

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES	)	
	)	Case No. 32
and	)	
	)	Award No. 32
UNION PACIFIC RAILROAD COMPANY	)	
	)	

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: May 1, 2009

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The dismissal of Welder Robert A. Powers for violation of GCOR Rules 1.6 in connection with failure to stay within his medical restrictions between May 15, 2008 and May 18, 2008 is based on unproven charges, unjust, unwarranted and in violation of the Agreement (Carrier's File 1510929).
2. As a consequence of Part 1 above, we request that Mr. Powers be reinstated to the service of the Carrier on his former position with seniority and all other rights restored unimpaired, compensated for all wage and benefit loss suffered by him since his removal from service and that the alleged charge(s) be expunged from his personal record."

FINDINGS:

Public Law Board No. 7258 upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

On July 24, 2008 Claimant was instructed to report for formal investigation on July 31, 2008 concerning an allegation that on May 15, 2008 and continuing through May 18, 2008, Claimant failed to stay within his medical restrictions thereby violating GCOR Rule 1.6. The hearing was convened and after receiving testimony, that hearing was recessed and scheduled to reconvene on August 13, 2008 in order to allow the Organization time to prepare a defense to the specific Rule violation, GCOR 1.6, Part 4, that Claimant was charged with. On August 13, 2008 the investigation was reconvened and held to its conclusion. By letter dated September 3, 2008 Claimant was notified that a substantial degree of evidence was presented to warrant sustaining

the charges and as a result Claimant was assessed a Level 5 discipline and dismissed from service.

Claimant's dismissal was appealed on October 22, 2008 and denied by Carrier on December 16, 2008. The denial was appealed on January 28, 2009 and denied on March 19, 2009. The claim was discussed in conference on April 6, 2009 without reaching resolution of the dispute.

Claimant has a seniority date of December 9, 1996 and testified that throughout his tenure with the Carrier he has held a variety of job classifications including welder, truck driver, foreman and assistant foreman. It is undisputed that Claimant sustained an injury to his left thumb and wrist in May, 2007. Claimant was able to continue working as a truck driver with medical restrictions on a Section Gang from May 21, 2007 through October 2007. In October, 2007 Claimant was recalled to System Gang 9221 as a welder. Claimant testified that the recall was a forced recall that he had to accept to protect his seniority. Once recalled to the System Gang, a determination was made that Claimant's medical restrictions could not be accommodated and he was placed on medical leave of absence from October 4, 2007 through January 18, 2008. The record reveals that Claimant continued to receive medical treatment and medical reports were furnished to the Carrier until at least July, 2008.

The Manager of Track Projects (hereinafter "MTP") testified that he had a telephone conversation with Claimant on May 29, 2008. Claimant remembered the phone call as occurring on May 30, but in any event there was a general discussion and it was in regard to putting the Claimant back to work. The MTP instructed Claimant to get in touch with someone from the health insurance claims department in that regard. Claimant explained that by this time had retained an attorney to represent him in an ongoing matter concerning his injury, and testified that the attorney had instructed him not to talk to Company Officials. Claimant testified that his attorney did contact the individual that he had been instructed to contact and that that individual told the lawyer that there was no way to get Claimant back to work, that it was up to System Gang 9221 management and that they were holding fast saying they would not let Claimant return to work with his then present restrictions.

The record evidence shows that on July 21, 2008 over the signature of General Superintendent William P. Meriwether, Claimant was conditionally cleared to return to work with the only restriction being that Claimant wear a thumb brace as needed, and that Claimant should make arrangements to meet with his manager for a return to work conference. Claimant testified that he tried to contact his manager three times over two days and left two messages on the manager's answering machine. Three days after the letter instructing Claimant to return to work, the Notice of Investigation into the instant matter was mailed to Claimant.

The MTP testified that he became aware of a video on July 15 that indicated that possibly Claimant was not staying within his medical restrictions. The MTP testified that he viewed the tape on July 17, 2008 and reviewed the tape with the Director of Track Maintenance and that together they came to the conclusion that Claimant was being dishonest with Carrier about

staying within his medical restrictions.

The video that the Manager and Director based their opinion on was reviewed at hearing and revealed the following activities that management felt constituted Claimant engaged in activity not within his medical restrictions:

On May 15, 2008 at 1:45 pm, Claimant was filmed wrapping a dry line onto a spool held in his left hand for 27 repetitions over a twenty second period of time. The MTP testified that in his opinion, that activity constituted repetitive motion outside Claimant's medical restrictions, but added that he had not consulted with Claimant's physician to verify that the activity was not within the restrictions.

On May 15, 2008 at 1:53 pm, Claimant used both hands to assist his wife unload what appears to be 8' x 6" x 6" timber from the back of a pick up truck. It was noted that Claimant was wearing a brace on his left wrist. The MTP testified he was unsure of the weight of the timber and could only speculate that if the timber weighed more than one hundred pounds, then Claimant's action would exceed his 50-pound lifting restriction. The MTP further stated that he could not confirm that Claimant was outside his lifting restriction because he had no idea what the timber weighed.

