

Hockenberry #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

This grievance arbitration case concerns the April 23, 1998 termination of the Employee from his employment with Employer because of dishonesty (Co. Ex. 8). Specifically, the Employee was alleged to have misrepresented his medical condition in order to obtain the Employer benefits, a violation of the Posted Rules of Conduct Number 32.

The Employee worked for the Employer as a Line Maintenance Mechanic in City 1, State 1. In October 1991, the Employee suffered an on-the-job injury to his back. He underwent two surgeries in connection with this injury. The Employee is covered by the Side Letter dated October 12, 1992 ("Side Letter"), an amendment to the parties' collective bargaining agreement which provides for continuity of benefits for previously recorded' occupational injuries.

In early March 1998 and as part of his regular work, the Employee removed a wheel assembly, weighing approximately 100 pounds, from a aircraft. On March 25, 1998, the Employee indicated to his foreman that he would not work due to a reoccurrence of his back injury. Person 1, the Employee's doctor, examined him on March 26, 1998. The doctor completed the Employer's Medical Report (or the "01-2 Form") which indicated that the Employee: suffered from "laminectomy/recurrent sciatica/nerve pain"; was prescribed "steroids/medications"; and was unable to work until April 6, 1998 (Co. E. 2). Person 1 declined to allow the Employee to return to work in limited duty status, despite the existence of limited duty work in the Employee's department and the notice printed on the Medical Report that limited duty work is

available in most cases (Co. Ex. 2). The reverse side of the 01-2 Form offered a variety of options for limited duty work, such as: restrictions on total hours or hours worked in certain positions, weight lifted, specific movements, and use of portions of the body (Co. Ex. 4). There was limited duty work available in the Employee's department.

Person 2, Line Maintenance Manager and the Employee's supervisor, advised the Employer's Workers Compensation Department about his concerns regarding the Employee's history of prolonged injury-related absences. At the Employer's behest, Company 1 (a private investigation company) observed and videotaped the Employee's actions during the period April 1 to 7, 1998, while the Employee was on medical leave. The Employer placed the videotape into evidence at the arbitration hearing. That videotape showed the Employee purchasing a golf cart (including bending over and squatting during the transaction), driving the golf cart (thus sitting for prolonged periods), jumping on the transport trailer once the golf cart was aboard, manually shifting the golf cart to position it on the trailer, and lifting a battery charger. Upon receipt of the videotape and the investigative report, the Employer consulted doctor Person 3, Medical Director of Company 2, a private provider of occupational medical services. Based upon Person 3's conclusion that the Employee's alleged incapacity was not consistent with the activities shown on the videotape, the Employer terminated the Employee for violation of Rule 32 of the Posted Rules of Conduct.

On April 22, 1998, the Union filed a grievance regarding the Employee's termination, which remained denied through the steps of the negotiated grievance procedure. Pursuant to the parties' collective bargaining agreement ("Agreement"), the case was referred to arbitration upon the February 1999 deadlock of the System Board of Adjustment.

The undersigned E. William Hockenberry was advised of his selection by the parties to be the neutral chair for the resolution of this dispute by letter dated May 6, 1999. At the hearing that was held on August 10, 1999, at the City 2, State 1 airport, a full and fair opportunity was provided to the parties to introduce evidence and examine witnesses. Witnesses were placed under oath but not sequestered. Testifying for the Employer were Person 2, Line Maintenance Manager and Person 3, Medical Director of Company 2. Testifying for the Union was the Employee, Line Mechanic. The proceedings were transcribed and resulted in a transcript of 151 pages (Tr.) which constitutes the official record; supplemented by two joint exhibits (J Ex.), eight Employer exhibits (Co. Ex.), and four Union exhibits (U Ex.). The parties concluded their argument with the submission of written, post-hearing briefs. Upon their receipt by the undersigned Chair, on November 1, 1999, the record was' closed.

ISSUE:

The parties stipulated to the following statement of the issues:

Was the Employee properly terminated for just cause? If not, what shall be the appropriate remedy?

(Tr. 9-10)

RELEVANT PROVISIONS OF THE AGREEMENT:

Article 12 SICK LEAVE AND BONUSES

(B) In the case of occupational sickness or injury, the employee will be paid the difference between the Employer paid insurance and/or compensation payments (i,Q., Workmen's Compensation and/or Federal Social Security benefits) and that amount the employee would have received at his regular rate to the extent his sick leave balance would entitle him. (J Ex. 1)

Side Letter Dated October 7, 1992:

This letter is to clarify our understanding concerning Article 12(B) which was reached during negotiations.

