

**PUBLIC LAW BOARD NO. 6538**

**Carrier File No. 10-00-0387  
Organization File No. C-00-D070-3**

<b>BROTHERHOOD OF MAINTENANCE )</b>	
<b>OF WAY EMPLOYES )</b>	
<b>And )</b>	<b>AWARD NO. 3</b>
<b>BURLINGTON NORTHERN )</b>	<b>CASE NO. 3</b>
<b>SANTA FE RAILWAY )</b>	

**STATEMENT OF CLAIM:**

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

- (1) The dismissal of Sectionman S. M. Malay for his alleged failure to protect his position and failure to follow instructions during the period beginning May 24, 1999 was without just and sufficient cause, excessive and in violation of the Agreement.**
- (2) As a consequence of the violation referred to in Part (1) above, Sectionman S. M. Malay shall have his dismissal ‘...reversed and any mention of the investigation, notice and dismissal be removed from his record completely. I am also requesting Mr. Malay be returned to service as soon as his doctors release him to return to service.”**

**FINDINGS:**

**Public Law Board No. 6552, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.**

**Claimant, a Sectionman on the Knoxville, Iowa Section Crew, had been employed by the Carrier for approximately twenty one (21) years. The record shows that Claimant has suffered from personal illness for several years. Carrier has instructed the Claimant on a number of occasions of the necessity for him to either obtain a medical leave of absence or report to work. Claimant has not complied, despite the issuance of a 60-day suspension and intervention from the Employee Assistance Program.**

**By letter dated July 23, 1999, Carrier instructed Claimant to comply with the instructions from the EAP. The letter states: “It is imperative that you comply with**

his instructions. Failure to comply completely with his instructions will be considered a failure to comply with instructions from proper authority.”

After several requests from the EAP for clinical information from Claimant’s health provider were ignored, the EAP warned Claimant that his failure to provide the requested information before December 1, 1999 would be deemed non-compliance with instructions.

Claimant did not respond on or before the designated date. Accordingly, Carrier was notified by letter dated December 9, 1999 of the EAP’s determination that Claimant was not in compliance with its instructions. By letter dated December 15, 1999, Claimant was directed to attend an investigation to determine whether he failed to protect his position and abandoned his job beginning May 24, 1999. Following the investigation, Claimant was dismissed.

Claimant’s principal defense at hearing was that his doctors delayed in filling out the requested information. Claimant testified that he mailed the necessary forms on December 1, 1999 by certified mail. The Organization contends that under the circumstances there was substantial compliance with the EAP’s directives and that discharge was unwarranted.

Several threshold time limit issues must be disposed of before proceeding to the merits, however. The Organization first argues that Carrier did not provide Claimant with a timely investigation. Rule 40A states that an investigation must be held no later than 15 days from the date of the occurrence, or, in personal conduct cases, within 15 days “from the date information is obtained by an officer of the company....” Here, the EAP notified Carrier on December 9 that Claimant was not in compliance with instructions from the EAP. Once that information was obtained by the Carrier, it proceeded in a timely fashion to issue the notice of investigation on December 15, 1999. Accordingly, the Organization’s objection is not convincing.

Equally unpersuasive is the Organization’s second procedural objection. The Organization contended that Carrier violated Rule 40C because the Claimant received only three days advance notice of the Investigation. The rule requires at least five days advance written notice to both the employee and the local Organization representative. In the instant case, the record shows that Carrier mailed the notice of investigation on December 15, 1999, notifying Claimant and the Organization of the December 23, 1999 hearing. Although it was received by the Organization on December 18, 1999, Claimant insisted that he did not receive his notice until December 20, 1999. Even if this is so, we find that mailing the notice eight days prior to the scheduled hearing fulfilled the Carrier’s obligation under the Agreement. Absent any evidence of prejudice resulting from the delayed receipt of the notice by the Claimant, we find *no proper basis for invalidating the discipline.*

On the merits, this is clearly a sad and troublesome case. Carrier has a right to expect its employees to either obtain a leave of absence or report to work. It need

not carry an employee in "limbo" status indefinitely. Moreover, it is evident that Carrier has been responsive to the Claimant's problems. He has been given multiple opportunities to comply with Carrier's directives. Claimant has been referred to the EAP, with the hope that he could complete the necessary documents under their guidance. His discharge can hardly be considered precipitous on the part of the Carrier, particularly since he was terminated only after discussions, warnings and a suspension.

At the same time, however, we believe the Organization is correct when it points to mitigating circumstances on this record. Claimant is a long-term employee. He apparently attempted to comply with the EAP's directive by sending the necessary medical documents, albeit not in sufficient time to meet the EAP's deadline. Carrier has been aware for some time that Claimant has psychological problems which impair his ability to function.

Based on all these factors, we are persuaded that Claimant should be given one last opportunity to clarify his employment status. Within thirty days from this Award, he is directed to comply with one of the following options:


- 1) Report for duty;
- 2) Obtain a medical leave of absence;
- 3) Comply with directives from the EAP if Carrier refers him to that program.

If Claimant fails to comply with the foregoing, he shall be returned to dismissal status without need for another investigation, on a non-referable basis. Should he report for duty, no back pay shall be awarded.

**AWARD**

Claim sustained in accordance with the Findings.

  
ANN S. KENIS, Neutral Member

  
Carrier Member  
William A. Osborn

  
Organization Member  
Roy C. Robinson

Dated April 10, 2003.