NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 67

System Docket No. BMWE-506D

STATEMENT OF CLAIM

Claim of the Brotherhood that:

(a) Carrier's dismissal of Claimant Daniel Casey 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 Casey shall be reinstated to his position with the Company with his seniority unimpaired and be compensated for all lost wages and benefits which would accrue to him as provided for in the Scheduled Agreement and his record cleared of the charge.

FINDINGS

The Claimant was subject to an investigative hearing on August 3, 2004. The Charges read in pertinent part as follows:

Charges:

1) Your act(s) of dishonesty in that you falsely asserted that you sustained a disabling injury on June 22, 2004, at approximately 9:00 AM, while working at East Greenbush, NY, which allegedly prevented you from working your assigned position with the carrier. You further used the asserted injury as the pretext for pursuing a fraudulent injury claim with the Carrier. The aforementioned act is a violation of Amtrak's "Standards of Excellence" as stated in the section entitled Trust and Honesty . . . .

2) Your failure to immediately report the alleged injury sustained by you on June 22, 2004, at approximately 9:00 AM, while working at East Greenbush, NY, which was a violation of Amtrak's Standards of Excellence, as stated in the section entitled Safety, as well as the M/W Safety Rules . . . General Rule 4000 . . . .:

> Safety: ". . . immediately report to your supervisor all injuries and illness that occur . . . while you are performing your duties or on Amtrak property. . . ."
>
> General Rule 4000: "When you are injured, immediately: A. Report the injury to your immediate supervisor. B. Seek first-aid or medical attention if required.

Following the hearing, the Claimant was dismissed from service on August 9, 2004.

The record clearly indicates that, on June 22, 2004, the Claimant was holding an adjustable wrench on a nut that was being tightened by another employee with an impact gun. As he later reported in an injury report, the Claimant "felt a sharp pain in my lower back. [I] heard a pop and had to let go of wrench". His fellow employees at the scene were made aware of this and inquired if he required medical care. The Claimant declined medical treatment.

On June 23, 2004, allegedly on intensification of his pain and impaired movement, the Claimant advised his Supervisor, completed a injury report form, and sought treatment from his own physician. As a result, he did not report for work commencing June 23 and for an extended period thereafter.

Both the notice leading to the investigative hearing and the letter of dismissal included two separate charges: a) the Claimant's alleged "dishonesty" in his activity following June 22, and b) his failure to "immediately" report the injury. Each of these require separate review:

Failure to Make Immediate Report of Injury

There are, of course, numerous instances in the course of work performance where an incident occurs involving failure to work safely and/or an unanticipated physical act causing momentary pain or strain. In instances where there is no further effect on the employee, it is questionable whether an "injury" occurred, at least to the extent of requiring an injury report. The Organization contends that such is the situation which occurred on June 22 and that no "injury" was immediately reportable. When the Claimant later found himself in continuing pain, the Organization points out that the Claimant immediately advised his Supervisor and completed the appropriate report.

The Board finds, however, that this does not accurately reflect what happened. The record shows that the incident was serious enough to raise concern among the Claimant's fellow employees and that the Claimant had to modify his activity for the

remainder of the shift. The Board concludes, therefore, that the Claimant was in violation of Safety Rule 4000, although this was mitigated by his advising his Supervisor prior to reporting for duty the next day. However, the short delay in reporting the incident, in and of itself, would not be cause for dismissal from service.

The Charge of "Dishonesty"

The Board is limited to reviewing the precise offense of which the Claimant was charged, that is, dishonesty. The first sentence of this charge, quoted above, is somewhat unclear. The Board accepts it to mean that the Claimant "falsely asserted" that the incident of June 22 prevented him "from working your assigned position". The Claimant is also accused of "pursuing a fraudulent injury claim with the Carrier".

Lacking entirely is any charge of working in an unsafe manner (although this is mentioned in the Carrier's analysis of the event). There is also no contradiction to the Claimant's description of what occurred as he stated on the June 23 injury report. The issue is limited to the medical conclusion (by the Claimant's own physician) as contrasted with observations made of the Claimant's physical activity and ability.

In the June 23 injury report, the Claimant described his injury as follows:

> Pain in lower back, can't bend over or sit, walk for long periods of time.

The June 23, 2004 report of the Claimant's physician, a member of Hudson Valley Orthopaedic Associates, states in pertinent part as follows:

> According to the patient, he had pain shooting down his buttocks but most of the pain is localized in the left sacroiliac area. . .
> His neck has a full range of motion although when he flexes forward, he complains of some pain in his lower back. . .
> He walks with an essentially normal gait. . . . He has no motor deficits in his lower extremities. . . . He has paravertebral spasm and tenderness in his low back. . . .
> We are requesting authorization for an MRI of his LS spine.

With these findings, the physician classified the Claimant's "disability status" as "Totally disabled" (to be discussed further, below). The report predicted continuance of "totally disabled" until "7/15/04??", with return to full duty on August 1.

A further report from the same physician on July 16 continued the "totally disabled" classification, with a predicted date of return to work on September 15. The findings included the following:

> He is still having significant pain in his back, in the right sacroiliac area in particular. He has some pain down into his right leg. . . .
>
> The [requested] MRI [was undertaken and] suggested disk herniations without significant mass effect. . . .
>
> He is doing only fairly well in PT [physical therapy] and really not gaining much progress.

