

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 7

Case No. 7

Carrier File No. BMWE-D-118

STATEMENT OF CLAIM

Appeal of discipline of 90-day disciplinary suspension assessed to Assistant Track Foreman Joseph Murphy.

F I N D I N G S

On April 20, 1989 the Claimant suffered an on-duty injury to his knee, rendering him temporarily unable to work. Thereafter, the following sequence of events occurred:

June 8 -- Claimant voluntarily discontinued physical therapy which had been prescribed for him.

June 28 -- Claimant advised he was unable to come to the Carrier office to pick up a check. Nevertheless, he was observed by a Carrier representative in the driver's seat of his car, while a friend picked up the check.

June 30, July 6 and 12 -- Following Carrier's request for an investigation, Claimant was observed performing various physical activity -- riding a bike, carrying groceries, lifting and disassembling a lawn mower, etc.

July 20 -- A medical report from the Claimant's personal physician was received. This stated:

Diagnosis, severe contusion and ecchymoses and hematoma of right quads with partial tear.

Mr. Murphy making good progress but continues with pain, limitation and weakness of his leg.

Has continued limping.

Feels he cannot perform exertional activities that are required at work.

He is taking heat and using Vicodan and Nalfon.

Uses crutches intermittently.

Physical therapy has been discontinued.

Remains disabled. Return in two weeks for evaluation of return to work.

July 26 -- Carrier received reports of the investigators' observations.

August 10 -- Claimant returned to work.

August 24 -- Notice sent to Claimant concerning an investigative hearing under the following charge:

Alleged violation of Rule F-3 of the National Railroad Passenger Corporation Rules of Conduct

which reads in part "Conduct involving dishonesty is prohibited" in that after sustaining an injury to your right knee while on duty for Amtrak on April 20, 1989 at Uphams Corner Station, you failed to return to work until August 10, 1989 despite stopping your physical rehabilitation on June 8, 1989 and despite being observed on June 30, July 6, and July 12, 1989 by an agent of the corporation performing activities involving your right knee without apparent restriction.

Following the hearing, the Claimant was dismissed from service. This penalty was reduced during the claim handling procedure to a 90-day disciplinary suspension.

As a procedural matter, the Organization argues that the investigation notice was untimely under Rule K and that the claim must be sustained on this basis. The Organization contends that the Carrier had "actual knowledge" of the Claimant's alleged offense more than 30 days prior to August 24. The Organization notes in particular the investigators' observations on June 30 and July 6 and 11. Rule K reads in pertinent part as follows:

2. An employe and his representative shall be given written notice in advance of the investigation, such notice to set forth the specific charge or charges against him. No charge shall be made that involves any offense of which the Company has had actual knowledge thirty (30) calendar days or more. . . .

The Carrier defends its position by pointing out that the investigators' report was not received until July 26,

at which time the notice was sent for a hearing within 30 days.

The Board finds that the hearing notice was timely. Although the Carrier may have had some indication at an earlier date of the Claimant's alleged malingering, it is reasonable that the Carrier awaited the investigatory report prior to determining that a charge was warranted. This became the "actual knowledge".

As to the merits of the matter, the Board finds that the record shows insufficient evidence or proof that the Claimant did, in fact, deliberately delay his return to work. His allegation that he could not himself pick up a check on June 28 clearly warranted suspicion, and the Claimant's termination of therapy appears to be poor judgment on his part. These considerations, however, do not prove that the Claimant was still not incapacitated. As to the three separate observations of the Claimant undertaking various activities, these were not shown to be medically incompatible with the status of his previously injured knee. Some credence must also be given to the physician's note of July 20.

For whatever reason, the Carrier waited two weeks beyond the Claimant's return to duty before charging him. What was missing was any medical substantiation of the Carrier's contention of malingering. Something of this nature would have

been appropriate to counter the physician's July 20 report. It is noted that the Claimant did report for work a little more than two weeks after this evaluation. The physician provided a further statement, dated September 18, 1989, in which he stated that the Claimant had been prescribed "walking and bicycling as therapy"

The 90-day suspension must therefore be rescinded and the Claimant made whole for lost straight-time wages for the period of suspension which he served.

A W A R D

Claim sustained. The Carrier is directed to put this Award into effect within thirty (30) days of the date of this Award.



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



B. A. WINTER, Employee Member



P. A. ENGLE, Carrier Member

NEW YORK, NY

DATED: *May 16, 1991*