Employees who have a recorded occupational injury on the date of ratification of this Agreement will continue to be eligible for the then current benefits governing such injury.

Subsequent injuries will be covered by Article 12(B) of the current Agreement, unless such injury is a reoccurrence of the same recorded injury.

(J. Ex_ 1)

Relevant Provisions of the Posted Rules of Conduct

32. Dishonesty such as...misrepresentation to obtain employee benefits or privileges will be grounds for immediate dismissal.

(Co. Ex. 7)

POSITION OF THE PARTIES

It is the position of the Employer that the Employee's termination was for just cause. The Employer reasonably concluded that the Employee's physical activities, which were contrary to his doctor's directions, constituted misrepresentations in order to continue to obtain the benefit of salary continuation. Citing the Employee's activities (as shown on videotape) while he was on injury leave, the Employer contends that it proved the Employee engaged in physical activity that was inconsistent with his doctor's diagnosis and directions. The Employer argues that Person 3's testimony establishes that the Employee's physical activities are inconsistent with the diagnosis rendered by Person 1. The Employer maintains that this inconsistency proves that the Employee exhibited dishonesty in violation of Rule 32. It argues that Rule 32 allows no discretion as to punishment and that the Employee must be terminated. The Employer asserts that the Union has not established that the Employer's conclusion was unreasonable with respect to the inconsistency between the Employee's claimed incapacitation and his activities. The

Employer maintains that the Employee's level of effort and types of movement, as shown in the videotape, was the same as he would perform at work. The Employer rejects the position that the Employee was, in essence, feeling better at the times he was videotaped, arguing that the Employee was restricted from such activities. The Employer also rejects the Union's position that the Employee was prohibited or restricted from returning to work because he had not been cleared to do so by his doctor. The Employer argues that termination is consistent with controlling arbitral authority. In support of its position, the Employer cites Grievance of Ronald J. Smith, Employer and XAMAW, SBA Case No. 01-88 (Byron Abernathy, Neutral Referee, 1988) ("Abernathy Award") in which a utility employee with an injured back (lumbrosacral strain) was terminated after being observed performing farm work (e.g., driving a tractor, cutting hay, adjusting hay bailer) while off work on occupation injury leave and receiving salary continuance. The Employer urges that the grievance be denied and the termination upheld.

It is the position of the Union that the Employee was terminated without just cause arguing, in essence, that the Employer failed to establish that the Employee was dishonest. The Union maintains that the Employee's riding a golf cart or tractor were less strenuous than his normal activities and were activities from which his doctor had not restricted him. The Union contends that the Employee was not restricted from lifting; apparently contending that the instances in which he lifted objects did not constitute misrepresentations as to his incapacitation. Similarly, the Union points out that the jumping motion which the Employee performed briefly was the same as an exercise he performed regularly. The Union notes that the Employee took injections and/or medication which made him feel better by the time that the videotape was taken. The Union urges that the grievance be sustained.

DISCUSSION AND DECISION RATIONAL

Documentary evidence offered at the hearing indicated that the Employee had been commended for his "team efforts" in 1995 in connection with aircraft inspections (U Ex. 4). Other evidence indicated that the Employee is "a very compliant individual" (U Ex- 3). Additional documents indicated what medications the Employee was taking in 1999 (U Ex. 1) and his medical history during 1993 to 1995 (U Ex. 2). The evidence also included the medical report dated April 21, 1998 prepared by Person 3 following his review of the surveillance videotape, wherein he opined that 'within a certain degree of medical certainty, [the Employee's activity shown in videotaped] is medically inconsistent with this claim of being totally disabled". Person 3 further stated that the Employee "would be able to perform occupational duties" while cautioning that more testing is necessary to determine the Employee's occupational capabilities. (See Co. Ex. 1). The investigative report by Company 1 is also part of the documentary record. The report was a chronicle of the Employee's activities, as captured on videotape, and a summary indicating that the Employee appeared to experience no physical difficulties while looking at the golf carts, placing garbage in the golf cart, moving around his property, and "performing various tasks around his residence" (Co. Ex. 6).