On May 15, Claimant was further observed and taped at 2:25 pm shoveling, at 2:45 pm pushing what appears to be an empty wheel borrow, at 2:45 pm walking a 6" x 6" timber to a nearly vertical position and then walking the upright end around, at 4:04 pm hammering momentarily with his right hand, at 4:16 pm lifting a single deck plank and at 4:39 operating a hand drill with his right hand while wearing a brace on his left hand.

On the following day, May 16, 2008, Claimant was observed and filmed at 1:17 pm using both hands to guide a vibrating compactor; at 1:20 pm shoveling and again guiding the compactor with both hands, and at 1:25 pm pounding for less than thirty seconds with a sledge hammer. Claimant apparently then left his backyard landscaping project and drove his truck, pulling a cargo trailer behind, to the fairgrounds to set up for a gun show. At 2:45 pm Claimant was observed loading boxes, the weights of which were never determined, onto a dolly; at 2:49 pm he unloaded what appears from the film to be an aluminum ramp from the cargo trailer; and, at 2:53 pm Claimant was observed pumping a pallet jack five or six times. Claimant was further observed at 3:06 pm lifting a box that the MTP testified appeared to weigh more than a box of feathers; at 3:08 pm pulling the loaded pallet jack into a building with his right hand; at 3:22 pm Claimant slid a box off of the end of the trailer and onto the dolly cart; at 3:25 pm again pumping the pallet jack up five or six times; at 3:38 pm lifting the front end of the pallet jack up slightly to get it onto the ramp; at 3:39 pm pumping the pallet jack again; at 3:45 moving the loaded pallet jack off of the trailer; at 3:48 pm pulling the loaded pallet jack into the building with his right arm. Claimant was observed unloading boxes from the back of his pick up truck onto the dolly cart at 3:48 pm. It was later determined that the heaviest of these "ammo boxes" weighed 49.4 pounds. At 4:40 pm Claimant was observed loading more boxes onto the dolly.

On May 18, 2008 Claimant apparently spent a portion of his day back at the fairgrounds re-loading his gun show materials for transport back home. At 5:02 pm he was observed again unloading the aluminum ramp from the back of the cargo trailer and at 5:09 pm sweeping the back of the trailer with a kitchen broom. Between 5:10 pm and 5:25 pm Claimant, with the assistance of another, was observed loading his material into the back of the trailer by pulling the loaded pallet jack with his right arm up the ramp and into the trailer. The MTP testified that loading the trailer in this manner was not an issue as Claimant was at all times using his right arm to pull the pallet jack and that as he was using his right arm, this was not an act of dishonesty. At 5:30 pm Claimant was observed loading the ramp back onto the trailer and carrying a sign with his right arm. Claimant was observed at 5:31 pm loading a large box with assistance from another and at 5:35 lifting a box. The MTP testified that none of the boxes Claimant was observed handling were ever weighed.

The Organization strongly contends that the Carrier failed to prove by substantial evidence that Claimant failed to stay within his medical restrictions or was in any way dishonest between May 15 and May 18, 2008 or, for that matter, any time subsequent to the time that Carrier determined that it could not accommodate Claimant's physical restrictions.

The Organization further complains that Carrier failed to hold a timely hearing as specified in the Contract in that Claimant was charged with a Rule violation that occurred May 15 through 18 and Claimant was not formally charged until July 24 and a formal investigation not convened until July 31, well beyond the thirty-day limitation from time of occurrence specified in the Contract. Moreover, the Organization maintains that the conduct of the hearing officer clearly shows that he was not intent on conducting a fair and impartial hearing, but was rather trying to steer the investigation toward his own predetermined conclusion of Claimant's guilt.

Turning to the merits of the dispute, the Organization argues that the record evidence fails to establish any dishonesty on Claimant's part with regard to his medical restrictions and contains no evidence that Claimant did not stay within his medical restrictions. Thus, the Organization asserts that the Carrier has failed to carry its burden to prove that the Level 5 dismissal was supported by probative evidence and therefore insists that the instant claim must be sustained in full.

The Carrier maintains that the three areas of concern are procedure, guilt or innocence and assessment of discipline and argues that in this matter Claimant was afforded all of the due process outlined in the Collective Bargaining Agreement, that the transcript of record contains substantial, credible evidence to support the finding of guilt of the charges preferred and that the measure of discipline assessed was neither arbitrary, capricious nor an abuse of managerial discretion.

The Carrier asserts that the evidence produced at the investigation is overwhelming and shows the Claimant, who was medically restricted to no repetitive wrist motion and no lifting over fifty pounds, performing activities that were clearly outside of his medical restrictions.

