

PUBLIC LAW BOARD NO. 4402

PARTIES) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
TO)
DISPUTE) BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT OF CLAIM

1. The Carrier violated the Agreement when it improperly withheld Laborer J. M. Duffey from service beginning July 25, 1984 (System File #9 Gr./DMWA 84-12-27).
2. The discipline of censure (while continuing to be withheld from service) imposed upon Claimant J. M. Duffey for alleged violation of Rule 576 was unwarranted and an abuse of the Carrier's discretion (System File Reg. Gang/Gr. 10 DI - Duffey J. M.).
3. Chief Engineer W. H. Feryman failed to disallow the claim (appealed to him under date of January 9, 1985) as contractually stipulated within Rule 42.
4. As a consequence of Part (1) hereof, the Claimant shall be reinstated to service and he shall be compensated for all wage loss suffered, i.e., eight (8) hours each regularly assigned day plus any overtime worked by junior laborers on Steel Gang #1 from July 27, 1984 until he is returned to active service.
5. As a consequence of Parts (2) and/or (3) hereof, the Claimant shall be returned to service, his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered.

OPINION OF BOARD

Claimant is a sectionman with a seniority date of June 5, 1978. At the relevant time, Claimant was assigned to Steel Gang No. 1, Denver Region.

The Carrier asserts that due to Claimant's attendance problems, on July 20, 1984 Roadmaster R. L. Roskilly directed Claimant to secure a statement from his physician stating that Claimant was medically able to work. Specifically, Roskilly requested a detailed explanation of the kind of medical treatment Claimant received between June 27 and July 6, 1984. The record indicates further that on July 20, 1984 Claimant divulged to the Carrier's Program Coordinator M. M. Crespín that Claimant had a drinking problem.

Claimant failed to furnish the requested statement.

On July 25, 1984 Claimant was approached by Roskilly and Manager of Regional Gangs S. K. Kluthe and was instructed to report to Carrier's Social Counselor T. Owens. According to the Carrier, as a result of meeting with Owens it was agreed that Claimant would be allowed a 30 day leave of absence from his assignment so that he could enter St. Lukes Hospital and undergo evaluation and treatment for his condition. Further, according to the Carrier, Claimant did not admit himself to St. Lukes Hospital, report back to service or make contact with any Carrier supervisors. The Carrier further asserts that Claimant's last day of work was July 24, 1984.

The Organization asserts that on July 27, 1984 Claimant was told by Roskilly and Kluthe that he was being withheld from service. By letter dated September 18, 1984, and using the date of the event as July 27, 1984, the Organization filed a claim protesting the withholding from service.

By letter dated August 16, 1984 Maintenance Engineer B. M. Lutzenberger instructed Claimant to contact the Carrier's Chief Medical Officer T. M. Mears concerning Claimant's position as an employee. According to Lutzenberger, the last established contact with Claimant was on July 27, 1984 concerning sick leave. Lutzenberger further informed Claimant that:

The current status of your sick leave is lacking. Arrange to submit detailed Medical Report of treatment that has taken place and provide evidence of ongoing treatment; if still continuing.

Lutzenberger further directed Claimant to submit the information to Dr. Mears in Fort Worth, Texas. Again, Claimant did not submit the documentation.

After a meeting between Claimant and Lutzenberger on October 8, 1984 and by letter of the same date given to Claimant at the meeting, Claimant was instructed by Lutzenberger to furnish the medical records from his personal physician Dr. N. Pollack to Dr. Mears by October 15, 1984. In a subsequent conversation between Claimant and

Lutzenberger on that date, Claimant indicated that the records might be a few days late in arriving. Lutzenberger states that he told Claimant that as long as the records were mailed by October 15, 1984 the records would be accepted. Claimant asserts that Lutzenberger told him that "as long as I went ahead and did it and if it was a little late that would be okay"

Claimant states that he then requested Dr. Pollack to send the records to Dr. Mears. Claimant further asserts that upon receiving the October 8, 1984 letter he contacted Dr. Pollack and the first date he could get for an appointment was October 19, 1984. Claimant also states that on October 19th, Dr. Pollack "didn't show, so I went in, again, on the 23rd" Claimant further states that he had no control over Dr. Pollack's submission of the records to Dr. Mears.

By letter dated October 22, 1984 Claimant was directed to attend an investigation arising out of his failure to provide the medical records to Dr. Mears by October 15, 1984. Investigation was eventually held on November 5, 1984. The investigation revealed that the requested medical information was submitted to Dr. Mears on November 5, 1984.

By letter dated November 27, 1984 Claimant was censured for failing to provide the records by October 15, 1984. By letter dated January 9, 1985 the Organization filed a claim over the November 27, 1984 censure.

Both claims have been consolidated and are presently before us.