The Employee indicated that Person 1 knew that limited duty work available (Tr. 84). He testified that he could not return to work without his doctor's release. The Employee indicated further that had he called for an appointment on April 1, 1998, it would have been three (3) to seven (7) days before he would be able to get in to see his doctor (Tr. 94-95). In addition, the Employee testified that Person 1 released him to return to work effective April 7, 1998 (Tr. 84, 95). According to the Employee, the steroids made him feel "normal -- that is, as he felt "before (he] was ever injured" (Tr. 136). The Employee testified that during the first week he was off

(before the videotape was taken), he felt "down and out", but that during the second week, he improved (Tr. 94).

Person 2 testified that he was suspicious of the Employee's absence on March 25, 1998. He indicated that the Employee had taken long periods of time off, allegedly in connection with his back injury. According to Person 2, the Employee's co-workers informed him that the Employee was working elsewhere during his medical absence. (Tr. 64-67)

At the arbitration hearing, Person 3 confirmed his finding in his report that the Employee's activity in the videotape was medically inconsistent with his claim of total disability (see Tr. 37). Person 3 testified, without rebuttal, that:

the extent, the length, the no evidence of any pain behavior, freedom of movement, no restrictions, no orthopedic devices, doing activities that to me would put somebody at great risk of reinjury, would be inconsistent with his [the Employee's] diagnosis of being off of work, and would just basically end up putting himself at risk for making further damage.

(Tr. 38)

Person 3 indicated that his instruction to the Employee if he were off work would be not to perform the types of behavior shown in the videotape. He indicated "any reasonable person would not do this because he would end up risking reinjury" (Tr. 38). Person 3 acknowledged that he had reviewed five (5) to ten (10) videotapes of the Employee for the Employer and that in none of those instances did he find that the Employee's activities were consistent with the diagnosis (Tr. 42-43).

In consideration of the forgoing documentary evidence and testimony, the Board finds that the Employee was off work with a diagnosed back injury. There is no dispute that the Employee

performed the activities shown in the videotape. The unrebutted testimony of the Employer's medical expert establishes that the Employee's activities were not consistent with the diagnosis.

Since the activities are not in dispute, the Board concludes that the Employee was not incapacitated as diagnosed. In short, the Employee misrepresented his incapacity.

The explanations offered by the Union as to the sequence of events and considerations which led to the Employee's behaviors are not persuasive. If the Employee was feeling better — feeling up to squatting, sitting, bending, jumping on equipment and hefting weighty objects -- he had a duty to advise the Employer. In the matter of his return to work, Employee was not limited to Person 1's authorization; he could have at least advised the Employer and been prepared to present himself for duty prior to Person 1's examination. The Employer could have conducted its own return to work physical or awaited Person 1's examination. Either way, the Employer would have been on notice of the Employee's improved condition and his willingness to return to work.

Further, the Employee's explanation that his videotaped activities were similar, if not the same, to prescribed exercises is simply not credible when compared to the testimony of Person 3. The Employee's return to duty was not solely dependent on Person 1's calendar, as alleged.

The language of Rule 32 is clear. Dishonesty by misrepresentation for the purpose of obtaining employee benefits is a dischargeable offense. This Board has considered a remarkably similar set of facts in the Abernathy Award. There, that Board, chaired by Arbitrator Abernathy, sustained a discharge of an Employee who misrepresented his physical incapacity. The proof of the misrepresentation was that the Employee did not take care of himself as his doctor had ordered while the Employee was off work for an occupational injury. Further, that Board found that the Employee had misrepresented his condition to obtain benefits in violation of Rule 31 (the predecessor of the present Rule 32). This is the situation faced by the Board again in the present

case. The Abernathy Award confirms the conclusion that this Board reached independently on the facts in the instant case: That the Employee's misrepresentation of his capacity to perform his duty led to his receipt of benefits in violation of Rule 32.

The Abernathy Award further confirms the validity of the discharge. Rule 32 is self-enforcing, unequivocal, and "the Board has no authority to modify the rules (Abernathy Award at 19). The Board in the instant case has no authority under the Rule to mitigate the termination once it has found the violation. There is no allegation that the Employee was unaware of the Rule. Thus, this Board finds that termination was the proper penalty for the misrepresentation.

In consideration of the foregoing documentary evidence and. testimony, the Board must conclude that the Employee was terminated for just cause and that the termination was valid.

AWARD

The Employer sustained its burden of proof that the Employee was terminated for just cause under the Agreement and Rule 32. The grievance of Employee is denied.