**BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 1044**

**UNITED TRANSPORTATION UNION – YARDMASTERS DEPARTMENT**

**and**

**CONSOLIDATED RAIL CORPORATION**

**Case No. 39**

**STATEMENT OF CLAIM:**

Claim is made on behalf of Susan A. Jewell for the removal of the discipline of "90-Day Suspension" from her employee record and for compensation for all time lost. We further request that any benefits which may have been impaired be fully restored without loss of any kind.

**FINDINGS:**

During the time period relevant to this dispute, Claimant S.A. Jewell was employed by the Carrier as a yardmaster at Stoney Creek, Pennsylvania.

On June 6, 2001, Claimant was directed to appear, pursuant to a Notice of Investigation, for a formal hearing and investigation on charges that Claimant had been insubordinate in that she had failed to respond to a written letter instructing her to submit medical records from her treating physician so that the Carrier could determine her fitness for service and ability to return to work from an absence due to illness. The investigation began, as scheduled, on June 12, 2001, and the Carrier allowed the Claimant an additional twenty-five days to provide the requested medical information. On July 31, 2001, the Carrier issued a second Notice of Investigation to the Claimant, restating the charge of insubordination and noting that the Claimant still had not submitted the requested medical information. After a postponement, the investigation

was held on February 4, 2002. On February 20, 2002, the Carrier issued a Notice of Discipline to the Claimant, informing her that she was dismissed from the Carrier's service in all capacities.

The Organization filed a claim on the Claimant's behalf, challenging her dismissal. The Carrier subsequently reduced the penalty of dismissal to a ninety-day suspension. The Organization then filed a claim challenging the ninety-day suspension issued to the Claimant. The Carrier denied this claim.

The Carrier initially contends that the Claimant's failure to comply with the Superintendent's May 2001 instructions was clearly an act of defiance and insubordination. The Carrier maintains that the Claimant aggravated her insubordinate behavior by fabricating information, fax transmission cover pages and a letter from her treating physician dated February 1, 2002, in an attempt to show that she did comply with the instructions. The Carrier points out, however, that the Claimant's own testimony and other testimony on the Claimant's behalf unequivocally stated that the Claimant did not understand the May 2001 letter. The Carrier argues that the evidence demonstrates that the Claimant did not comply with the May 2001 instructions. The Carrier maintains that if the Claimant had complied, there would be no reason for the Organization to claim that she did not understand these instructions. The contradiction between the assertion that the Claimant complied with the instructions and the contention that the Claimant did not understand the instructions reveals the Claimant's testimony for what it is, a fabrication.

The Carrier goes on to argue that the Claimant's documentation also lacks veracity. The Carrier emphasizes that the Claimant herself would not attest to the

veracity of the documents she produced to support her assertions, including alleged fax transmissions dated August 16 and September 27, 2001. The Carrier maintains that it produced sufficient credible evidence that the Claimant is guilty as charged. The Carrier emphasizes that its Medical Office received only three documents from the Claimant or her treating physician: a one-page note, dated August 28, 2001, from Dr. Turner; a one page letter, dated September 19, 2001, from Dr. Turner to Dr. Prible; and a one-page "To Whom It May Concern" letter, dated November 8, 2001, from Dr. Turner. The Carrier argues that the documents that the Claimant and the Organization provided during the February 2002 investigation lacked veracity and were presented in an attempt to extricate the Claimant from the offense of insubordination.

The Carrier then asserts that employees are solely responsible for ensuring that required medical information is sent to and received by the Carrier's Medical Office. The Claimant failed to fulfill that responsibility, and then she attempted to fabricate a story and place blame on the Carrier. The Carrier argues that under the circumstances, it acted in a lenient manner by reducing the initial penalty of dismissal to a ninety-day suspension. The Carrier emphasizes that insubordination is a serious offense that is subject to the most severe disciplinary penalties. The Claimant's insubordinate behavior cannot be tolerated, so the ninety-day suspension must be sustained.

As for any contention that the Carrier prejudged the Claimant, the Carrier points out that if it had done so, it would not have given the Claimant an additional twenty-five days to comply with the May 2001 instructions. The Carrier emphasizes that the Claimant was given ample time to comply with a simple instruction, but the Claimant

simply chose to ignore the Carrier directive. The Carrier further asserts that the investigation was fair and impartial. The Carrier maintains that the Claimant was present, she was represented, and she was given the opportunity to testify and produce documents on her own behalf, as well as the opportunity to cross-examine the Carrier's witnesses.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the Carrier failed to meet the contractual time limits when it faxed a denial of this appeal on the sixtieth day after receiving the appeal. The Organization points out that there is no provision for sending such notices by facsimile, and the Carrier obviously was attempting to get "in under the wire," as it realized that the time limit for this response was expiring.

The Organization goes on to argue that the Grievant is a victim of disparate treatment. The Carrier required the Claimant to produce documentation for an unnecessary purpose, without regard to Carrier rules or the collective bargaining agreement, and despite the fact that the Carrier has not required the same of other employees in similar circumstances.

The Organization maintains that the Carrier has no right to all of the Claimant's records. Although the Carrier would be justified in requesting proof that the illness or injury for which they are paying sick benefits is legitimate, the May 2001 letter to the Claimant asks for all medical records, not just those pertaining to the Claimant's current illness. The Organization further asserts that it is the Medical Department's practice to

initiate such a request only after an absence has been of a greater duration. In fact, the Carrier's policy is to ask an employee to undergo a physical and provide medical information when returning to work after being off for a period of thirty days or more. At the point when the Medical Department requested all of the Claimant's records, she had been off work for a period of nine days. The Organization argues that the May 2001 letter was precipitated by local management, which repeatedly has treated the Claimant differently than other employees.

