

O'Brien #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

STATEMENT OF THE ISSUE

As stipulated by the parties, the following questions must be decided herein:

Whether the Employer had just cause to terminate Employee?

If not, what shall be the remedy?

BACKGROUND

On August 14, 1989, the Employee was hired by the Employer. He worked as an Utility-man at the Airport 1. His job was to clean and service aircraft at Airport 1.

On January 3, 1992, at approximately 2:30 A.M., the Employee was throwing a heavy bag of trash into a dumpster when he felt pain in his left shoulder. He reported this injury to his supervisor at Airport 1 on January 7, 1992. The Employee was subsequently examined by Person 1, M.D., an orthopedic surgeon, and X-rays were taken. Dr. Person 1 found some impingement in the Employee's left shoulder and concluded that he was partially incapacitated. It should be noted that the Employee is left handed. On January 7, 1992, Dr. Person 1 advised the Employer that the Employee could perform no heavy lifting and no overhead lifting for a period of two (2) weeks. He was placed on light duty as a result of these restrictions and was examined by Dr. Person 1 several times after January 7, 1992. The Employee worked on light duty until the end of March.

On January 9, 1992, the Employee was examined by Dr. Person 2 of the Central Medical Center. Dr. Person 2 diagnosed his condition as a left shoulder strain. He concluded that the Employee could return to limited duty provided that he did not lift anything heavier than twenty-five (25) pounds. Dr. Person 2 also instructed the Employee to undergo physical therapy and referred him to Dr. Person 3 for an orthopedic consultation.

On March 11, 1992, the Employee was examined by Dr. Person 3 who concluded that, although Employee complained of pain in his left shoulder, he discerned no positive objective findings of any shoulder injury. Dr. Person 3 concluded that the Employee could resume full activity and there was no further need for work up or treatment on his shoulder.

On April 2, 1992, the Employee was examined by Dr. Person 4 of Occupational Health. It should be observed that Dr. Person 4 has a contract with the Employer to examine employees who have suffered occupational injuries. Dr. Person 4 directed the Employee to undergo a "functional capacities assessment" at a work evaluation center. On April 4 and 16, 1992, the work evaluation center conducted a "functional capacities assessment" of the Employee. They found no signs of atrophy, muscular spasm or swelling in his left shoulder region. Finding no documental problem in the Employee's left shoulder; they informed Dr. Person 4 that the Employee could return to his job as an aircraft cleaner. On April 16, 1992, Dr. Person 4 advised the Employee that there was no need for any medical restrictions, and that he could fulfill his job duties in a safe and reliable manner. He also advised the Employer that the Employee could resume full duty without any restrictions.

Despite the aforementioned medical opinions, the Employee insisted that he could not return to work because of his shoulder strain. The Employee maintained that on or about March 26, 1992, he aggravated his shoulder strain while replacing a seat cover on an aircraft that he was

servicing. It should be noted that on April 28, 1992, the Employee was denied workers compensation for his January 3, 1992, injury pursuant to State 1's Workers' Compensation law. On April 28, 1992, Person 5, Maintenance Manager at Airport 1, notified the Employee by certified mail that:

"[I]n light of what Dr. Person 4 has written and stated, you are being issued a direct order to return to work on your next regularly scheduled shift after receiving this letter. Failure to return to work will be considered as insubordination and will result in the termination of your employment."

The Employee never contacted Person 5 after receiving this letter. On May 7, 1992, Person 5 advised the Employee that since he failed to report for work as instructed he was guilty of insubordination, and that consequently his employment with the Employer was terminated immediately.

On May 15, 1992, the Union filed a grievance on behalf of the Employee claiming that he was terminated without just cause. A special hearing was held that day. On May 19, 1992 the Employer upheld the Employee's termination. The Union appealed the Employee's grievance to a System Board of Adjustment pursuant to Article 15 of the collective bargaining Agreement between the Union and the Employer. The System Board of Adjustment met on March 11, 1993, to consider the grievance. On March 24, 1993, the System Board of Adjustment could not reach a majority vote as the Agreement requires and the parties were advised that the grievance was deadlocked.

On or about April 5th, 1993, the Union invoked arbitration pursuant to Article 15(L) of the Agreement. This Arbitration System Board of Adjustment (hereinafter referred to as the Board) met on January 17, 1994 to consider the grievance submitted on behalf of the Employee. At that hearing, the Employee insisted that he had not been insubordinate as charged by the Employer.

