

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5905

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

)
) Case No. 40
)
) Award No. 34
)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
J. F. Ingham, Carrier Member

Hearing Date: June 5, 2008

STATEMENT OF CLAIM:

1. The dismissal assessed Track Foreman D. S. Hopper for allegedly making false statements and/or misrepresenting himself to Integrated Disability Manager Joyce McNash on July 17, 2007 and Dr. Dewry at the U.S. Steel Dispensary on July 26, 2007 was without just and sufficient cause and based on an unproven charge.
2. As a consequence of the violation referred to in Part (1) above, Track Foreman D. S. Hopper shall now be reinstated to service, compensated for all wage loss suffered and this matter shall be removed from his personal record.

FINDINGS:

Public Law Board No. 5905, upon the whole record and all 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 August 6, 2007, Carrier directed Claimant to report for an investigation on August 15, 2007, concerning his alleged violation of Maintenance of Way Rules 0.7, 1.5, 1.15 and 1.27, in connection with his alleged misrepresentations and false statements on July 17, 2007, and July 26, 2007. The hearing was held as scheduled. On August 23, 2007, Claimant was notified that he had been found guilty of the charge and dismissed from service.

The record reveals that during the relevant time period, Claimant was on medical restrictions precluding lifting, pushing, pulling, carrying more than 15 pounds (later reduced to 10 pounds), bending, twisting, kneeling and squatting. On July 17, 2007, Claimant was contacted by the Integrated Disability Manager. He represented to the Manager that he was not

doing much walking because his foot would get tight and he would get a burning pain. He reported that he was not doing any lifting and that he was still having trouble with his right leg. He further reported that he had not pushed himself to test his limitations. The Medical Director testified that she performed a return to work examination on Claimant on July 26, 2007, and Claimant reported that he was walking further but still having pain in his right leg.

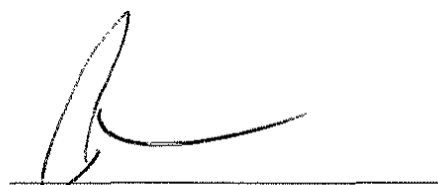
Surveillance video of Claimant recorded June 14 and 15 and July 4, 2007, was introduced. The video showed Claimant frequently walking and standing for lengthy periods of time; frequently entering his jeep, which did not have steps or running boards, by lifting his right leg above the doorsill and pulling himself up with his left arm; lifting up the jeep's hood and performing repairs that required him to twist and bend; pulling into a gas station and pushing the jeep forward a few inches to reach the gas pump; and participating in a 4th of July parade in the jeep, performing tricks with the jeep and other jeeps during which he was twisting and bending, and twisting to get and throw candy from the jeep to the crowd. The evidence clearly established that Claimant misrepresented his condition to the Integrated Disability Manager and to the Medical Director. Carrier proved the charge by substantial evidence.

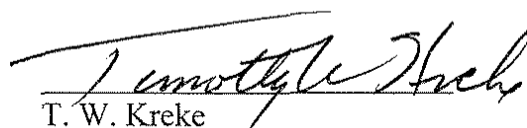
The Organization urges that the penalty of dismissal was excessive and that Carrier should have assessed demerits against Claimant rather than dismiss him. We do not agree. Such blatant dishonesty as Carrier proved breaks the bond of trust between employee and employer. The Agreement does not require Carrier to keep such an individual in its employ. The penalty of dismissal was not arbitrary, capricious or excessive.

AWARD

Claim denied.



Martin H. Malin, Chairman

J.F. Ingham
Carrier Member

T. W. Kreke
Employee Member

Dated at Chicago, Illinois, September 27, 2008.

Sept 27, 2008