

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36173
Docket No. SG-36248
02-3-00-3-467

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Long Island Rail Road

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Long Island Rail Road:

Claim on behalf of G. Maldonato for payment of all lost time and benefits and for any reference to this matter to be removed from the Claimant's personal record. Account Carrier violated the current Signalmen's Agreement, particularly Rule 47, when Carrier dismissed the Claimant from service without meeting the burden of proving the charges against him and without the benefit of a fair and impartial investigation and issued harsh and excessive discipline against him in connection with an investigation held on December 16, 1999 and concluded on January 14, 2000. General Chairman's File No. C99-092. BRS File Case No. 11435-LI."

FINDINGS:

The Third 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.

Our review of the record does not reveal any procedural shortcomings of significance.

The Claimant was dismissed from the Carrier's service by notice dated January 28, 2000 for conduct unbecoming an employee and fraud. At the time of his dismissal, the Claimant had approximately 30 months of service.

It is undisputed that the Claimant fell from a ladder on August 3, 1999 and was hospitalized overnight. He suffered injuries to his back, ribs, chest and wrist. He remained off-duty at full pay for nearly two months thereafter while recovering and undergoing physical therapy.

The Claimant maintained that he continued to experience back pain and some wrist pain. A letter from his therapy provider dated October 5, 1999 reported the following:

"... this patient is in excruciating pain and is not able to travel by car, whether driving by himself or being driven by someone else. He is not able to sit for any period of time. Someone else drives him to our office, but he is less than one mile from our office."

* * *

The Carrier hired a Private Investigator to conduct surveillance of the Claimant's activities beginning in late September. Video tapes of the Claimant on September 30, October 4, 14, November 12, 17, 19 and 20 show him engaging in a variety of activities without any apparent difficulty. This included walking his large dog, running or jogging a short distance to the street from his house, squatting to put air in his tires, grocery shopping and removing several bags at once from the back of his pickup truck and carrying them into his house, carrying his empty plastic trash container one-handed, unloading bar stools from their cardboard containers, and retrieving something from a street grate using two-by-four type pieces of lumber while on his hands and knees. The tapes also depict multiple instances of slipping into and out of his truck as well as extensive driving by himself, including some at high speed weaving between lanes in heavy traffic. They also show him driving by himself in connection with therapist visits. However, when within sight of the therapist's office, his movements were considerably slower and more careful as though he might be in pain.

The Carrier attempted to return the Claimant to light duty beginning October 21, 1999. Rather than report, the Claimant invoked a three-doctor panel procedure under the parties' Agreement to resolve the dispute over his fitness for light duty.

The third doctor examined the Claimant on November 3 and found nothing to preclude performance of the light duty. He estimated release to full duty on December 1. His report was issued on November 12 and the Carrier returned him to light duty on November 16. Complaints of back pain prompted an exam by the Carrier's doctor on November 18, 1999. The Carrier's doctor did not remove the Claimant from light duty.

This same day, the Claimant telephoned his own doctor and obtained prescription pain relief medication. The Claimant remained on light duty.

On November 30, the Carrier's doctor viewed the surveillance video tapes and found the activities they showed to be inconsistent with the Claimant's complaint history. Indeed, the doctor characterized the Claimant as "faking" his complaints. The doctor so testified at the Investigation.

On the other hand, the Claimant's doctor provided a written report for the Investigation record that opined that the video tapes did not depict activities inconsistent with his complaints. In this regard, the thrust of the Claimant's testimony was that he was heavily medicated at the times when the videos showed him to appear to be problem free. He noted that the tapes did show times when he moved much more slowly and carefully to and from his truck in connection with therapy visits. According to his testimony, he did not take medication for those visits so his problems would not be masked by the pain medications. Other times, the medications allowed him to overcome the pain sufficiently to engage in activities, but side effects left him drowsy and dizzy at times. Thus, he did not feel competent to work while so impaired.

The surveillance video was provided to the Board for its use. It has been thoroughly reviewed along with the extensive documentary record comprising this docket. That review discloses substantial evidence in support of the charge.

Not only does the surveillance video depict extensive physical activities entirely inconsistent with the Claimant's professed complaints, the Claimant also conceded he had no proper explanation for all the driving he did, which was directly contrary to the complete disability, allegedly from excruciating pain, that supposedly prevented him from even riding in a motor vehicle. Moreover, the Carrier's determination of guilt is supported by competent medical testimony that described the Claimant's behavior as fakery.

Careful review of the medication evidence provided the Carrier with another basis for rejecting the credibility of the Claimant's testimony. Organization Exhibit No. 4 showed the Claimant's prescription drug history at the pharmacy he patronized. He received a 5-day supply of Vicodin on August 4, 1999. A 5-day supply of Tylenol #3 with Codeine was filled on August 11. The Claimant received a 10-day supply of Naproxen on September 25 and also an 8-day supply of Methocarbamol that same day. Given the level of pain the Claimant says he suffered together with the rate of consumption that his testimony describes, the Claimant would likely have exhausted his entire supply of pain relief medications on or before October 5, 1999. The Claimant did not obtain more Tylenol #3 until November 18. Accordingly, the evidence provides no persuasive explanation for the Claimant's ability to perform the normal appearing physical activities shown in the surveillance videos of October 14, November 12 and 17.

On this property, the kind of misconduct involved here has been consistently found to be serious enough to warrant the discharge penalty. See Public Law Board No. 4197, Award 134; Public Law Board No. 4162, Award 28; Public Law Board No. 2912, Award 1 and Fourth Division Award 4019. Accordingly, we find no proper basis for disturbing the Carrier's action.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

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

Dated at Chicago, Illinois, this 20th day of August 2002.