PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

UNION PACIFIC RAILROAD COMPANY

Case No. 5

Statement of Claim: Claim of the System Committee of the Brotherhood that:

(1) That the Union Pacific Railroad Company violated Rules 1, 33, and 48 of the current agreement when it found Mr. Ban Tabaha [Claimant] guilty of violating Rules 1.6(3) and 1.13 for not complying with Carrier instructions to provide medication information regarding an alleged personal injury, or in the alternative, to report for work by 10/26/2001.

(2) As the Carrier violated the terms and provisions of the current Agreement, the Carrier shall be order to exonerate the Claimant and remove all record of this incident from the Claimant's personal record.

Facts

This case concerns the Carrier's imposition of discipline based upon Claimant's failure to provide medical documentation in connection with an alleged on the job injury he sustained on August 24, 2001. Based on this event, Claimant sought medical treatment from Dr. Reese Polesky in Beverly Hills, California on August 30, 2001. On September 4, 2001, the Carrier instructed Claimant, in writing, to have his doctor complete a Union Pacific Medical Progress Report (MPR) and to send the information to the Carrier's Tucson office. The Carrier's letter to Claimant and the MPR required information concerning current diagnosis/prognosis, expected date of return to work, expected work restrictions, medications, current level of function, and return to work plan.

Dr. Polesky did not fully complete the MPR. Instead, he wrote the following on the MPR form:

> [Diagnosis]: cerebral concussion, neck and back sprain/strain, fractured rib
> [Treatment plan]: temporary disabled at this time
> [Anticipated Return to Work Date]: 11/1/01

Because Dr. Polesky did not fully respond to the questions on the MPR, the Carrier wrote to Claimant on September 21, 2001, instructing him to have his doctor "...provide ALL information listed below to this office NO LATER THAN September 24, 2001." (emphasis in original).

Claimant filed to provide the requested information. Therefore, the Carrier again instructed Claimant to furnish the requested medical information or to report to work by October 26, 2001. The Carrier further stated in its correspondence:

> You have failed to comply with instructions as of this date. If you fail to supply the information requested or return to work by the date listed above, you will be considered as insubordinate and appropriate action will be taken under the Carrier's UPGRADE Policy. (C-Ex., A-2, p. 83.)

Neither Claimant nor his physician responded to the Carrier's third request for a properly completed MPR. Therefore, on November 15, 2001, the Carrier sent Claimant a Notice of Investigation. Following a hearing held on December 5, 2001, Claimant was found guilty of violating Carrier Rules 1.6(3) (Insubordination) and 1.13 (Reporting and Complying with Instructions). He was assessed Level 2 discipline under the Carrier's UPGRADE Policy, which was imposed at Level 3 because of his prior record, and the Organization filed the instant grievance.

Contentions of the Parties

The Organization challenged the discipline, contending that the Carrier failed to prove the charges. It submits that Dr. Polesky faxed a Supplemental Report to Tom Hyatt, Director of Track Maintenance, on September 23, 2001 providing the requested information. The Organization further asserts that the Carrier's letters of September 21, 2001 and October 12, 2001 did not include an address to which Claimant was to respond. It is the Organization's additional position that Rule 33(d) of the parties' Agreement superseded the Carrier's Policy and, therefore, Claimant was not required to furnish any medical information until such time as he returned to work. Rule 33(d) states:

> Sick Leave. (d) Employees on sick leave or with physical disability shall not require written leave of absence, but they may, upon their return to service, be required to furnish satisfactory evidence of their sickness or disability.

The Carrier contends that it has substantiated the charges. Neither Claimant nor his doctor furnished the required medical information, despite three requests and clear warnings that failure to comply would result in discipline. Moreover, Claimant admitted that he did not contact his doctor to ensure that the MPR form was completely filled out. The Carrier further submits that Rule 33(d) is inapplicable because Claimant was not on sick leave. He was off work due to an on-duty personal injury. Therefore, the Carrier was within its rights in demanding that Claimant provide information about his medical status.

