharged from the service.

INTRODUCTION

This Board is duly constituted by agreement of the parties dated December 20, 1996 ("The PLB Agreement"), and as further provided in Section 3, Second of the Railway Labor Act ("Act"), 45 U.S.C. Section 153, Second. The Board, after hearing and upon review of the entire record, finds that the parties involved in this dispute are a Carrier and employee representative ("Organization") within the meaning of the Act, as amended.

FINDINGS

On July 7, 1996, the crew manager of the Denver crew office, Michael J. Maruniak, inspected a physician's release to return to work for the claimant, Wade A. Halvorson. (Investigation Ex. B). The claimant was working an "eleven four" board, or eleven days on, four days off. Due to the number of days the claimant had laid off work sick in June 1996, a medical release for claimant's absence was requested by the crew caller. The return to work certificate provides that the physician saw the claimant on July 6, 1996, and treated the claimant for an unspecified illness or injury. Of the six possible recommendations on the certificate, a provision stating that the employee may return to work with no restrictions immediately, was marked.

However, the attending physician's return to work record reveals an alteration of the date on which the claimant was seen by the physician. After his review of the medical note, the crew manager contacted the physician whose name appears at the bottom of the release. The treating physician wrote to the Carrier that he last saw the claimant on August 15, 1995, and his office was closed on July 6, 1996. On July 12, 1996, the Carrier issued a notice of investigation into allegations of dishonesty and failure to give factual information in connection with the physician's release the claimant provided to the crew office on July 7.

During the investigation, the claimant admitted he had been assigned to the conductor's extraboard on July 6, 1996. He testified to marking off sick on the morning of July 6, and the crew caller requested a physician's release for claimant to return to work. On July 7, the claimant faxed the medical release in question to the crew caller. The claimant readily

admitted that he altered the date on the attending physician's return to work record because it was required for him to mark up, and he needed the time off work due to fatigue caused by working every eight to ten hours on the extra board. The work records indicated the claimant had extraboard rest on June 23, 24, 25 and 26; he worked one shift on June 27 and then was off June 28 through 30, 1996. For the period July 1 through July 5, the claimant worked a total of seven starts before he laid off sick on July 6.

By his own admission the claimant violated General Code of Operating Rules (GCOR) 1.2.7 and 1.6,¶4, in that he was dishonest and withheld information when he tendered the altered medical excuse on July 7, 1996. The Organization argues that the claimant's discharge must be set aside based upon the failure of the Carrier to comply with procedural requirements, and disparate treatment of the grievant with respect to the penalty assessed when compared to similarly situated employees.

Section B(2) of Rule 73, effective August 5, 1983, provides an opportunity to waive an investigation when mutually agreed to between the parties:

> 2. Waiver of Hearing
>
> (a) An employe who has been notified to appear for a hearing shall have the option, prior to the hearing, to discuss with the appropriate Carrier official, either personally, through or with the employe's representative, the act or occurrence and the employe's responsibility, if any.
>
> If disposition of the charges is made on the basis of the employe's acknowledgment of responsibility, the disposition shall be reduced to writing and signed by the employee and the official involved and shall incorporate a waiver of hearing and shall specify the maximum discipline which may be imposed for employe's acceptance of responsibility.

> Disposition of cases under this paragraph (a) shall not establish precedents in the handling of any other cases.
>
> (b) No minutes or other record will be made of the discussions and, if the parties are unable to reach an agreed upon disposition on this basis, no reference shall be made to these discussions by either of the parties in any subsequent handling of the charges under the discipline procedure.

Rule 73, Section B(1)(e) further provides, "[i]f an employe who is to receive a notice of hearing will not be permitted to exercise the option under Section B(2) of this Rule, the notice of hearing shall so specify." Rule 73 also provides that notice of the hearing shall be sent to the employee in duplicate. It appears to the Board that the Carrier failed to comport with the clear language of the agreement on both these points. While the Organization argues that these procedural violations alone are sufficient to return the claimant to service, the Board respectfully disagrees.

First, the remedy which the Organization now seeks to impose for the contractual violations is not to be found within the language of the collective bargaining agreement. Second, there has been no showing that the claimant's right to due process, including notice of the charges against him and the right to a fair and impartial hearing were affected by the violations. No evidence was presented to show the grievant (or the local chairman) failed to receive the notice of investigation setting forth the focus of the investigation, or the two notices of postponement which followed. No surprise or undue prejudice has been demonstrated.

Further, the Board notes that a waiver of hearing is not a matter of right. Rather, it is achieved through mutual agreement, including an employe's admission of responsibility, a waiver of hearing and stipulation of the maximum discipline which may be imposed. Despite the Board's rejection of the Organization's assertion that the claim should be sustained on the basis of these violations alone, it cautions the Carrier that compliance with the contractual language requires minimal effort, and the potential benefits, including avoiding the time and effort spent in conducting investigations, are not insignificant. Based upon the record before the Board in this case, the contractual violations do not call for the remedy requested by the Organization.

More persuasive, however, is the assertion by the Organization that the Carrier has failed to discipline similarly situated employees with the same severity as the claimant. Another employee, Switchman Cevin L. Cox, was discharged on the very same day as the claimant for identical conduct in violation of GCORs 1.2.7 and 1.6. Cox was reinstated four months later on a leniency basis. The Carrier reasons that the claimant, unlike Cox, had a prior two-month suspension for a drug and/or alcohol violation, and a censure and thirty-day suspension for rule violations which support his dismissal.

The Board cannot find any reasonable justification to have treated these two employees any differently for the commission of the serious offenses of falsification and dishonesty after taking into account their personal records, together with the scope of their respective ...fications. Both employees had relatively short seniority established with the Carrier -- the claimant possessed three years and three months, Cox only served two years and one month.

The infractions noted on the claimant's personal record are countered by the fact that Cox falsified doctor excuses not just once as did the claimant; rather, he submitted false medical documentation on at least five separate occasions over a one-year period.

Consistent and equitable administration of discipline for similar offenses committed by similarly situated employees is an essential element of just cause. Accordingly, the Board determines the claimant shall be compensated for time lost from December 10, 1996, to the date of his reinstatement previously ordered by the Board on April 28, 1997. Consistent with the penalty assessed against Cox, the claimant shall also be placed in a Level "S" status of the Carrier's Employee Accountability program, with a probationary period of three years commencing August 14, 1996.

AWARD

The claim is sustained, in part, in accordance with the Findings, set forth above. The Carrier is directed to comply with this Award within thirty (30) days of issuance.

E. T. Koenig, Carrier Member

Robert R. Repstine, Employee Member

Jonathan I. Klein, Neutral Member

This Award issued the 16TH day of December, 1998