With respect to the withholding from service claim, the record sufficiently establishes that Claimant was withheld from service for medical reasons. Claimant disclosed the existence of a drinking problem and, under the given facts in this matter, that problem coupled with the attendance problems were sufficient to permit the Carrier to withhold Claimant from service for medical reasons. Claimant's failure to provide the medical information as requested justified the continued withholding from service. Withholding from service for medical reasons is not a disciplinary matter. See Second

Division Award 10500 ("[M]edical disqualification is not discipline requiring an investigation before suspension."). Therefore, contrary to the Organization's position, Rule 40(A) does not apply and an investigation was not required. Considering Claimant's attendance difficulties coupled with Claimant's disclosure of his drinking problem and further considering the fact that Claimant initially did not submit the medical documentation as requested, we cannot say that his being withheld from service was either arbitrary or capricious.

The fact that Claimant may have worked for several weeks prior to his being withheld from service and the additional fact that Claimant may have provided some documentation in early July 1984 prior to his being withheld from service do not change the result. Nothing in the record establishes that the decision made in late July 1984 to withhold Claimant from service was either arbitrary or capricious. Further, we disagree with the Organization's argument that the record does not disclose how Claimant was medically unsuitable to perform his duties. We believe the articulated factors of attendance difficulties and a drinking problem were sufficient.

We shall therefore deny the claim concerning the withholding from service.

With respect to the disciplinary action of censure, we are unable to conclude that substantial evidence exists in the record to support the Carrier's action. We note that the charge is very narrow. The charge does not cover the entire time that the Carrier requested Claimant to supply the medical information but only focuses upon Claimant's failure to submit the documentation by October 15, 1984. Therefore, Third Division Award 25195 is not dispositive since that award dealt with a case where the employee was disciplined for failure to produce medical documentation over a four month period. Here, the focus of the charge was Claimant's failure to precisely meet the October 15, 1984 deadline.

When the Carrier decided to impose a deadline, the Carrier determined that Claimant was to submit the documents within seven days as evidenced by the Carrier's letter of

October 8, 1984. However, the record establishes that Claimant immediately undertook steps to comply with that deadline. The record reveals that Claimant could not comply with the deadline in the time set by the Carrier. Claimant could not get an appointment with Dr. Pollack until October 19, 1984 (which was postponed until October 23, 1984) which appointment appeared necessary for the supplying to the Carrier of the "current status ... and evidence of ongoing treatment" as required in the Carrier's August 16, 1984 letter concerning Claimant's condition. From the totality of the record, it appears that Claimant acted in a reasonable fashion to comply with the given direction and deadline. The ultimate control of the records was in Dr. Pollack's hands and, given that the records were eventually submitted a few weeks after the deadline and further given the fact that Claimant was withheld from service until he complied with the demand for production of records, we are unable to uphold the imposition of discipline for failure to precisely meet the deadline.

The fact that Lutzenberger agreed to extend the deadline does not require a different result. The extension amounted to only one or two days in that, according to Lutzenberger, the records needed to be mailed by October 15, 1984. Under the given facts, Claimant also could not comply with that extended deadline. Claimant was cited for violation of Rule 576 ("Employees must comply with the instructions from proper authority."). Thus, the thrust of the Carrier's theory is really one asserting that Claimant was insubordinate by failing to comply with the established deadline. Insubordination generally requires a showing of a positive act of defiance by the employee in refusing to carry out an order as opposed to an inability to carry out an order. After the deadline was given, no positive act of defiance was shown by Claimant. Claimant simply could not comply within the given time period. We note that Claimant did not benefit from his inability to comply in that he was continued in a withheld status until he did comply and the necessary documentation was supplied.


We shall therefore require that the censure be removed from Claimant's record.


In light of the above, the Carrier's argument that the initial claim concerning the withholding from service was untimely filed and the Organization's similar argument that the Carrier did not timely respond to the Organization's appeal from the decision to impose discipline need not be addressed. Since the parties have prevailed on those respective claims (i.e., the Carrier prevailed on the withholding from service claim that it contends was untimely filed and the Organization prevailed on censure claim that it contends that was not timely responded to), those timeliness questions are moot. Finally, with respect to the Carrier's argument that the Organization's claim over the censure was not timely filed, we find that the record establishes that the Organization mailed the claim on January 9, 1985 - well within the 60 day time limit set forth in Rule 42(A). The claim was apparently lost and under the circumstances we do not believe the Carrier can assert the claim was not timely filed.

AWARD

The claim for withholding Claimant from service is denied. The claim for imposition of censure is sustained and the censure shall be removed from Claimant's record.


Edwin H. Benn
Neutral Member


E. J. Kallinen
Carrier Member


P. S. Swanson
Organization Member

Denver, Colorado
August 11, 1988