

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
and
Burlington Northern and 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 when on December 10, 2002, Mr. S. B. Burr was dismissed from the Carrier's service for violation of Maintenance of Way Operating Rule 1.13 (Reporting and Complying with Instructions) and 1.15 (Duty-Reporting or Absence); and Maintenance of Way Safety Rule 26.3 (Medical Examinations) in conjunction with his alleged failure to comply with instructions to provide required medical information in regard to a requested leave of absence.
2. As a consequence of the Carrier's violation referred to above Mr. Burr shall have his record expunged of the above referenced discipline, returned to service, and compensated for all time lost. [Carrier File No. 14-03-0005. Organization File No. 10-1311-0212.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 of the dispute herein.

The Claimant, Mr. Samuel B. Burr, entered the Carrier's employment in 1979. He suffered an off-duty injury in a vehicle accident on May 26, 2001. He returned to work thereafter as a Trackman/Machine Operator, but a time line in the record indicates that he was granted a leave of absence in July, 2001, which was extended several times, finally expiring on June 6, 2002.

The time line also shows that the Claimant requested a further extension of his leave of absence in June 2002, but his request was declined, pending submission of certain information concerning his physical condition. This Board's Award No. 304 discusses the circumstances surrounding his failure to provide the required information at that time.

On September 12, 2002, the Carrier's Division Engineer wrote the Claimant, as follows, in pertinent part:

As your employer, the BNSF requires medical information regarding your reason for being on a leave of absence for the following reason(s):

1. Diagnosis of the medical condition/s for which you are currently being treated.
2. Treatment plan or treatment being received.
3. An approximate length of time that this treatment will continue.
4. Your current functional level - along with your current functional restrictions.

We need to know when and in what capacity you will be able to return to work so we can meet our manpower planning responsibilities. This entails developing an individualized return-to-work plan, which can only be responsibly accomplished by knowing specifically what your treatment plan and physical/functional capabilities are, as well as specific restrictions and pertinent time factors for anticipated work ability status changes.

The Claimant was given ten days from receipt of this letter to submit the requested medical information. The above letter was sent to the Claimant's address of record by UPS Next Day Air. No receipt was taken for its delivery. The delivery person recorded a notation that it was left at the front door at 11:59 a.m. on September 13, 2002.

When no communication was received from the Claimant within ten days, a notice of investigation was sent him on September 24, 2002:

[F]or the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with instructions when you allegedly failed to comply with my letter of September 12, 2002, informing you to provide required medical information regarding your requested leave of absence, within 10 days from receipt of letter of September 12, 2002, which was delivered on September 13, 2002.

The investigation was twice postponed at the request of the Organization, and finally held on November 21, 2002. The Claimant did not attend because he was incarcerated in a county jail. He was capably represented *in absentia* by the Organization's Assistant General Chairman, who submitted documentary evidence in the record, cross examined the Carrier's only witness, and made a closing statement.

The Board finds that there are several rules, directives, and/or regulations governing employee conduct and extended leaves of absence.

Schedule Agreement Rule 15.E. (in part)

An employee failing to report for duty on or before the expiration of their leave of absence will forfeit all seniority rights, unless an extension is obtained.

Instructions on Leave of Absence Request Form

Failure to report for duty on or before the date of expiration of leave of absence, unless application for extension has been approved, will be considered sufficient cause for dismissal.

An employee absent for medical reasons, sickness or injury, must provide a doctor's statement along with this form indicating duration for absence. Medical leaves in excess of 30 calendar days may require additional medical forms.

Extension Required - For medical reasons - must provide another doctor's statement indicating duration of absence along with this form.

Maintenance of Way Operating Rule 1.13

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.

Maintenance of Way Operating Rule 1.15

Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority.

Maintenance of Way Safety Rule 26.3

The Medical Department will determine when medical examinations are necessary, the content of such examinations and requirements for participation as the

needs arise. Employees subject to these examinations must follow any and all requirements as issued.

The record contains documentary evidence which was sent to the Carrier's Division Engineer by the Organization, on the Claimant's behalf, by facsimile, on September 25, 2002. The Board notices these in particular: First, a letter which had already been sent the Carrier's Division Engineer by the Claimant's personal physician, dated June 27, 2002, reading:

Mr. Burr has been a patient of mine for a significant period of time and had been released back to work with limitations when he was in Mitchell, South Dakota, recently. Apparently Mr. Burr was at Mitchell on June 24, 2001 to July 11, 2001, and he had significant restrictions at that time, which were completely ignored by the supervisors on the job and when Mr. Burr brought the facts to the attention of the supervisors they were wanting him to resign. Mr. Burr elects not to go through that again. He is scheduled to have surgical intervention with back injections in both the lumbar area disks and the cervical disks by Dr. _____ out of Springfield on July 18, 2002.