Rather, he maintained that he was unable to return to work since he suffered a recurrence of his January 3, 1992 shoulder injury in late March. According to the Employee, he was unable to perform his duties as a Utility-man and, in fact, could not operate a motor vehicle because of his shoulder injury.

The Union and the Employer attended the January 17, 1994 hearing and proffered evidence and arguments in support of their respective positions. Based on the evidence and arguments advanced by the Union and the Employer, this Board hereby renders the following decision.

FINDINGS AND OPINION

The central question before this Board is whether the Employee had the right to disregard Maintenance Manager Person 5's April 28, 1992, directive to return to work. In the light of the unequivocal medical evidence available to the Employer at the time, we find Person 5's order to be a reasonable one. The Employee had no right to disregard this clear and reasonable order. The Employee's failure to return to work as directed clearly constituted insubordination, in the opinion of this Board.

It may well be that the Employee was still in considerable pain over three months after his January 3, 1992, shoulder injury. However, none of the doctors who examined the Employee could discern any objective evidence of a disabling injury. Dr. Person 3 and Dr. Person 4 found no objective evidence of a shoulder injury and the physical therapists at the work evaluation center reached the same conclusion. Dr. Person 2 and Dr. Person 1 concluded in January and February that the Employee should be restricted to light duty, but this restriction was limited to a period of two weeks. Obviously, this was not intended to be a permanent restriction on the

Employee's work activities. Indeed, even Dr. Person 1 concluded as early as February 2, 1992, that he had nothing else to offer the Employee for his shoulder strain.

The Employee disagreed with the consistent medical opinions advanced by Doctors Person 4 and Person 3, but offered no medical documentation to support his claimed inability to resume employment as a Utility-man for the Employer. While the Employee questioned the objectivity of Dr. Person 4, since he has a contractual relationship with the Employer, there is absolutely no reason to question the judgment of Dr. Person 1, Dr. Person 3 and the physical therapists at the work evaluation center who did a two day "functional capacities assessment" of him. The latter found no signs of atrophy, muscular spasm or swelling in his shoulder area. There is no evidence that they had any professional relationship with the Employer. Their conclusions must therefore be considered fair, objective and unbiased. It is also significant to note that State 1 denied the Employee workers' compensation benefits for his shoulder injury. He also declined to have an MRI done or to have a corticosteroid injection which may have helped to alleviate his shoulder pain.

The Employee explained that he suffered a recurrence of his shoulder injury in late March while servicing an aircraft at Airport 1. Yet he acknowledged that, though this recurrence occurred while he was on duty, he did not apprise anyone in management at Airport 1 of it. Nor did he seek medical attention or file a report of this recurrence of his shoulder injury. There is no evidence that he returned to Dr. Person 1 whom he trusted after he re-injured his shoulder, or that he requested a medical leave of absence from the Employer. Logic would dictate that if the Employee had re-injured his shoulder as he claimed he would have brought this to Person 5's attention when he received his April 2S, 1992 letter instructing him to return to work or face

termination for insubordination. The Employee's total silence when his job was in jeopardy renders his contention that he re-injured his shoulder in March, 1992, less than convincing. The Employee was agitated that Person 5 never contacted Dr. Person 1 as he said he would. It is difficult to understand how the Employee was prejudiced by Person 5's decision not to contact Dr. Person 1. There is not a scintilla of evidence that Dr. Person 1 found the Employee unfit to return to work. Indeed, he stated in February, 1992, that there was nothing more he could offer him for his shoulder injury. In the light of the conclusive medical evidence that the Employee was able to return to work as a Utility-man with the Employer, he simply was not harmed by Person 5's decision not to contact Dr. Person 1, in the judgment of this Board.

In view of the overwhelming medical evidence that the Employee was physically able to resume his employment in April, 1992, his refusal to comply with Maintenance Manager Person 5's April 28, 1992, directive was unjustified. For some inexplicable reason, the Employee had a cavalier attitude toward his employment obligations with the Employer. In fact, even now, two years after his injury, the Employee claims he is still in pain and unable to work. For all the aforementioned reasons, this Board finds that the Employee was given a legitimate and reasonable order to return to work and there was no justification for his refusal to comply with these valid instructions. Accordingly, the Employer had just cause to terminate his employment and his grievance must be denied as a result.

AWARD

The Employer had just cause to terminate Employee. His grievance is therefore denied.