To a non-medically-trained person, these findings suggest the presence of some injury results, together with continued pain as well and some (but not major) impairment in certain body positions

when held for extended periods. In the literal sense of the phrase, the Claimant was not "totally disabled". The Carrier, in fact, did not believe this to be true in that the Claimant was offered the voluntary opportunity to return to duty in some sedentary capacity other than his regularly assigned position. (The Claimant declined this offer.)

The Board notes that, as to fitness classification, the physician is directed to check one of four boxes as to "disability status". The first is "Totally disabled - defined by NYS Worker's Compensation as unable to perform any work". The other three are various degrees of "Partially disabled". The Board, of course, has no means to determine why the physician chose the "Totally disabled" category. Clearly, however, it is recognized as a medical determination in relation to the work involved (in this instance, employment with the Carrier). One aspect, however, is certain: **It was not the Claimant who made the determination.** His degree of impairment is found in his injury report statement, in his responses to the physician, and the specific medical analysis as quoted above.

Upon receipt of the initial "totally disabled" report from the physician, the Carrier determined to place the Claimant under surveillance by a professional service. The Claimant was observed for portions of eight days between June 24 and July 8 and for four days between July 10 and July 15. These observations were made as the Claimant was driving his personal vehicle, performing various errands, repairing a car door lock and, most extensively, being

present at a pizza restaurant where the Claimant had been under a construction contract for restoration of the building.

The resulting video tapes were shown at the investigative hearing and included as evidence therein. With consent of the other two members of the Board, the Neutral Member reviewed these tapes concurrently with studying the hearing transcript and the surveillance written reports.

The Carrier accuses the Claimant of "dishonesty", apparently based on the range of his activities at a time he was supposedly "totally disabled". Specifically, the Carrier states the Claimant "is guilty of dishonesty when he falsely asserted a debilitating injury, which was inconsistent with his physical activities".

The Board finds little or no support for the Carrier's accusation of "dishonesty", for the following reasons:

1. There is no convincing demonstration that the Claimant simply continued his construction work at the restaurant after the June 22 incident. Best evidence of this is the introductory testimony by the surveillance expert, as follows:

> SURVEILLANCE EXPERT: We were informed that [the Claimant] had a side business, a contractor's business. We were conducting surveillance to see if he was active in that business.
>
> Q . . . Is it indicated in your report that [the Claimant] was actually doing work during your surveillance?
>
> A (by surveillance expert) Actually doing physical work?
>
> Q Well, no. I mean, work of the nature. He was overseeing his business.
>
> A He was overseeing his business.

Q Is that your interpretation of what occurred?

A That's my interpretation of what occurred.

This appears to conform with the Claimant's testimony that, immediately after June 22, he informed the restaurant owner that he could not continue his construction work and would get someone else to take over. The video tapes, as confirmed in the testimony, above, show that the Claimant continued to be present to "oversee" the physical work of others.

2. The video tapes clearly show the activity of an individual who is not "totally disabled" (if the phrase is taken literally). On the other hand, the Claimant's movements -- including some brief lifting, driving his personal vehicle, momentarily demonstrating a construction task at the restaurant work site -- are not incompatible with the Claimant's account of his condition to his physician, as quoted above.

3. Although such was not explained to the Board, it is apparently agreed that the Claimant was not obligated to accept a sedentary assignment of work. There was no indication that the refusal was because he felt himself unable to do the work; rather, he apparently simply elected to decline.

4. It is a matter of law whether or not the Claimant's condition warranted receipt of compensation benefits or whether or not the physician's finding of "total disability" could be challenged by contrary medical judgment. In any event, such classification by the physician cannot be charged against the Claimant as an act of "dishonesty".

Discussion

The record shows no support for the charge of "dishonesty". The Claimant's injury report was not challenged as to accuracy. He made no claim to his physician of inability to move about and function within his capacity for pain. The physician prescribed no specific limitations as to his activity (while at the same time finding him unable to "work").

It is possible, as argued by the Organization, that the Claimant may have believed any pain resulting from the June 22 incident was only momentary and thus not an "injury"; when this proved not to be the case, the injury was promptly reported. As stated above, however, this judgment was not for the Claimant to make. He violated the rule requiring "immediate" reporting of an accident. For this, corrective discipline is warranted, but termination of employment is an overly severe penalty.

As a result, the Board finds the Carrier's action in dismissing the Claimant from service was disproportionate and unduly harsh. The Award will direct that the Claimant be restored to duty with seniority unimpaired. The Award does not include back or retroactive benefits on two bases: first, the Board is unaware when or if the Claimant has been found physically fit for duty; second, even if physically fit, the remaining period shall serve as a disciplinary suspension in reference to violation of General Rule 400.

PLB NO. 4979
AWD NO. 67

AWARD

Claim sustained to the extent provided in the Findings. The Carrier is directed to make this Award effective within 30 days of the date of this Award.

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

B. A. WINTER, Employee Member

ROCHELLE MIELE, Carrier Member

NEW YORK, NY

DATED: 1/27/05