

**PUBLIC LAW BOARD NO. 6621**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**AND**

**UNION PACIFIC RAILROAD COMPANY**

**Case No. 16**

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

- (1) The Union Pacific Railroad Company violated Rules 1, 33 and 48 of the current Agreement when it found Mr. Ben 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 07/01/2002.
- (2) As the Carrier violated the terms and provisions of the current Agreement, the Carrier shall be ordered to exonerate the Claimant and remove all record of this incident from the Claimant's personal record.

**Background**

This case is a sequel to Cases 1 and 5 before the Board. It involves the Claimant's failure to comply with the Carrier's directive to return to work by 07/01/2002.

This case grew out of an incident that occurred on August 24, 2001 in which Claimant allegedly suffered an on-duty injury. On August 30, 2001, he was treated by an orthopedic physician in California, Dr. Reese Polesky, who diagnosed Claimant with a "cerebral concussion, neck and back sprain/strain, and fractured rib." Initially, Dr. Polesky stated that Claimant's anticipated return to work date with no restrictions was to be November 1, 2001. Apparently, however, at some point, Dr. Polesky changed his assessment of Claimant's condition and reported an expected return to work date of September 2, 2002.

On March 13, 2002, the Carrier instructed Claimant to report for a Fitness for Duty Examination (FFD Exam) on April 9, 2002 with Dr. Michael Epstein at Glendale, Arizona. Based on the results of the FFD Exam, on May 20, 2002, the Carrier informed Claimant he was cleared to work and that he should contact Manager M.J. Battista to schedule an examination for the Carrier's operating rules.

Claimant did not contact Manager Battista. Thereafter, by letter dated June 18, 2002, the Carrier instructed Claimant to report to his Tractor-Bulldozer Operator position at Phoenix, Arizona by July 1, 2001. However, Claimant did not comply with the Carrier's June 18, 2002 directive. Consequently, the Carrier served Notice of Hearing on the Claimant. A disciplinary investigation was held on July 29, 2002, as a result of which Claimant was found guilty of violating Rule 1.6(3) (Insubordination) and Rule 1.13 (Reporting and Complying with Instructions). These were Level 2 violations under the Carrier's UPGRADE policy, but because of Claimant's disciplinary history, he was assessed a Level 4 penalty, i.e. 30-day unpaid suspension.

### **Opinion**

It is undisputed that Claimant did not return to work on July 1, 2002, as instructed. Claimant also testified that after receiving the Carrier's June 18, 2002 letter, he failed to comply even though he understood the instructions. He further testified that he did not notify anyone that he would not be reporting, and he did not leave a message the one time he allegedly attempted to contact Tom Hyatt, Director Track Maintenance. He also admitted that he understood he had been given a direct order; he simply elected not to comply with it.

At the hearing, the Organization presented Manager Battista with two statements from Dr. Polesky: (1) a June 23, 2002 statement saying that Claimant should remain on leave of absence until September 1, 2002 due to his rib fracture and concussion, and (2) a Medical Progress Report, dated June 25, 2002, which stated that Claimant was last seen on June 11, 2002 and that he remained totally disabled as a result of "post concussion syndrome." Manager Battista testified credibly that the first time he saw these reports from Dr. Polesky was at the July 29, 2002 hearing.

Claimant offered no valid reason for failing to communicate regularly with the Carrier during months of absence. He offered confusing testimony about not leaving a message for Director Hyatt, suggesting that Hyatt's mailbox was full, but never explaining why he did not make more than one effort to reach his employer. His behavior implies that he believed he had the right to remain out of work despite the results of his FFD Exam with Dr. Epstein and the notice he received to report to work by July 1, 2002. Manifestly, if Claimant felt he was not physically able to return to his job, he should have timely presented Tom Hyatt with medical documentation to that effect. Alternatively, Claimant could have requested a medical review board in accordance with the Carrier Medical Rules. He did neither.

The Organization contends that pursuant to Rule 33(d) in the parties' Collective Bargaining Agreement, the Carrier was precluded from issuing its June 18, 2002 instruction to report to work by July 1, 2002. However, past awards interpreting Rule 33(d) have consistently held that employees who fail to provide medical documentation of a continuing medical condition can be disciplined or discharged.

As was stated in Award 128, PLB 2766 (Dennis, 12/29/95):

If an employee is carried on a seniority list and has a right to exercise certain rights that flow from seniority, Carrier logically has the right make itself aware of the status of the employee and determine whether productive work exists that that employee can perform. Claimant in this instance had an obligation to follow Carrier's directive and appear as directed for a physical and functional capacity evaluation. He cannot hide behind his lawyer in the FELO, nor can he refuse to appear because he claims that his medical condition does not allow him to work.

Similarly, Arbitrator Brown held in Award 160, PLB 1160 (07/30/76):

Where an employee has been certified by the Company Physician as being fit for duty, if such employee would avoid service thereafter he has the burden of proving that he is in fact unable to return to duty.


In the instant case, Claimant did not provide the Carrier with timely and accurate medical documentation of his status, even though he remained out of work for months. After he was certified by Dr. Epstein as being fit for duty, it was incumbent upon Claimant to either report to work as directed or contact his superiors to advise them of his condition and the basis for his continued absence. There is no credible evidence in the Record below that Claimant took these necessary steps. While some documentation was presented to Manager Battista at the investigatory hearing in July 2002, arbitral precedent holds that medical information furnished at the time of the investigation does not satisfy the Carrier's instructions.

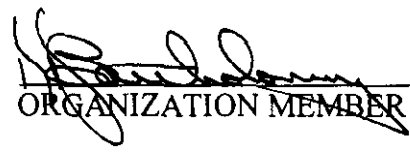
For all of the foregoing reasons, the claim must be denied.

Award

The claim is denied.

  
JOAN PARKER, Neutral Member

  
CARRIER MEMBER  
DATED: 10-3-03

  
ORGANIZATION MEMBER  
DATED: 10-3-03