PUBLIC LAW BOARD NO. 6621

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

And

UNION PACIFIC RAILROAD COMPANY

Case No. 38

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

(1) The Union Pacific Railroad Company violated Rules 1 and 45 of the current Agreement when it found Mr. Ben Tabaha (Claimant) guilty of violating Rules 1.13 and 1.15 for not complying with Carrier instructions to provide medication information regarding an alleged personal injury, or in the alternative, to report for work by 12/04/2002.

(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, 5, and 16 before this Board. Awards 5 and 16 sustained the Carrier's assessment of discipline as a result of Claimant's failure to follow the Carrier's instructions either to submit medical information or to return to work by July 1, 2002. The instant case stems from Claimant's continuing failure to comply with instructions to submit required medical information or return to work.

As was developed in Cases 1, 5, and 16, Claimant sustained an on-the-job injury on August 24, 2001 while working as a Track Laborer in Phoenix, Arizona. Ten days later, he took a medical leave of absence and traveled to Beverly Hills, California where he was treated by Dr. Reese Polesky. At that time, Dr. Polesky found that Claimant was

suffering from a "cerebral concussion, neck and back sprain/strain, fractured rib." He anticipated that Claimant would be able to return to work without restrictions on November 1, 2001. Claimant was repeatedly instructed by the Carrier to have Dr. Polesky complete a Union Pacific Medical Progress Report (MPR), but Claimant failed to provide the requested information. Nor did he report to work by November 1, 2001.

In fact, Claimant did not return to work for months thereafter, and on March 13, 2002, the Carrier instructed Claimant to report for a Fitness for Duty Examination on April 9, 2002 with Dr. Michael Epstein at Glendale, Arizona. As was developed in Case 16, Dr. Epstein examined Claimant and on May 20, 2002, the Carrier informed him that he was cleared to work and that he should contact Manager M. J. Battista in regard to his return. Claimant did not contact Manager Battista, however, and despite written instructions to return to work by July 1, 2002, Claimant did not appear. At the disciplinary investigation that followed, Claimant submitted for the first time a statement from Dr. Polesky, dated June 23, 2002, saying that Claimant should remain on leave of absence until September 1, 2002.

Based upon the Record in the instant case, Claimant finally appeared at work on October 1, 2002, but was sent home after he told his managers that he was still taking certain medications. Thereafter, on three separate occasions, October 7, 2002, October 28, 2002, and November 18, 2002, the Carrier wrote to Claimant and instructed him to either provide six specific items of information to verify his medical status or to report to work by December 4, 2002. The requested information, to be furnished by Claimant's doctor, was as follows:

"1. Your current medical condition, including diagnosis and prognosis.
2. Expected date you may resume work duties.
3. Any work restrictions recommended by your treating doctor(s) and the anticipated duration of the suggested restrictions.
4. Any medications prescribed.
5. Your current level of function.
6. Your return to work plan."

The Carrier's letter of November 18, 2002 expressly stated that if Claimant did not supply the requested information or return to work by December 4, 2002, he would be considered absent without leave and subject to disciplinary action.

Nevertheless, Claimant failed to comply with these instructions. Consequently, the Carrier served him with a Notice of Investigation on December 16, 2002. Following a hearing held on January 17, 2003, the Claimant was found guilty of violating Rules 1.13 (Reporting and Complying with Instructions) and 1.15 (Duty - Reporting or Absence). Claimant was assessed UPGRADE Level 2 discipline, but in view of his existing Level 4 UPGRADE discipline status, the Level 2 assessment resulted in Level 5 overall status, i.e. dismissal. The Carrier further noted that inasmuch as Claimant had been found guilty of the same rule infractions three times within thirty-six months, the Carrier's 3-strikes-and-you're-out aspect of the UPGRADE Discipline Policy also mandated Claimant's dismissal. The Organization grieved the dismissal, but the parties were unable to resolve the matter, which now comes before this Board for adjudication.

