

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 58

System Docket No. BMW-420D

STATEMENT OF CLAIM

Claim of the Brotherhood that:

(a) Carrier's dismissal of Claimant Julio Rodriguez 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 Rodriguez shall be reinstated into Carrier's service with all seniority entitlement 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 was subject to an investigative hearing under a Charge and Specifications, reading in pertinent part as follows:

It is alleged that subsequent to your sustaining an "on-the-job" personal injury on May 25, 2000, while allegedly unable to work at Amtrak, you have been observed on multiple occasions by qualified employees of a professional surveillance company . . . to have been performing work for Hood Milk Company delivering milk.

These activities include making deliveries by driving and climbing on a Hood Milk Truck, bending forward from the waist and lifting crates of milk, and using a dolly.

These surveillance observations, which occurred during the months of October through December, 2000, were reported to [the Division Engineer's] department on January 9, 2001. . . .

This alleged misrepresentation of the [extent] and/or duration of your injury and your ability to perform the duties of your Amtrak position constitutes dishonesty and is considered malingering and an attempt to misappropriate Amtrak funds through the Claims process. . . .

Following the hearing, the Claimant was dismissed from service.

The record provided to the Board is less than clear and convincing in certain aspects. The Board, nevertheless, concludes that the Claimant was sufficiently remiss in his obligations to the Carrier to support the charge of "malingering" while off duty as a result of his work-related injury. This conclusion is supported by the following:

1. In twice attempting to report for work, the Claimant was advised of the requirement for medical documentation. On neither occasion was such information provided.

2. Two letters were sent to the Claimant in November 2000 with specific instructions to provide information concerning his current medical information. This resulted in a physician's note which gave no details as to the history and extent of the Claimant's disability.

3. Credible testimony and evidence was provided to support the charge that the Claimant was "performing work" in October-December 2000 in a manner not consonant with alleged disability. It was not established that he was actually in the employment of a milk delivery company during this period. However, such observed activity was at a time that the Claimant had provided no medical documentation to the Carrier as to his fitness for duty.

Given the extended period of all these events, there is sufficient proof that the Claimant deliberately avoided advising the Carrier of his medical status. This conduct supported the Carrier's charge of "malingering", leading to the appropriate action of dismissal from service.

The Organization advised the Claimant of his opportunity to be present at the Board's hearing, but he did not appear.

A W A R D

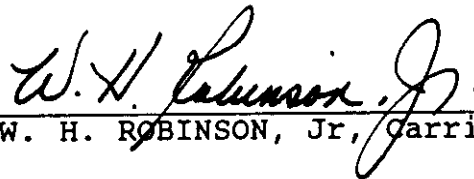
Claim denied.



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



B. A. WINTER, Employee Member



W. H. ROBINSON, Jr., Carrier Member

NEW YORK, NY

DATED: *June 18, 2002*