Thus, the Carrier avers, substantial evidence was produced demonstrating that Claimant did violate the rule with which he was charged. On that basis, the Carrier argues, it cannot be said that Claimant's discipline was in any way arbitrary or capricious, but was in accordance with Carrier's UPGRADE policy that has been upheld as reasonable by numerous Boards.

Moreover, with regard to the Organization's claim that the contractual time limit was violated in this matter, the Carrier contends that the record shows that the Carrier Officer with authority to initiate disciplinary proceedings did not have knowledge of the reported rule infraction until July 17, 2008 and initiated disciplinary proceedings (Notice of Investigation) within seven (7) days thereafter, well within the time prescribed in Rule 48 of the Agreement and that thus, the Organization's argument has no merit.

Finally, the Carrier points out that dishonesty is a very serious matter which cannot be condoned and that under the present circumstances, Claimant's discipline for breach of the rule was neither arbitrary, capricious nor an abuse of Carrier's discretion and should not be disturbed.

After reviewing the surveillance tape covering activities performed by Claimant during the period of May 15 through and including May 18, 2008 repeatedly while simultaneously reading the transcript of the investigation in connection with the activities being performed by Claimant, we come to the conclusion that Carrier has failed to prove by substantial evidence that Claimant was in violation of GCOR Rule 1.6, Part 4 - dishonest, by working outside his then current medical restrictions.

The first incident that Carrier finds fault with is Claimant wrapping a string onto a spool held with his left hand for a total of 27 repetitions during a twenty-second time period. We do not find this to be repetitive motion as intended by Claimant's work restrictions.

Next, Claimant was observed helping his wife unload landscaping timbers from the back of his pick up truck. The MTP took umbrage with this activity and determined that Claimant was working outside his restrictions. However, the MTP could only speculate that Claimant was outside his restriction because he testified that he had no idea what the timber weighed and only if it weighed more than 100 pounds would Claimant violate his lifting restriction. There must be more than speculation to provide substantial evidence upon which to dismiss the Claimant.

Moreover, although Claimant was surreptitiously observed hammering and drilling with his right hand, there was no proof that those activities were not within his restrictions. Likewise, Claimant was observed pushing an empty wheel barrow, shoveling, swinging a sledge and guiding a vibrating compactor for a matter of a minute or two or even seconds on each occasion, but Carrier failed to show how that activity constitutes working outside of his medical restrictions. While the Carrier's witness surmised that the activities listed above violated Claimant's repetitive motion restriction, we find it absurd to consider activity lasting less than a minute to fall into the category of repetitive motion as intended by Claimant's physician. While Carrier may disagree with that conclusion, it failed to consult with Claimant's physician to prove that those activities were in violation of the restrictions as intended. The burden here was on the

Carrier to prove Claimant's activities violated his work restrictions, a burden it failed to meet.

We next consider the activities Claimant engaged in with setting up for a gun show. This activity consisted of loading cardboard boxes, boxes that the witness could only conclude "weighed more than a box of feathers," onto a dolly, pumping a pallet jack a half-a-dozen times during each occurrence, sweeping the back of the trailer, and pulling a pallet jack with his right arm.

First, in regard to pulling the pallet jack or dolly with his right arm, the Carrier witness, who was also the charging officer, testified that those activities were not at issue and that pulling and pushing with Claimant's right arm did not constitute dishonesty on Claimant's part. Further, with regard to Claimant loading cardboard boxes, the charging officer testified that the Carrier didn't weigh any of the boxes in question and thus, could not substantiate that the activity was outside Claimant's restrictions. Moreover, concerning loading of ammunition boxes, the Carrier's contract investigator testified that he bought and subsequently weighed the Claimant's heaviest ammunition box and found it to weigh 49.4 pounds, less than Claimant's lifting restriction. Thus, Carrier has failed to prove with probative evidence that Claimant exceeded his medical limitations during the gun show.

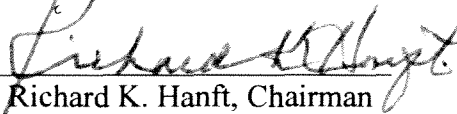
While we cannot agree that Carrier violated the time restrictions contained in Rule 48 because there was no evidence that the Carrier had knowledge of the occurrence to be investigated prior to July 15, 2008 when, the MTP testified, he became aware of the surveillance tape, we do find and hold that the Carrier failed to carry its burden to prove by substantial evidence that Claimant violated the Rule with which he was charged.

AWARD

Claim sustained.

ORDER

The Board, having determined that an award favorable to the Claimant be made, hereby orders the Carrier to make the Award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.


Richard K. Hanft, Chairman

I dissent

D. A. Ring
Carrier Member


T. W. Kreke
Employee Member 8-25-09

Dated at Chicago, Illinois, July 8, 2009

8/25/2009