

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5905

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

**GARY RAILWAY COMPANY (formerly
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY)**

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

)
) Case No. 41
)
) Award No. 35

Hearing Date: June 11, 2009

STATEMENT OF CLAIM:

1. The dismissal of Daniel O'Meara for violation of Rules 0.7, 1.5, 1.15 and 1.27 in connection with making false statements and/or misrepresenting himself to Integrated Disability Manager Joyce McNash on April 22, 2008 and May 7, 2008 and Dr. S. Epner of Medworks on May 9, 2008 regarding his work status and ability is unjust and unwarranted and in violation of the Agreement (Carrier's File UM-11-08).
2. As a consequence of the violation of Part (1) above, Mr. O'Meara shall be entitled to the remedy provided for in Rule 57(c) of the Agreement.

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 May 19, 2008, Carrier directed Claimant to report for an investigation on May 28, 2008, 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 April 28 and May 7, 2008 to Integrated Disability Manager Joyce McNash and on May 9, 2008 to Dr. S. Epner. The hearing was held as scheduled. On June 5, 2008, 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 restricted duty due to an on-duty injury to his foot. On April 28, 2008, Carrier's Integrated Disability Manager spoke with Claimant about the status of his injury. Claimant related that walking remained

spoke with Claimant about the status of his injury. Claimant related that walking remained painful, that he had particular difficulty and pain walking on uneven surfaces and that he could not be on his feet for more than an hour at a time. In a follow-up conversation with the Integrated Disability Manager on May 7, 2008, Claimant stated that walking remained painful and that he could not walk or stand for very long. In both conversations, Claimant rejected the Manager's suggestions that he try doing some small welding jobs or work as a watchman.

On May 9, 2008, the Medical Director of MedWorks examined Claimant. At that time, Claimant reported that he could walk only 300 feet at a time, that he experienced a terrible burning sensation in his foot when walking on uneven surfaces, that he had pain when squatting and found it difficult to walk up an incline, could not climb a ladder and that he could not carry more than 30 pounds.

Surveillance video of Claimant recorded April 5, 6, 12, 13, 19, 20 27 and 29, and May 10, 2008, was introduced. The parties disagree over whether the video establishes that Claimant misrepresented his physical condition on April 28, May 7 and May 9, or whether the video corroborates Claimant's representations.

The Board has viewed the many hours of surveillance video carefully. We find that in much of the video, Claimant is seen walking relatively effortlessly, including walking and carrying various items up and down inclines. Particularly telling is video from April 20. Claimant appears to have spent the entire day working in his yard. He walks effortlessly on uneven surfaces and up inclines. He carries items effortlessly up a ladder. He squats for several minutes while working around a tree. Although he is limping when he gets up, he continues working, and climbs a step ladder with no hesitation or apparent discomfort. He later carries two large jugs of what appears to be water up the stairs from his garage into his house, again without hesitation or apparent discomfort. He returns and carries a third such jug into the house. Later he is seen on his hands and knees and then stretched out on the floor apparently fixing something, then gets up and continues working. He is seen bending frequently.

Video shot on April 27 shows Claimant walking effortlessly throughout the morning around his garage and driveway, at time carrying various items. He squats by his car, apparently putting air in a tire, again without hesitation or sign of discomfort. On May 10, Claimant again is seen walking effortlessly, carrying different items. At one point, he climbs onto the bed of his pickup truck, is seen bending several times while on the truck and steps down, all without hesitation or sign of discomfort.




It is true, as the Organization argues, that at various times in the videos, Claimant can be seen limping. Generally, this occurs in the afternoon, after Claimant has been active for several hours. However, that Claimant was limping at times does not negate that he can be seen performing many activities that he represented to the Integrated Disability Manager and Medical Director that he could not do or could not do without pain. As the Integrated Disability Manager testified in response to Claimant's questioning:

Whether you limp here or there really isn't relevant with regard to what you are talking about. You know you might have limped here or there but you were still able to do things you told me you couldn't do.

We conclude that Carrier proved the charges by substantial evidence. 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 9/8/09
T. W. Kreke
Employee Member 9-8-09

Dated at Chicago, Illinois, August 31, 2009.