Van Wart #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

Background

The Employee, a Mechanic of some three years, was terminated May 14, 1993 because of his alleged deceitful and misleading conduct displayed following an on the job injury (0JI) of May 5, 1993 resulting in a violation of Conduct Rule 31 and Agreement Rule 12 (F).

An arbitration hearing was held on the termination in the above identified case on June 30, 1994 in the Employer offices. The matter had been previously submitted to the System Board of Adjustment for adjudication.

The parties were afforded ample opportunity to present evidence, testimony and argument in support of their respective positions. The Employee was fairly and competently represented and so testified.

The parties stipulated to the waiver of Article 15 (L) which required an award within ten (10) days after the hearing closed. Oral arguments were heard in lieu of post hearing briefs.

Issue

Was there just cause for the discharge of the Employee from his employment with the Employer?

If not, what shall be the remedy?

Pertinent Agreement Rules

> ARTICLE 12 - SICKLEAVE, PREMIUMS AND BONUSES
> (F) The employees covered by this Agreement and the Union recognize their obligation of being truthful and honest in preventing unnecessary absences or other abuses of sick leave privileges. Employees may be required to present confirmation of illness and the Employer reserves the right to require, when in doubt of a bona fide claim, a physician's certificate to confirm such sick claim. Employees who abuse sick leave privileges may be subject to disciplinary action by the Employer.
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> ARTICLE 14 - GRIEVANCE PROCEDURE
> (C) No employee who has been in the service of the Employer for more than ninety (90) work days will be disciplined to the extent of loss of pay or discharge without being advised in writing of the charge(s) preferred against him leading to such action. Such notice shall be presented to the employee not later than five (5) days from the time of the incident, upon which such charge is based, with a copy to the Local Committee and General Chairman.
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> POSTED RULES OF CONDUCT
> (General Maintenance Manual)
> 31. Dishonesty such as theft or pilferage of Employer property, the property of our customers or property of employees, or the misappropriation of funds entrusted to employees, or misrepresentation to obtain employee benefits or privileges will be grounds for immediate dismissal and may where facts warrant77ad to prosecution to the fullest extent of the law. (Underscoring added)

Position of Parties

The Employer

The Employer argued, in essence and among other things, that the Employee was discharged for just cause, via the PE-1 dated May 14, 1993. Employee's deceitful, dishonest and misleading conduct and actions, particularly on May 10, and 11 flowed from his on the job workmen's injury arising on May 5, 1993. He injured his head while working in the tail section of a plane and his subsequent aberrant and bizarre actions flowed there from.

The Employee claimed sick time when he was not sick. His conduct was dishonest, misleading, and deceiving. It violated Rule 31 of the Rules of Conduct and Agreement Article 11 (F). After

the May 5 workmen's compensation injury, he returned from the hospital and reported a neck strain, that he had an x-ray, and that he was to follow up with doctor office.

On May 5 he went to the doctor's office. The doctors found that the Employee was fit for duty with certain restrictions such as lifting and bending. He told them that he would not return to duty, that he was sick. Later he told his supervisor that he was sick for May 6.

The doctor's office called Person 1, Workers Compensation Analyst, and reported the conduct and actions of the Employee. She notified his supervisor, Person 2, and had surveillance placed on the Employee commencing May 7, Monday, May 10 and Tuesday, May 11.

The Employee called in late on Monday after his shift had started to Planner Person 3, a person not normally in his chain of command and reported off sick for Monday, May 10 and Tuesday, May 11. That information was passed on to Person 2.

The surveillance investigator reported to Person 1 late afternoon that the Employee had just come in from the golf course, placed his bag in his car and set off to visit a chiropractor.

Person 2 called the Employee at on two separate occasions, on a speaker phone call witnessed by two observers and specifically asked the question, in essence, what he had been doing.

The Employee responded that he was just lying around. He said he had been to the chiropractor's office and had been lying around. The Employee was advised by Person 2 that it was a serious matter and could be a matter of discipline.

The Employee worked on May 12. Person 2 found out from Foreman Person 4 that the Employee had requested him to change his sick call for the 11th retroactively to an employee request day off (ERDO).

The request was granted by the Foreman. Person 2 advised that it could not be so and made sure that the computerized payroll system was not so altered.

The Union

The Union asserted, in essence and among other things, that the Employee did not violate Rule 31 or Agreement Article 14(F). His doctor gave him permission on May 11 to play golf. The Employee was on ERDO and thus was not receiving any Employer benefits, nor did he receive any workmen's compensation benefits from the State.

The Employee returned to work on May 12 and worked his regular shift. He also worked his regular shift on May 13. On May 14, he worked a swap from 7:00 AM to 3:00 PM. He was terminated by the Employer prior to working his regular shift.

Evidence

The parties submitted some 24 exhibits as evidence, 6 jointly, the Employer 9 and the Union 9. JX-2 represented the Employee's appeal for a special hearing on the PE-1 issued on May 14, 1993, the Employer's denial thereof, the step 3 appeal and denial thereof and the Steps of the System Board of Adjustment handling of grievance 53-93 and said Board's deadlocking on said grievance. JX-4 was the supervisor's report of the May 5, 1993 occupational injury including copy of the Hospital's report on Employee's injury.