Opinion

This case demonstrates Claimant's persistent refusal to comply with the Carrier's reasonable instruction that he submit information concerning his lengthy medical absence. Despite numerous warnings and discipline which this Board upheld, Claimant

failed to conform to the Carrier's rules, and as a result, he has brought about his own termination.

Manager Battista testified credibly that the single statement faxed to the Carrier by Dr. Polesky, dated November 4, 2002, did not provide the medical information requested. Dr. Polesky's report did not show any expected date for Claimant to resume normal work duties, did not show any recommended work restrictions and the anticipated duration of such restrictions, did not show any prescribed medication, did not show Claimant's current level of function, and did not show any return to work plan. When Claimant was questioned as to whether he believed that the faxed document supplied the six specific items of medical information that he was required to submit, his only response was "I don't know." (Tr. at 35-36).

At the hearing, the Organization introduced for the first time several statements from Dr. Polesky. However, most of these statements were general and vague, and in any event, they were submitted on January 17, 2003 ---well after the deadline Claimant was given to either submit the reports or return to work. Claimant did much the same thing when he presented documentation to Manager Battista for the first time at his investigatory hearing in July 2002, and in Case 16, this Board held, consistent with other arbitration panels, that "medical information furnished at the time of the investigation does not satisfy the Carrier's instructions." The ruling now is no different from what it was then.

Claimant offered no valid reason as to why he failed to submit the medical information that the Carrier repeatedly requested. The information was reasonable

and necessary for the Carrier to understand Claimant's status, prognosis, and restrictions, if any, in the future. Indeed, the importance of this information was underscored when Claimant appeared for work on October 1, 2002, only to be sent home when he reported that he was still taking several medications. The Carrier had no prior information about these medications and their potential side effects. Clearly, such information was necessary before Claimant could be allowed to resume his duties.

It was Claimant's responsibility to provide the requested medical information in a timely manner. The Organization's claim that Rule 33(d) precluded the Carrier from demanding such information was dismissed by this Board in Case 16, as well as by numerous other arbitral boards which have held that employees who fail to furnish medical documentation of a continuing medical condition can be disciplined or discharged. (See, for example, **Award 128, PLB 2766** (Dennis, 12/29/95); **Award 160, PLB 1160** (Brown, 07/30/76); **Award 44, PLB 3241** (LaRocco, 04/16/93); and **Award 123, PLB 4746** (Simon, 07/24/96). As Arbitrator Simon stated in **Award 123, PLB 4746:**

> 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. Certainly, when he received the notice of investigation, Claimant should have inquired as to whether the doctor had sent in the letter. Instead, Claimant waited until the investigation to provide the requested letter....We conclude, therefore, that discipline was warranted.

Moreover, Rule 33(d) does not give an employee on medical leave the right to ignore instructions to either report to work and provide medical information. In Case 5, this

Board quoted Arbitrator Norris' seminal decision in **Award 15, PLB 1795** (02/21/78), but perhaps it also bears repeating herein:

> 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.

An employee who suffers a work-related injury does not have the right to stay out on medical leave while refusing reasonable requests to furnish updated information as to his medical status. This principle is particularly compelling to the instant case, given that Claimant went on medical leave in August 2001, and despite the fact that he was cleared to return to work in the spring of 2002, was still not back on the job as of January 17, 2003. Furthermore, the fact that Dr. Polesky kept changing the date of Claimant's anticipated return to work made the Carrier's request for specific medical information very understandable. Claimant's refusal to either return to work by December 4, 2002 or supply the requested medical information left the Carrier with no choice but to impose discipline. The fact that Claimant was dismissed was directly attributable to his status in the UPGRADE Discipline program. His stubborn refusal to comply with the Carrier's

legitimate and repeated instructions resulted in his Level 5 overall status and brought about his dismissal.

Award

The claim is denied.

JOAN PARKER, Neutral Member

CARRIER MEMBER

DATED August 11, 2004

ORGANIZATION MEMBER

DATED 8-11-04