Second, an undated, handwritten letter from the Claimant to the Division Engineer:

In response to your latest letter requesting medical information. You told me that I am to correspond to & thru you. I gave you this information thru the letter my doctor sent you at the investigation in Galesburg. See Exhibit 14. I would like for you to send it to Dr. Michael M. Jarrard. Also I am again sending my request for a leave of absence which I had to take from my investigations paperwork because there wasn't a request form with your letter. See Exhibit 11. Also I was never informed by the railroad that I had been put on a Level S (30) day record suspension by you. Therefor[e] I am sending this letter & your letter to the Union and I am requesting them to forward it to you and Blunt & Assc.

The Claimant's references to the investigation and its exhibits are in regard to the investigation on July 17, 2002, the outcome of which was considered by this Board in its Award No. 304.

The third document which was submitted through the Organization was an executed form for requesting a leave of absence, dated September 16, 2002, asking that the leave be extended from June 6, 2002 until December 31, 2002.

The record also includes two documents which were put in evidence by the Carrier's witness, Roadmaster John Bainter. The first is a copy of a disability claim for the negotiated

Supplemental Sickness Benefit Plan, which includes an attending physician's statement. This statement was signed by the same doctor who wrote the June 27, 2002 letter, quoted above and had been sent the Division Engineer by facsimile on October 15, 2002. Mr. Bainter was questioned whether this physician's statement supplies the medical information sought by the Division Engineer in his letter dated September 12, 2002. Mr. Bainter indicated that it provided some information, but still left other questions unanswered; i.e., the expected length of treatment and the Claimant's current functional level and functional restrictions.

The second document offered in evidence by Mr. Bainter was a letter from the Claimant's wife, dated November 19, 2002, addressed "To whom it may concern," which was sent to the Division Engineer by facsimile on November 21, 2002. It reads:

My husband, Samuel, has been seen by Dr. J_____, MD at Horizon Medical Center in Carthage, Illinois. Dr. J_____ refused to fill out any medical forms, stating a continuation of disability. He has made it very clear that he does not want to see Sam again until after he has surgery. Sam is currently working on finding another physician that is more cooperative with filling out the required documentation.

Dr. D_____ C_____ 's office staff said they would comply with your requests, but you will need to have releases sent to them that are signed by Sam. There [sic] reasoning is that they feel they have provided all the needed information to you on more than one occasion and that this is harassment to them and Sam.

Please call me if you need any additional information. I am happy to cooperate in any way I can.

Since the Claimant was unable to be present and to offer testimony and evidence on his own behalf, the Board has given particular notice to his representative's closing statement:

On October the 15th the Carrier furnished, was furnished with a doctor's statement dated August the 15th, which is the most currant [sic] doctor's statement of all of them. His doctor has refused Mr. Burr's request for an updated statement. The Carrier is aware Mr. Burr suffers from an on-duty injury and has access to all the medical information they would need to honor Mr. Burr's request for medical leave of absence, which is still being refused by the Carrier. And he has complied with the Carrier's instructions to the extent that he can, given the level of un-cooperation from his doctor in regard to a current doctor's statement.

On December 10, 2002, the Division Engineer advised the Claimant that as the result of the investigation on October 8, 2002, revealing his failure to comply with the instructions in the Division Engineer's letter of September 12, 2002, for not providing the required medical information, he was dismissed from the Carrier's employment for violation of Maintenance of Way Operating Rules 1.13 and 1.15, and Maintenance of Way Safety Rule 26.3. The letter further stated that consideration had been given the Claimant's personal record in assessing this discipline.

The Organization promptly appealed the Division Engineer's decision to the Carrier's Labor Relations Department. The appeal was there denied, and the issue comes before this Board for a final and binding decision.

The Organization first raised two procedural arguments. It states that although the Division Engineer's letter was written on December 10, 2002, the transcript was not made available until December 16, 2002. Based on this, the Organization argues that the disciplinary decision was made in advance of any review of the transcript. The Organization further argues that the Division Engineer made reference to an investigation held on October 8, 2002. If that date is correct, the disciplinary decision was not made within the time limit provided therefor.

The Carrier made no response directly on point with these procedural objections, except by a catch-all rebuttal: "The Carrier rejects and denies all of the other objections, arguments and claims raised in the Organization's appeals."

The Board has carefully considered the Agreement's Discipline Rule in light of these threshold procedural issues. There is nothing therein which requires the officer who issues the letter of discipline to read the transcript, although the practice of doing so is generally observed. In practice, however, in this industry, the officer who issues the discipline often relies on the recommendations of the officer who conducted the investigation, who has observed the demeanor of those offering testimony and evaluated their credibility. While it is possible that the outcome of this matter was predetermined, there is no hard evidence that it was. As for the reference to October 8, 2002, that is clearly a typographical error, probably based on the fact that one of the charge letters set that date for the investigation, although it was subsequently postponed.

The Organization also argues that the Carrier has a release from the Claimant which permits it to seek any additional medical information it requires from the Claimant's physician.

The Carrier responds that it is the Claimant's responsibility to provide the medical information, and he has failed to do so. The Carrier states that it requests medical information from its workers on a daily basis and most are easily able to provide the same. The Carrier

states, "No evidence has been provided indicating that the Claimant's Physician was unwilling to provide additional information. If that was the case why wasn't there something provided from the Doctor?"