JX-5 was a copy of the Rules of Conduct, particularly Rule 31. JX-6 was a copy of the May 14, 1993 PE-1 termination notice.

The Employer offered CX-1 which was the handwritten memo of Planner Person 3 wherein he reported that Employee had called in sick after the shift had commenced working on May 10 to report himself as being sick for May 10 and 11 and that he had a doctor's appointment Tuesday afternoon. CX-2 was a memo from Person 2, the Employee's supervisor, covering the telephone call on May 11 on the speaker phone with witnesses thereto. Person 2's effort to ascertain from

the Employee whether he had an occupational injury or was sick, what he had done on Tuesday (May 11) and when asked twice, what he had done on that day prior to going to the chiropractor the Employee said that he had laid around all day and relaxed because of his jammed neck. CX-3 represented a copy of the Maintenance and Engineer's Attendance Report reflecting the Employee's sick mark offs. The report also reflects that the majority of off days were on a Monday. CX-4 was Foreman Person 4's memo of 5/17/93 covering his recollection of 5/5, 5/6, 5/10, and 5/12.Of importance was that he okayed the sick days for May 5 and 6. While okaying the May 12 retroactive request to change sick to ERGO, such request was denied by Manager Person 2. CX-6 is the doctor's office medical report form covering the Employee's injury of 5/5/93 (shown as a diagnosis is "scalp contusion and cervical strain"). They recommended a light duty return to work with limited restrictions on 5/6/93 but that the patient refused any further medical treatment at the doctor's office.

CX-6B was the doctor's office return to work evaluation of the Employee. CX-6C was its advice that the Employee was treated by a doctor under the physical panel of the worker's compensation law and that the Employee informed the doctor's office that he no longer tends to follow the physician panel and is seeking treatment with an unknown physician. CX-60 was the doctor's office's initial evaluation on May 6 involving the Employee's chief complaint of a head pain and how he obtained it. CX-6E reflected his physical examination and his release to work light duty with a 20 pound weight restriction. Included was the Employee's notification that he would not go to work and would take sick days, despite the fact that light duty would require little more effort than associated with ordinary household activities. The Employee was asked to return to the office but he refused. CX-6F was the worker's compensation form requesting medical information from a doctor. CX-7 was a notice from the Bureau of Worker's Compensation

advising a denial of worker's compensation pointing out "although an injury took place, the employee is not disabled as a result of this injury within the meaning of the Workmen's Compensation Act." CX-8 is a report of the surveillance by an investigator for Employe covering the surveillance on Friday, May 7, Saturday, May 3 and May 10 and 11, 1993. Two important facts were that the Employee had gone camping in Canada over the weekend and was expected back about 8:00 PM Monday (May 10), and that he had played golf on Tuesday, May 11, before visiting his chiropractor. CX-9 is 5 Awards of a System Board of Adjustment, three of which were from the System Board between these same parties. The other two involved the Flight Attendants and the IBT and what the Employer offered in support of the Employer's position.

The Union offered 7 exhibits. UX-1 was a notice to employees of the manner in which to cover a work related injury in the first 14 days thereof, and advice in connection with the thereafter. UX-2 is a copy of a medical treatment provision taken from Chapter 7 of the Workmen's Compensation Medical Benefits, in part, reading: "An injured or diseased employee who refuses reasonable medical treatment, including reasonable surgery, may lose all rights to worker's compensation for any injury or increased incapacity shown to have resulted from such refusal." UX-3 covers an Employee Work Analysis, dated July 1, 1993, for the Employee of 5/10, 11, 13 and 14. UX-4 is a Performance Review of Person 4. UX-5 covered a letter from his doctor addressed "to whom it may concern."The letter, allegedly written by Employee's doctor, asserted that the Employee was treated on 5/11/93 for neck and upper back pain. Prior thereto the

Employee had phoned in to ask if golfing would exacerbate his condition and after discussion the doctor approved. UX-6 was a letter from the Employee's doctor that he will not be available to testify. UX-7 was copies of 6 PE-1's of various employees disciplined.

A review of the evidence presented, both documentary and testimonial, clearly supports the conclusion that the Employer had just cause for disciplining the Employee on May 14, 1993. The Employer, of course, is limited to that which constituted the Employer's charge and conclusion at the time that the discipline was imposed on May 14, 1993 based on the facts concerning May 10 and 11, 1993. The Referee understands that the reference of other dates, i.e., May 5, 6, 7 and S was only intended as background information and while related cannot be utilized under the structure of Article 14 for disciplinary purposes.

The Board understands that the use of evidence covering dates other than mentioned in the 13E-1 serves a credibility purpose as well as a showing that what happened on May 10 and 11 insofar as dishonesty is concerned is likewise true on the earlier dates. The Employee a three year mechanic was notified via the customary PE-1 form on May 14, 1993 reading, in part:

> "This is your notification that you have been charged with a violation of Employer Rules and Regulations and/or unsatisfactory performance as follows:
> On May 10, 1993 you reported off sick for May 10 and 11 indicating your sickness was due to an injury sustained at work and that you would be seeing a doctor. On May 13, 1993, the Employer received information that during your regular shift on May 11, you were playing golf. You are charged with violation of the following GMM Posted Rule of Conduct:
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> Rule #31, which reads in part:
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> 'Dishonesty...or misrepresentation to obtain employee benefits... will be grounds for immediate dismissal.'

