Special Board of Adjustment No. 1112

Parties to Dispute

Brotherhood of Maintenance of Way Employees' Division/IBT	)	
vs	)	**Case 88/Award 89**
Burlington Northern Santa Fe Railway Company	)	

Statement of Claim

Appeal of discipline of dismissal assessed employee Kathy I. Pinto on February 9, 2005.

Background

On November 24, 2004 the Claimant to this case, Kathy I. Pinto, was advised by the Carrier to attend an investigation in order to determine facts and place responsibility, if any, in connection with her alleged failure to comply with instructions about her medical condition prior to the date of November 19, 2004 in accordance with a letter to that effect sent to her by the Carrier on November 5, 2004.

After postponements an investigation was held on January 12, 2005. The Claimant was advised on February 9, 2005 that she had been found guilty as charged. She was then advised that she was being dismissed from service of the Carrier for violation of Rule 1.13 of the Maintenance Operating Rules, effective October 31, 2004.

On March 16, 2005 the Claimant appealed the discipline in accordance with Section 6 seq. of an arbitration agreement signed on July 29, 1998 between the Carrier

and the Organization which created Special Board of Adjustment (SBA) 1112 under the authority of the National Mediation Board. In accordance with the provisions of that agreement this case is now properly before SBA 1112. The neutral member has been granted final and binding powers to issue an Award on this case based on the criteria outlined by the parties in accordance with Section 8 of the agreement creating SBA 1112, and in accordance with Section 3 of the Railway Labor Act.

Discussion & Findings

Rule 40 of the parties' labor agreement is incorporated into this Award by reference and in toto.

The BNSF policies applicable to this case are the following which are cited here in pertinent part.

BNSF 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.

On November 5, 2004 the division engineer in Denver, Colorado wrote the following letter to the Claimant to this case which is cited here in pertinent part.

> "Dear Ms. Pinto:
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> "The BNSF is committed to the safety and well being of each employee. Our vision includes a work place where everyone is entitled to a rewarding job which is free from unacceptable risk of injury and illness, and provides a sense of community in which respect, trust and open communications exist.
>
> "As your employer, we sympathize that you have been unable to work due to an

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on-duty injury received on September 24, 2004. However, open communication and the sharing of information is very important for facilitating optimal care, treatment and timely return to full duty for employees who have experienced personal injuries.

"I understand from our medical and environmental health (MEH) group that you have not voluntarily provided the with requested medical information. At this juncture, however, please understand that as your employer, the BNSF requires this medical information regarding your injury for the following reason(s). (Emphasis in original).

> "The information provided by your physician/your time away from work indicates that your unavailability is beyond a reasonable duration for an injury of this nature --- according to national disability guidelines.
>
> "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.
>
> "To allow us to identify appropriate existing vocational/developmental opportunities to assist you in locating alternative work.

"As such you are required to have a physician provide the information listed below, and submit it to Aimee Uhrig, MCM: P.O. Box 6141, Lincoln, Nebraska 68506, FAX 866-870-0921.

> 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.

"You have the option to complete the enclosed medical release forms, whereby a BNSF medical team member can contact your physician and make the above-cited inquiries on your behalf.

"The BNSF needs to receive the information required above **no later than**

> **November 19, 2004.** Your failure to provide the information will be considered as misconduct and may be handled as a disciplinary matter for failure to comply with instructions."[1] (Emphasis in original)

There is information in the record to show that this letter was sent by certified mail and that it arrived at the Claimant's address in Moorcroft, Wyoming.

This letter was written to the Claimant as a result of a Physician Activity Status Report sent to the Carrier by a physician who saw the Claimant on September 24, 2004. That Report states that the Claimant suffered "lumbar strain", and "sprain of unspecified site of shoulder and upper arm". The Claimant was approved to return to work on that same day with restrictions. Those restrictions included: "no repetitive lifting over 5 lbs.; no bending greater than 0 times per hour; no pushing and/or pulling over 10 lbs. of force; and no reaching above shoulders.". [2] This report states that prescription medication was dispensed to the patient without specifying what that was. According to this report it also projected an "...anticipated date of maximal medical improvement..." to be October 31, 2004.

On September 24, 2004 the Claimant signed an authorization to release medical information.

Although the Carrier did not have this information on November 5, 2004 when it wrote the letter cited in the foregoing to the Claimant, the record before the Board in this case also shows that on October 28, 2004, or some 30+ days after the Claimant suffered

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[1]Record Exhibit A.