The Organization then emphasizes that although the Claimant was confused as to why the Carrier wanted the records, the Claimant nevertheless contacted her physician's office and requested that they be sent. It did not occur to the Claimant, who was dealing with her daughter's illness as well as her own, that she had to follow up with the Medical Department. The Organization asserts that the Claimant did comply with the request that she received. The Claimant did not disobey or disrespect authority. The Organization maintains that the Claimant may be guilty of not calling to confirm that her doctor's office sent the records to the Medical Department, but she was not guilty of insubordination.

The Organization then contends that the Notice of Investigation, which states that the Claimant committed an act of insubordination without mentioning that this is an "alleged" offense, demonstrates that the Carrier prejudged the Claimant. The Organization points out that after the June 12, 2001, investigation, at which the Carrier gave the Claimant an additional twenty-five days to submit the information, the Claimant again contacted her doctor's office and explained the importance of sending the

information. The Organization emphasizes that the Claimant was told that the doctor's office already had faxed the information to the number that they had in the file, but would do so again.

The Organization then asserts that when the Carrier issued the second Notice of Investigation and the Claimant appeared for the February 4, 2002, investigation, the hearing officer displayed obvious bias. The Organization points out that while the hearing officer questioned the Claimant's veracity, the hearing officer did not question the validity of the Company's practice and did not allow for the possibility of any error or miscommunication on the part of the Medical Department. The Organization further points out that after receiving hearsay information regarding what the Medical Department received, the hearing officer could have taken hearsay information from the doctor's office about its office procedure and sending of information.

The Organization contends that even if the Carrier had substantiated the charges, dismissal certainly was not justifiable. The Carrier originally attempted to dismiss an eleven-year employee for reasons that were unfounded and biased. The Organization asserts that, adding insult to injury, the Carrier sent yet another Notice of Investigation to the Claimant after she had been discharged. The Organization acknowledges that the dismissal was reduced to a ninety-day suspension, but it argues that there should not have been any discipline in the first place.

The Organization additionally maintains that even after the Claimant's dismissal was reduced to a ninety-day suspension, the Carrier refused to return the Claimant to work for twenty-seven days. The Organization points out that the Carrier subsequently

admitted that this action was improper and made the appropriate payment to the Claimant, but the Claimant nevertheless was without income during that twenty-seven day period.

The Organization then argues that the Carrier offered different reasons for seeking the Claimant's medical information. At one point, the Carrier indicated that it wanted documentation to support the Claimant's "inability to perform service." At another point, the Carrier stated that the information was to "determine your fitness for service and ability to return to work." The Organization asserts that the Carrier never did demonstrate whether it was interested in establishing that the Claimant's absence from work was justified, or whether it was attempting to determine if the Claimant was sufficiently recovered to return to her position. The Organization suggests that the Carrier was harassing the Claimant, and it emphasizes that other employees who have missed time in excess of nine days were not asked to provide medical records in this manner.

The Organization goes on to argue that because the Carrier subsequently found that there was no basis for its charge that the Claimant had given false and misleading testimony and submitted falsified documents during the February 4, 2002, investigation, then the information provided by the Claimant at that investigation must be deemed truthful and accurate. The Organization argues that no discipline should have been assessed relative to the hearing on February 4, 2002. The Claimant was not insubordinate as she had complied with the May 2001 letter, as confirmed by her physician's letter which was entered in the transcript of the February 4th hearing.

The Organization contends that the Claimant was treated in an unfair and discriminatory fashion. The Organization maintains that the claim should be sustained, the ninety-day suspension overturned, the Claimant's record cleared, and the Claimant fully compensated for all time and benefits lost.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the evidence and testimony in this case, and we find that the Carrier has failed to meet its burden of proof that the Claimant was guilty of insubordination and failing to follow instructions given to her on May 9, 2001, seeking medical information about the Claimant's fitness for service and ability to return to duty. Although the record is somewhat confusing, it is apparent from all of the correspondence that the Claimant requested that her doctor forward her medical records to the Carrier in a timely manner. There is insufficient evidence of any insubordination on the part of the Claimant. The Carrier charges her with an act of defiance and insubordination; and although the Carrier did not obtain the records that it wanted in a timely fashion, there is insufficient evidence in this record to demonstrate to this Board that there was any insubordination on the part of the Claimant that led to the fact that the Carrier did not receive the medical records in a timely manner. The Claimant's doctor indicated that she had attempted to transmit those records to the Carrier; and if any problem existed in the transmission, it can be blamed either on the doctor or on the failure of the Carrier to route the records to the appropriate people in a timely manner.

Insubordination is a very serious offense, and it involves the intentional refusal on

the part of an employee to carry out a specific order by management. There is simply insufficient evidence in this record of any insubordinate behavior on the part of the Claimant that would justify the issuance of a ninety-day suspension to her. Therefore, the claim must be sustained.

**AWARD:**

The claim is sustained. The ninety-day suspension shall be removed from the Claimant's record, and she shall be made whole.

**PETER R. MEYERS**
**Neutral Member**

**ORGANIZATION MEMBER**

**DATED:** 4/1/04

**CARRIER MEMBER**

**DATED:** 4/1/04

**Carrier Member's Dissent**
**To Award No. 39 of SBA No. 1044**

The Carrier disagrees that the record in this case was confusing. Neither the claimant's doctor nor the Carrier's medical office are the parties responsible to ensure that a properly issued directive is followed. That responsibility lies solely with the employee.

This Board however has bought into the, "it's not my fault" argument, thus releasing the Claimant from her fundamental employee responsibility.

For these reasons, I must respectfully dissent.

Respectfully,

Joseph W. Flanley
Carrier Member