File: NEC-BMWE-SD-1419D

Special Board of Adjustment No. 987

Parties to Dispute

Brotherhood of Maintenance of Way Employees	)	Case No. 1
vs	)	Award No. 1
National Railway Passenger Corporation	)	

STATEMENT OF CLAIM

1. The discipline of dismissal assessed Claimant Mark A. Acevedo was excessive, without just and sufficient cause, and based upon unproven charges, and that the Claimant was denied proper notice and a fair and impartial hearing;

2. Claimant Acevedo's record be expunged of the charges and that Claimant be reinstated into Carrier's service and be compensated for all lost wages.

FINDINGS

On July 9, 1985 the Claimant sustained an injury to his back and rib cage while on duty. He did so while lifting a bag of sand with a fellow employee. According to the record the Claimant slipped and suffered lumbosacral sprain. Shortly after the accident the Claimant was taken to the emergency room of the Yale-New Haven Hospital where he was examined and given prescriptions for Valium and Motrin. On July 30, 1985 the Carrier wrote the following to the Claimant under signature of the Assistant Division Engineer-Structures:

> "...On Tuesday, July 9, 1985 you sustained a company injury to your upper back areas and rib cage with an estimated lost time of three days.
>
> As you have not returned to work to date, kindly submit medical documentation of your present condition. Also include the anticipated length of your absence with an expected date of return to work."

This letter to the Claimant was sent by certified mail. Absent an answer from the Claimant the Carrier sent a second certified letter to the Claimant on August 9, 1985 wherein the Claimant was informed that since:

> "...the office (of the Assistant Division Engineer-Structures) has received no information from you regarding your continued absence, consider this (letter) a formal notice for you to respond by Tuesday, August 20, 1985 or further disciplinary action will follow.

On October 9, 1985 the Carrier followed the August 9, 1985 correspondence with the notice to the Claimant that he was to attend an investigation on October 16, 1985 for alleged violation of General Rules of Conduct I, P and K. After a number of postponements the investigation was held on December 30, 1985 after which the Claimant was informed that he had been found guilty as charged and he was dismissed from service.

The Rules at bar are the following which are herein quoted in pertinent part:

> Rule I
>
> Employees will not be retained in the service who are... dishonest...
>
> Rule P
>
> Employees will not be permitted to engage in outside activity which affects their availability for duty or efficiency on duty...
>
> Rule K
>
> Employees must...comply with instruction from their supervisor.

The Claimant was specifically charged with being observed on various dates in September of 1985 performing tasks and engaging in athletic activities which were inconsistent with those which could be performed by an individual with the medical condition which the Claimant alleged he had which did not permit him to cover his assignment. The Claimant was also accused of not complying with written instructions when he did not answer the correspondence, cited above, which was sent to him

on the dates of July 30th and August 9th, 1985.

After his injury on July 9, 1985 the Claimant was out of service and receiving railroad unemployment benefits until his return to work on October 14,1985. Since the Claimant was contacted on two occasionsby the Carrier, in July and August of 1985, in order to ascertain his condition, and absent any response from the Claimant, the Carrier hired two different investigative services to do checks on the Claimant's condition. The investigators working for these services obtained evidence on three different dates in September of 1985 by means of both moving and still films which showed the Claimant engaged in various kinds of physical activities which included playing golf and using a chain saw. After the Claimant received the October 9, 1985 notice he returned to work on October 14, 1985. At the investigation the Claimant testified that he felt "...110%" by this latter date.

A review of the evidence before the Board shows that the Claimant was engaging in what can reasonably be called vigorous exercise as early as September 12, 1985 and that such had been ascertained by the Carrier by means of private investigators which it had hired. Additional examples of what the Board reasonably considers to be vigorous physical activity on the part of the Claimant, which included playing golf and using a chain saw, were also documented by the Carrier by means of investigators on September 20, 1985 and September 28, 1985.

There is some apparent inconsistent evidence in the record respect to whether the Claimant could or could not have returned to work prior to October 14, 1985 which was the date on which the Claimant claims he felt "...110%" physically. The record suggests the reasonable conclusion that the Claimant may indeed have been physicallyready to return to work earlier than this date and such is supported by a memo to the Carrier dated August 12, 1986 by Stanley Roth MD wherein such conclusion has medical support. Dr. Roth concludes that if the Claimant could have played golf he

could have covered his assignment. On the other hand, it is also true that his attending physician did not release the Claimant to return to work until October 14, 1985. A close study of the record shows, however, that it is far from clear if this physician knew the extent of the Claimant's physical activity as early as September 12, 1985. There is no evidence of record to permit the conclusion that he did. The inconsistent medical evidence of record is, therefore, more apparent than real.

In its handling of the case on property the Carrier effectively claims that the Claimant was a malingerer and that he could have returned to his assignment much sooner than he did. Such conclusion is not unreasonable in view of the factual evidence of record relative to the type of physical activity the Claimant was engaged in well over a month before he actually returned to work, in view of one medical opinion, in view of the Claimant's obvious lack of cooperation with the Carrier when it was attempting to solicit information about his condition, and in view of the fact that his physician'sconclusion were obviously based on what information he obtained from the Claimant. The Claimant's physician certainly did not know, as noted above, until after the fact, that the Claimant was engaging in such strenuous activity as the physical evidence of record suggests. It is unclear from the record if his physician ever knew the true extent of his activities as they were documented by the films of record.

The record supports the conclusion that the Claimant was in violation of Carrier's Rules when he did not provide information about his physical condition as requested by the Carrier. He simply refused instructions. By not providing the requested information the Claimant was also in violation of Carrier's Rules by not being honest about his condition during the time-frame in question. On merits the claim cannot be sustained.

The final issue to be resolved by the Board is whether the discipline assessed by the Carrier was reasonable and just. The

Claimant's past record is part of the total record before the Board. It shows that the Claimant had been assessed discipline on six (6) different occasions from 1980 through 1985. These violations included sleeping while on duty, unauthorized absences and responsibili for the disappearance of Carrier equipment. Numerous arbitral Awards in the railroad industry have concluded that a Claimant's past histor can be used to determine the proper quantum of discipline (Second Division 5790,6632; Third Division 21043, 23508 inter alia). In view of the total record before it, and in view of the Claimant's past disciplinary record this Board is not warranted in disturbing the Carrier's determination in this matter.

AWARD

Claim denied.

Edward L. Suntrup, Neutral Member

C. E. Woodcock III, Carrier Member

J. J. Davison, Employee Member

Date: 11/3/89