> You are also charged with violation of Article 12(F) of the Labor Agreement:
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> 'The employees covered by this Agreement and the Union recognize their obligation of being truthful and honest in preventing unnecessary absences or other abuses of sick leave privileges.'
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> 'Employees who abuse sick leave privileges may be subject to disciplinary action by the Employer.'"

The Employer successfully carried its burden of proof. The Employer conclusively showed by a sufficient amount of competent, credible and probative evidence that the Employee had violated Conduct Rule #31 and Agreement Article 12(F). The Employee's violation was easily proven by the Employer's factual presentation that demonstrated: (1) the Employee's untimely sick mark off through Planner Person 3 on Monday, May 10th at 3:20 PM for that day as well as Tuesday, May 11, 1993. Said mark off was made after the Employee's shift (3-11 PM) had started. The mark off was made, peculiarly, through other than the normal organization channels. (2) The Employee's calling in sick for Monday, May 10 and Tuesday, May 11, represented a continuance of the Employee's dishonest and deceitful actions. a) He had marked off "sick" for the previous Thursday and Friday, May 6 and 7, respectively. At that time the Employee had marked off sick not because he was sick, in fact, but rather because he disagreed with the medical doctor's evaluation of his existing physical condition resulting from his OJI on May 5. The doctors found that the Employee was fit enough to work light duty. Such medical conclusion caused the Employee's belligerent assertion and the subsequent action of marking off sick because he refused to work light duty. (3) Thus, the Employee's marking off sick for May 10 and 11 supports the presumption that because he was also sick Thursday and Friday he was also sick on Saturday and Sunday. The Employee's behavioral pattern, to say the least, was inconsistent with that of an honest and sick man. The Employee chose to go camping in Canada over the weekend

and return there from on Monday evening. Then the Employee chose to play golf on Tuesday before he visited his doctor. These two actions belie the assertion of being sick. The allegations of sickness were a brazen and deliberate attempt to defraud, misuse, and misapply provisions designed for honest purposes.(4) The Employee's devious actions and his dishonest replies to Manager Person 2 during Person 2's May 11 telephonic inquiry simply and properly triggered the subsequent disciplinary action of May 14.

The Employee asserted to his Manager that he had lain around all day relaxing because of his jammed neck and that he had trouble turning and moving his neck. The Board noted that Manager Person 2 advised the Employee that he was trying to determine whether the Employee had an occupational injury or he was sick. The emphasis of the Employee was put on an occupational injury. The Board noted, from the Exhibit CX-3 the Maintenance and Engineers Attendance Report, a trend of the Employee to utilize sick time to extend his weekends. Such usage indicated that Mondays, in particular, and sometimes a Tuesday were chosen as sick days. The Employee's subsequent attempt to try to change his sick mark off to an ER00 was an attempt to change the character of his action. It is undoubtedly true that the Employee's benefits actually ran out at 9:30 PM on Monday. However, that fact in and of itself does not change the character of what the Employee was attempting to do which, in essence, was to defraud the Employer. There was no medical information of any evidentiary nature other than that of the doctor’s office to support sick mark offs. In fact the only evidence was to the contrary. The Employee's protracted sick mark off was not as serious as Employee was attempting to make it appear by his actions and assertions. Although injured on May 5th, he did not see his own doctor until May 11th. That fact would not indicate a serious injury or a need for 6 days rest. As to the Employee's camping, it commenced on a Friday and it took place on two sick days, Friday and

Monday. Otherwise, the Employee could have been working on his normal work shift. The Union offered Exhibit 7 (a) through (f) representing two mechanics and four utility employees, and alleged that the Employer was not applying its rules uniformly. The Employer was not applying its discipline in a uniform manner and that it was issuing discipline disparately. The Board finds that in those cases in Exhibit UX-7 the discipline of discharge was not involved and that they are distinguishable from this case. They were matters that were settled at a lower level, were not appealed to the System Board and are given no weight.

The Employer countered with five awards rendered by Arbitration

Boards for the System Board of Adjustment that are dispositive of this case. The five awards involved injuries that were either faked or overly emphasized with the employee portraying a debilitative limitation on his work ability which surveillance and video tapes reflected otherwise. The Arbitration Board's findings were that the Employees' credibility, dishonesty and deceitful actions were intended to deceive the Employer. Union Exhibit 7 is clearly distinguishable from this case. On the other hand, the five awards reflected the Employer's policy of applying discharge where it finds the employee is attempting to take advantage of it. Said Awards are more reflective of the variables in this case and supports the Employer's actions. The Board found the Employee's testimony was less credible than that of the testimony of the Employer's witnesses. The Board's decision to deny the grievance is upheld. The decision to terminate the Employee is upheld. The grievance is denied.

AWARD

The issue is found in the affirmative. There was just cause for the discharge of the Employee. The grievance is denied.