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**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13339

Docket No. 13123

98-2-96-2-23

The Second Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(International Association of Machinists and
(Aerospace Workers
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“(1) Consolidated Rail Corporation arbitrarily and capriciously dismissed Machinist Ezra S. Short, Jr. following trial held on August 2, 1994.

(2) Accordingly, Machinist Ezra S. Short, Jr. should have his record cleared of any reference to the charges, as if the unjust discipline had not been imposed.”

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant, a 20 year employee with no prior disciplinary record, was regularly assigned as a Machinist at Carrier's Enola Diesel Terminal. He received an on-the-job

injury to his left knee and foot on February 3, 1993. He was out of work with torn cartilage in his left knee and a partially torn tendon in the bottom of his foot and received Temporary Wage Continuation (TWC) between March 15 and July 21, 1993. During that time he underwent tarsal tunnel release surgery, physical therapy and a work hardening program. He briefly returned to work in July 1993 in a light duty position in the Clerk's craft, but could not continue in that position due to a complaint lodged by the Clerk's Union.

The record reflects that Claimant underwent various medical examinations, was given work restrictions including limited standing and walking on hard surfaces, and returned to work in his craft at Carrier's insistence on three different occasions during the following year - in September 1993, January 1994 and June 1994. On each occasion Claimant was forced to mark off from work due to his physical condition after a brief period of time.

A trial was held on August 2, 1994 on charges that Claimant was using his injury as a subterfuge to avoid work on June 16, 1994, and had unauthorized absences from work on June 17, 20, 21 and 22, 1994. The charges were based upon the results of videotape surveillance showing Claimant playing golf on April 1, May 3 & 24 and June 21, 1994. Carrier found Claimant guilty of the charges and dismissed him in all capacities on August 31, 1994. The Organization appealed and an appeal Hearing was held on September 5, 1994, during which it was noted that Claimant had been medically disqualified and was receiving a disability annuity from the Railroad Retirement Board covering the dates he was charged with unauthorized absence. In its denial of October 5, 1994, Carrier again asserted that the video showed that Claimant was able to perform his Tool Room Attendant work, but reduced his dismissal to a suspension for time out of service (36 days) on the basis of leniency. On January 2, 1996 Claimant entered into a Letter of Agreement with Carrier indicating that in consideration of the settlement made that he would not present himself for re-employment with Carrier in the future.

Carrier argues that the videotape reveals Claimant walking and standing as well as playing golf during the time period when he was off work, and indicates that he was able to perform the functions of a Tool Room Attendant. It also notes that Claimant entered into a settlement with Carrier concerning his injury which makes this claim moot.

The Organization contends that the video does not disprove Claimant's disability or undermine his restrictions from walking and standing on concrete as required by his position, since playing golf was done on grass with special soft shoes and at his doctor's direction for purposes including rehabilitation, and was done with the knowledge of Carrier's medical representative. The Organization argues that Claimant followed all of Carrier's directions to have medical examinations and to report for work despite their adverse impact on his condition.

The record establishes that Claimant's position required standing and walking for a number of hours daily on a concrete floor wearing safety shoes, which was not within his medical restrictions. Claimant admittedly played golf during the Spring and Summer of 1994 in an effort to strengthen his muscles, and with his doctor's concurrence and the full knowledge of the Registered Nurse sent by Carrier's insurance agency to monitor his progress during his prolonged recovery period. By letter dated July 26, 1994 Dr. Reilly clarified Claimant's restrictions of no standing or walking on concrete, as in the Tool Room, and noted that he had discussed playing golf with Claimant on a number of occasions and informed him that was acceptable to, with the use of a cart when necessary, since it was done on a soft, yielding surface.

Based upon a careful review of the record, the Board concludes that Carrier failed to establish by substantial evidence that Claimant was guilty of using his injury as a subterfuge to avoid work. The videotaped evidence of Claimant playing golf on a few occasions is not inconsistent with his inability to work within his restrictions, as proven by medical evidence, and does not prove the charges against him. Since this claim only seeks the removal of the discipline from Claimant's service record and not reinstatement or compensation, we do not find that it is encompassed within the settlement agreement or that the matter is moot. Accordingly, the claim is sustained.

AWARD

Claim sustained.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 24th day of November 1998.