

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 53

System Docket No. BMW-342D

STATEMENT OF CLAIM

(a) Carrier's dismissal of Claimant Ricardo Cordoba was without just and sufficient cause, was not based on any clear and probative evidence and was done in an arbitrary and capricious manner, wholly beyond the Scope of the Scheduled Agreement.

(b) Claimant Cordoba shall be reinstated into Carrier's service with all seniority entitlements and shall be compensated for all lost wages, including overtime benefits which would accrue to him, as provided for in Rule 15 of the Scheduled Agreement.

FINDINGS

The Claimant, a Track Foreman, was injured on May 7, 1998. There apparently was some question thereafter as to whether the incident was considered by the Claimant and the Carrier as an on-duty accident or a "personal injury". In either event, the

Claimant was off duty commencing May 7, 1998 and continuing thereafter. As a result of an investigation by an outside firm to observe the Claimant's activities, and as a result of alleged non-compliance with directives issued in correspondence with the Claimant, he was subject to an investigative hearing under the following charges:

Charge One: Development of the facts and determination of your responsibility, if any, in that following receipt of December 23, 1998 driven correspondence, which ordered you under consequence of insubordination to provide medical documentation, you have failed to provide us with the documentation within the specified limits and hence, this constitutes an act of alleged insubordination.

Charge Two: Development of the facts and determination of your responsibility, if any, in that upon our January 26, 1999 receipt/acquisition of a video tape, you were observed engaged in activities which were totally inconsistent with the implied nature of your alleged disability that has prevented you from performing work for Amtrak since at least August 22, 1998.

Following the hearing, the Claimant was dismissed from service. The Organization disputed the disciplinary action, contending that the Claimant had not been "insubordinate" and that the observations by video camera did not conclusively prove that the person undertaking extensive physical activity was the Claimant.

As to the video tapes, supported by written reports and testimony of a professional investigator, the Hearing Officer in his Decision Letter expressed his conviction that the Claimant had been fully identified as the person undertaking physical tasks not in consonance with any allegation of inability to perform his regular duties. The Hearing Officer's Decision Letter stated in part:

Three persons -- your Supervisor of twelve (12) years, the Claims Officer who worked with you for a year in a former injury and the [outside] investigator -- all identified you as being the person shown in the videos.
. . . .

Nonetheless, you claim the person shown in the video was your brother. . . .

The [outside] investigator in many cases followed you from your home to the work site before making and recording her observations. One might reasonably expect that this would facilitate a positive identification at the work site. She was not hesitant, whatsoever, to indicate that the individual shown in the video, and mentioned in her reports, was present at the investigation in the person of yourself.

The Board has reviewed the hearing record and the video tapes and finds no basis to arrive at a conclusion differing from that of the Hearing Officer.

There may be room for some disagreement as to the degree of the Claimant's disability (making it impossible to return to his regular duties) and the exact nature of the physical exertions demonstrated on the video tapes. Of more significance, therefore, is the charge of insubordination in failure to comply with the directives in the Division Engineer's December 23, 1998 letter, which the Claimant acknowledged to have received. This letter stated in part as follows:

Your continued absence, allegedly due to a medically based impairment, has yet to find any confirmation from a physician.

Please be advised that your professed medical basis for abstaining from work is hereby cancelled and you are hereby ordered to report for a return to duty physical examination.

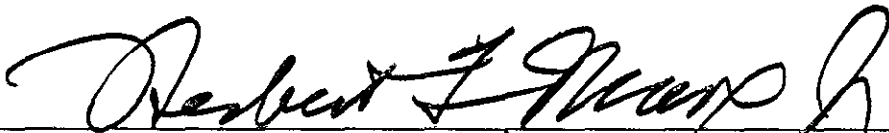
You are hereby instructed to call my office . . . to schedule this examination no later than seven (7) days from receipt of this letter.

In absence of your compliance, we will consider such to be an act of insubordination and formal charges will be issued.

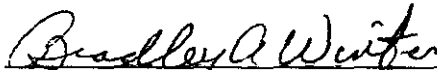
While the Claimant did submit a physician's note in response to this letter, the record confirms that he did not comply with the clear instruction to report for a physical examination. Based on this, the Board finds that the Carrier has demonstrated ample proof of insubordination. This, together with the video tape observations, warrant the discipline imposed by the Carrier.

A W A R D

Claim denied.



HERBERT L. MARX, Jr., Chairman and Neutral Member



B. A. WINTER, Employee Member



W. H. ROBINSON, Jr., Carrier Member

NEW YORK, NY

DATED: 8/31/99