The Carrier further argues that it requires this updated medical information so that it may determine if there is work which an injured employee may perform. Further, the Carrier needs to know when it may expect an injured employee to be able to resume work, so that its work force planning can be done. It has been extremely patient with the Claimant, but he has continued to thwart the process by not providing the necessary information.

The Board has carefully studied the transcript of testimony and evidence, and considered the Parties' well-phrased arguments. Both the Claimant and the Carrier have presented arguments which should be balanced. Seniority and employment are valuable assets to the Claimant. Efficient manpower utilization is not an insignificant issue with the Carrier, on the other hand. It must have reliable, predictable human assets.

The Board offers these observations. The Carrier cannot reasonably be expected to continue in its employment persons who have no expectation of ever returning to work. The Carrier has a right to determine the physical fitness of its employees, subject to appeal, of course. To do so, it requires the informed evaluations of medical professionals. Typically, the employee's own physician(s) supply medical information, which is in turn reviewed by the Carrier's own Medical Department, in light of the medical requirements peculiar to this industry and the characteristics of the employee's duties.

Here the Carrier questions the veracity of the Claimant's assertions, but it appears that he has had difficulty obtaining the comprehensive medical data demanded by the Carrier. His physician's letter dated June 27, 2002, resonates with an air of hostility. (See page 4, supra). Admittedly, that may reflect some attitudinal disposition on the Claimant's part. Then, there is the unrefuted letter from Mrs. Burr, which indicates a seeming lack of cooperation from one doctor and the office staff of another. (See page 5, supra). In the record considered in this Board's Award No. 304, there is testimony that one of the Claimant's doctors was murdered and another's practice was disrupted by a divorce proceeding.

In connection with this "doctor problem," the Carrier argues that there is no evidence that the Claimant's physician was unwilling to provide additional information, but if that were the case, it asks why there wasn't something from the doctor. The Board believes that if a physician, for whatever reason, refuses to provide further medical information, it's quite unlikely that he would take the time to write a letter stating that he does not wish to provide the sought-after medical information.

The Carrier has been very forbearing with the Claimant. Had it wanted to play hard ball, the Carrier might have acted to terminate the Claimant's seniority when he failed to report on June 6, 2002, and not having sought an extension of his leave of absence at that time. Instead, it extended him additional time, twice outlining what medical information it required. But the Board is not convinced that the Claimant is solely at fault in this matter. His doctors' recalcitrance has materially contributed to this problem. Then, there are other issues:

First, the record contains two references to planned surgical procedures which might result in the Claimant's rehabilitation. If those procedures were performed, it is important to know whether they have resulted in improvement of his condition to the degree he might be employable again.

Second, there is the matter of the Claimant's incarceration. As his representative correctly pointed out in the record, he had not been convicted of anything as of the date of the investigation. As far as the Board knows, he may have been acquitted, the charges may have been dropped, or he may be confined.

Balancing these respective arguments is a daunting task. The Board is loath to send 24 years of seniority down the drain. The Claimant has had no disciplinary entries in almost twelve years. On the other hand, the Carrier needs to know what it can expect from this employee. Both Parties require closure in some fashion. On this record, permanent dismissal from the Carrier's service — closure, indeed — cannot be justified while there are so many questions which remain unanswered. As a result thereof this claim, with the following conditions, will be sustained to the extent that the Claimant's seniority and employment relationship will be restored, but without pay for any work time lost in connection with this disciplinary proceeding. The following conditions are prescribed for the Claimant's reinstatement:

The Carrier will notify the Claimant of his reinstatement by Certified Mail, Return Receipt Requested, at his last address of record. In that notification, the Carrier will provide the Claimant the proper medical forms and the documents necessary to authorize the physician to release his medical information, and will instruct the Claimant to have his personal physician complete the forms and forward them to the Carrier's Medical Department within thirty (30) calendar days after receipt of the notification. Within thirty (30) calendar days after receipt of this medical information, the Carrier shall allow the Claimant to return to service, or grant him a leave of absence, as appropriate.

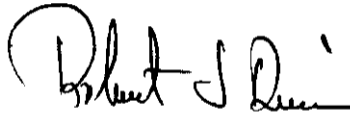
If the notice to the Claimant is returned undeliverable or if the Claimant fails to provide the necessary medical information as prescribed above, his seniority and employment relationship shall be terminated pursuant to the provisions of Schedule Agreement Rule 15.E., partially

quoted herein (page 3, *supra*), for his failure to return to service on or before the expiration of his leave of absence without an extension thereof being obtained.

The Board shall retain jurisdiction for the purpose of resolving any problem which may arise with respect to the Carrier's and the Claimant's compliance with the terms and conditions specified herein above.

AWARD

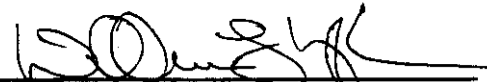
The claim is remanded to the Parties, for disposition in accordance with the Board's ruling.



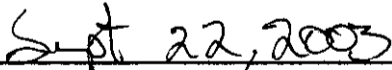
Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member



Date