[2]Record Exhibit C.

an on-the-job injury, she was admitted for two days to a hospital in Gillette, Wyoming with principal diagnosis being a "major depressive affective disorder, single episode, in partial/unspecified remission".[3] She was released from this hospital on October 30, 2004. This document was provided to the Carrier, as far as the Board can determine, only after the Claimant had been charged with violation of Rule 1.13.

Testimony at the investigation by the road master to whose territory the Claimant was assigned is that the letter of November 5, 2004 was sent to her because the Carrier was not getting any medical information from the Claimant about the on-duty injury that she sustained on September 24, 2004 outside of the original report sent by the doctor after examining her on that day.

There is some discussion in the record with respect to whether the November 5, 2004 letter was received by the Claimant. It was. The hard copies of computerized tracking data produced by the postal service are somewhat difficult to decipher, as the Claimant's union representative states at the investigation, but that data warrants conclusion that the letter in question was indeed delivered and received.

The Claimant does not deny that she received the letter. She just states at the investigation, in testimony that is evasive at best, that she does not "...remember that letter at all...".. If the Claimant had not received the letter, the Board can but opine, she would have explicitly testified to that effect. In fact, she implies a bit further on in her

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[3]Record Exhibit G.

testimony that she did receive the letter. But then states, in a bit more of evasive testimony, that she did not remember when she got the letter, and that it "...didn't make sense to me...".

The record shows that the Claimant did not come back to work from the date of September 24, 2004 through the date of the investigation which was held on January 12, 2005. The evidence also shows that the Claimant never went back to any of the physicians at the Concerna Medical Center in Fort Collins, Colorado after her initial visit there on September 24, 2004 after her on-the-job injury.

When the Claimant was asked at the investigation what she did with the forms contained in the November 5, 2004 letter that she was asked to fill out in order that the Carrier's medical staff assist her in obtaining information on her status, she responded at the investigation that she did not remember what she did with those forms.

The narrow issue before the Board in this case centers on the alleged violation of Rule Rule 1.13 by the Claimant because she did not follow instructions when she did not respond to a Carrier's request to provide medical information on her status after an injury sustained by her on-the-job on September 24, 2004. As a result of that injury the Claimant was put back-to-work with restrictions. She was also asked to return for follow-up appointments. She never returned to work. She never met any of the appointments. For all practical purposes, she disappeared as an employees of this Carrier.

The letter sent to her on November 5, 2005 was a reasonable response by this employer to try and figure out what was going on. Obviously, neither this employer nor

any other can operate effectively if employees have on-the-job injuries, are treated, refuse to honor follow-up medical appointments, and then just disappear. This is the background to the narrow issue here before this Board in this case. This case is not comprehensible without being put in this context.

There is no question that the Claimant did not respond to the November 5, 2004 request for medical information. She tries to imply at the investigation that she may not have gotten it. Then she states that she did but did not remember when she got it. Then she testifies that she did not fill out the forms in that letter because she does not remember what she did with them. Then she states that the letter, which is about as clear as a letter on these matters can get, made no sense to her.

The Claimant's testimony is replete with convenient forgetfulness. At some points it is simply evasive. There is insufficient information of record, nor does the Claimant provide any which was her right at the investigation, to warrant conclusion that all of this forgetfulness, and indeed evasiveness in her testimony, is caused by some other condition not related to what happened to her in the first place on September 24, 2004. The Board does not discount that the record suggests that there were other issues at stake witnessed by the Claimant's hospitalization for two days in late October of 2004. But the information and evidence is far too tenuous to permit conclusions that this is why the Claimant did not respond to the simple set of clearly enunciated requests found in the Carrier's November 5, 2004 letter to her. On the face of it, there were reasons why the Claimant may not have wanted to respond, which is not the same as not being able to

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respond, to this letter: she had refused to cooperate with all other obligations related to both medical appointments and her return to work since September 24, 2004.

Upon the record as a whole conclusion is warranted that the Claimant was guilty as charged. On basis of evidence of the type permissible in forums such as this the claim must be denied on merits. Arbitral rulings are based on substantial evidence. This type of evidence has been defined as such evidence "...as a reasonable mind might accept as adequate to support a conclusion...".[4] As moving party to this case the employer has sufficiently borne its burden of proof.[5] The discipline assessed by the Carrier, in view of other information in the file on this relatively short-term employee, was neither arbitrary nor capricious.

Award

The claim is denied.

Edward L. Suntrup, Chair &
Neutral Member

Date: 6-6-05

[4] Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229. See also Second Division 6419, 8130; Public Law Board 5712, Award 4 inter alia.

[5] See Second Division 5526, 6054; Fourth Division 3379, 3482; Public Law Board 3696, Award 1 inter alia. Also Special Board of Adjustment 1112, Award 85.