Opinion

The credible testimony and evidence in the Record leave no doubt that Claimant violated the Carrier's rules requiring employees to comply with instructions. The

Carrier's three letters to Claimant were clear and reasonable in what they requested. As long as Claimant remained on the seniority list, the Carrier had every right to inquire as to his medical condition, prognosis, treatment, expected date of return, and anticipated work limitations. While the Organization claims that Claimant's doctor furnished the Carrier with a Supplemental Report on September 21, 2001, there was substantial question as to when, in fact, it was sent inasmuch as the Fax transmission report was dated 10/23/01, and Dr. Polesky's report was not addressed to anyone in particular and bore no address. Furthermore, the correspondence was not responsive to the questions asked on the MPR and, therefore, did not fully address the questions that the Carrier wanted him to answer. For example, Dr. Polesky never outlined a treatment plan, identified the medications he prescribed, discussed Claimant's current level of function, or presented a return to work plan. Claimant admitted that the MPR that was submitted to the Carrier did not provide all of the required information and that he had not attempted to call Dr. Polesky to request that he rectify the cited deficiencies.

Regardless of the legitimacy of Claimant's absence, he had an absolute responsibility to comply with the Carrier's instructions to furnish medical information or to return to work by October 26, 2001. Numerous arbitration panels have recognized this responsibility and have held accordingly:

> Whether or not the original letter from the doctor was mailed is immaterial. What is significant is that the Carrier never received anything and it informed Claimant of this fact. The burden for providing the medical information was on Claimant, not his doctor. When Claimant received the second notice, he should have taken steps to ensure that the information was received by the Carrier.
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> (Award 123, PLB 4746 (Simon 07/24/96)

> The record indicated that the Claimant was absent for a period of some three months without any communication as to why he was absent. Once communication was established, the Claimant advised he was off for medical reasons. The Supt.'s office initiated two letters that instructed the Claimant to furnish medical records from his doctor to support his absence from work. The Claimant ignored the two letters and remained off work ... The Claimant demonstrated indifference toward his position as a locomotive engineer and to the instructions that were issued. The Claimant is in violation of the Carrier's Operating Rules. The Carrier has cause to invoke discipline. (Award 26, PLB 6170 (Quinn, 10/26/99).

As to the Organization's contention that Rule 33(d) entitled Claimant to ignore instructions to provide medical information or to report to work, there is ample precedent supporting the Carrier's position that employees on leave due to on-duty injuries must, upon request, provide the Carrier with information on their medical condition. As was stated in Award 15, PLB 1795 (Norris, 2/21/78):

> It should be noted at this point that the particular Rule 33(d) really has no Application to this dispute. It relates to proof of physical disability or evidence of sickness in certain situations and emphasizes that these need not be furnished on a continuous basis. It is hardly logical for the Organization to contend that an employee is not subject to the jurisdiction of the Carrier in any manner whatsoever, for any period of time whatsoever, because of the specific language of Rule 33(d). Rule 33(d) carries no such implications, either expressly or otherwise.
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> We are compelled to recognize, as a reasonable working proposition in Industrial Relations, that in the event a work related injury occurs to an employee disabling him from performing his normal work assignments, that, after a reasonable period of time, measured by the nature and extent of the injury, and the reasonable duration of its disabling impact, the Carrier-Employer has a right to demand competent medical evidence from claimant...substantiating that Claimant is still disabled from returning to work.

The above-quoted language is applicable to the instant case. It supports the finding herein that Rule 33(d) may not be used to eliminate the responsibility of an employee allegedly suffering from an on-duty injury to respond to reasonable requests for medical

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information. In this case, the Carrier's requests were particularly valid given that while Dr. Polesky had released Claimant for full duty as of November 1, 2001, Claimant had still not returned to work as of his December 5, 2001 investigative hearing.

For all of the foregoing reasons, the claim is denied.

Award

The claim is denied.

JOAN PARKER, Neutral Member

CARRIER MEMBER

Dated: 10-3-03

ORGANIZATION MEMBER

DATED: 10-3-03