PUBLIC LAW BOARD NO. 6942

Case No. 28

United Transportation Union
and
Union Pacific Railroad Company

Appearances:

Mr. Richard M. Draskovich, Sr. Vice General Chairperson UTU, 5990 SW 28th Street, Suite F, Topeka, Kansas 66614-4181, appearing for the Organization.

Mr. Robert A. Henderson, Assistant Director-Labor Relations, Union Pacific Railroad Company, 1400 Douglas Street, STOP 0710, Omaha, Nebraska 68179, appearing for the Carrier.

ARBITRATION AWARD

The undersigned was appointed as the third or Neutral Member of Public Law Board No. 6942 on May 3, 2006. The undersigned was assigned this case on May 4, 2006.

Based upon the entire record and arguments of the parties, we issue the following Award.

DISCUSSION

By letter dated May 19, 2005, the Carrier notified C. E. Scott, Conductor, ("Claimant") to report for a Fitness-for-Duty Examination on Tuesday, May 31, 2005, at Lincoln and Physical Association & Nebraska Occupational Health in Lincoln, Nebraska. The letter advised the Claimant that: "Appointments **may not** be canceled or changed without obtaining prior permission from the undersigned. **Failure to comply with this instruction may result in disciplinary action.**" (Emphasis in the Original). The letter was signed by Camalynn S. Clark.

By letter dated May 27, 2005, Attorney Mark A. Kille informed Camalynn S. Clark that the Claimant would not be attending the May 31, 2005 appointment in Lincoln. In the letter Attorney Kille informed the Carrier that because the Claimant "has not been advised by his treating physician as having achieved maximum medical improvement, it is simply premature for him to be evaluated by another physician for a determination of his fitness for duty."

By letter dated June 13, 2005, the Carrier notified the Claimant to report to the Conference Room at the Depot at Marysville, Kansas, on June 17, 2005, for investigation and hearing in connection with his responsibility, if any, for: "Allegedly failed to comply

with instructions to attend a medical examination on Tuesday, May 31, 2005, which we were notified of on June 1, 2005."

By letter dated July 6, 2005, the Carrier informed the Claimant that the above charge against him had been sustained. As a result, according to the letter, the Claimant was "in violation of General Code of Operating Rule 1.1.3, effective April 2, 2000." The Carrier assessed the Claimant a "**Level 2 Discipline** which is five days off work without pay and you will be placed at the **Conference Level** in the Behavior Modification Matrix with a 24-month recovery period." (Emphasis in the Original).

The Organization does not assert any procedural errors.[1]

The Organization argues that the Carrier failed to meet its burden of proof in the instant case because of mitigating circumstances and, as a result, opines that the discipline assessed against the Claimant must be reversed. The Carrier takes the opposite position.

The Organization initially argues that the Claimant "testified that he was unable to attend the examination because he was in too much pain from his on-duty injury." (Tr. p. 27). However, that is not exactly what he said. In this regard, the record indicates that the Claimant did not go to the examination because "I really didn't feel like it. I was in too much pain." Id. (Emphasis added). The Claimant wasn't incapacitated at the time, (Tr. pp. 16-17), he was just in some pain." (Tr. p. 16). (Emphasis added). He also wasn't in the hospital, or in jail. (Tr. pp. 16-17).

Based on the above, we conclude that the Claimant was able to attend the examination but chose not to because he was suffering some, but not debilitating, pain. The May 19th notice informed the Claimant that he could not cancel or change the examination appointment "without obtaining prior permission from the undersigned." (Tr. p. 13). (Emphasis added). The notice also stated: "Failure to comply with this instruction may result in disciplinary action." Id. (Emphasis added). The record is clear that the Claimant did not obtain prior permission from the undersigned to not keep his appointment.

It is clear from reported arbitration decisions that management has the right, unless restricted by the agreement, to require employees to have physical examinations where the right is reasonably exercised under proper circumstances, such as where an employee desires to return to work following an accident or sick leave. Elkouri and Elkouri, How Arbitration Works, (BNA, 6th Ed., 2003), p. 825. The Organization has

[1] The Organization does not argue in its "Position" that there are any procedural errors. However, following the investigative hearing, the Organization asserted that the Carrier committed a fatal procedural error when the notice of investigation was not issued within 10 days of the date the Carrier knew of the alleged rules violation. (Carrier's Exhibit C, p. 1 of 2). To the contrary, the record indicates that the Claimant's notice was sent out within the timelines on the tenth day after the Carrier was first notified by the physician's office that the Claimant did not show up for his medical examination. (Tr. pp. 20-21). Even the Claimant admits that he received the Notice of Investigation on a timely basis. (Tr. p. 10). Assuming arguendo this issue is properly before us, the Organization's argument is rejected.

pointed out no such restrictions here. The request, on its face, is reasonable. (Transcript Exhibit C).

Claimant's attorney states in his letter dated May 27, 2005, to the Carrier that the Claimant will not attend the examination because he "has not been advised by his treating physician as having achieved maximum medical improvement, it is simply premature for him to be evaluated by another physician for a determination of his fitness for duty." (Transcipt Exhibit E). This is not an acceptable excuse. The Carrier is entitled to have the Claimant examined in order to make its own determination regarding the Claimant's fitness for duty. If that opinion is different from the Claimant's treating physician's diagnosis, the parties can go from there. There has been no showing the Claimant was physically unable to comply with the Carrier's directive.

The Organization also claims that the Claimant "properly used" the Carrier's empowerment policy which allows employees to "refuse to perform an unsafe act" and "question a decision that may affect [their] safety or the safety of others." However, there has been no showing by the Organization that the Carrier's empowerment policy applies to the facts of this case. In addition, there has been no showing that the Claimant by complying with the Carrier's directive would be performing an unsafe act and/or endangering himself or others.

Based on all of the above, we find that the Carrier has proven by substantial evidence that the Claimant is guilty of the actions complained of.

Based on the foregoing, it is our

AWARD

The grievance is denied, and the matter is dismissed.

Dated at Madison, Wisconsin this 23rd day of May, 2006

Dennis P. McGilligan

By Dennis P. McGilligan, Chairman & Neutral Member

I concur / Date 6-6-06 I dissent _____ Date _____

R Henderson

Robert A. Henderson, for the Carrier

I concur _____ Date 6-6-06 I dissent _____ Date _____

Richard M. Draskovich, for the Organization