Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27803
THIRD DIVISION Docket No. MW-28295
89-3-88-3-62

The Third Division consisted of the regular members and in addition Referee Stanley E. Kravit when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Denver and Rio Grande Western Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Lead Carpenter D. D. Johnson for failure to make a prompt written report of an injury sustained in March, 1985 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement (System File D-87-01/MW-10-87).

(2) The Claimant shall be returned to service with all seniority and other rights unimpaired, his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered in accordance with Rule 28 of the Agreement."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

At the time of his discharge on January 27, 1987, Claimant was a Lead Carpenter with approximately 10 years of service during which he had never before been disciplined. He was dismissed for "his failure to make prompt written report to the Carrier," concerning an injury alleged to have occurred on March 22, 1985.

Although the letter of dismissal does not cite a Rule, the Parties acknowledge Safety Rule 1 which states as follows:

> "Employees injured while on duty must make a verbal report to their supervisor not later than end-of-shift or tour of duty. As soon as practicable after accident, the injured employee must make report on Form 3922. Obtain immediate first-aid and necessary medical attention for all injuries."

On March 24, 1985, Claimant verbally reported to his Foreman that he had been involved in an incident in which a chute through which concrete was being poured was dropped and jerked Claimant's body as he hung on to the chute to keep it from swinging and injuring any of his crew.

He was asked by the Foreman "how bad it was and whether 'he wanted to fill out an accident report'", but Claimant replied that he was all right and "threw his arm around" indicating that he had suffered no apparent injury. Claimant did not file an injury report and his Supervisor did not ask him to. Claimant lost no time that day, nor apparently at any time during the next 13 months until he took a layoff, in May of 1986.

In 1986, after extended treatment by the Chiropractor he recommended that Claimant see a neurosurgeon and Claimant described both the car and the chute accidents to him and to a subsequent doctor who replaced the first. These examinations occurred in November and December, 1986, and an injury report was eventually filed on January 2, 1987. It is the Organization's position that when the Claimant received a competent medical opinion that his need for treatment was due (at least in part) to the March 22, 1985, incident, he filed an injury report; and that these facts and circumstances relieve him of any prior obligation to do so.

In addition to contending that the Carrier has not met its burden of proof, the Organization also argues that discharge is an excessive penalty for what was an error in judgement, not an intent to violate the Rule.

The Carrier's position is that the obvious failure to make a timely accident report meets the Carrier's burden of proof in and of itself and justifies discharge. It cites case authority for this result, the rationale of which is that timely reporting is essential to the Carrier's need to manage potential liability situations and evaluate employee benefits Claims.

The Carrier also contends that with the admitted passage of time, now "it is questionable as to whether Claimant actually incurred or sustained an on-duty injury." However, the dismissal is clearly based on a failure to report and whether the Claimant can prove compensable injury on March 22, 1985, is not before this Board.

The difficulty with the Carrier's case is that it apparently permits employees to differentiate between incidents with no apparent injuries and accidents in which reports are obviously required even though injuries may be minor. Many employers require strict reporting of any occurrence which could give rise to liability or Claims, but here the Claimant's Foreman, even when the incident was described to him, took Claimant's word for the fact that he was not injured and did not require a report.

This was poor judgement on both parties because the Foreman as well as the Claimant knew of the earlier auto accident. Within two months Claimant began seeing a Chiropractor for discomfort in his shoulder and arm. This dis-

comfort, even if initiated by the auto accident, could easily have been aggravated by the incident with the chute. At this point, a year and a half before the accident report was finally made, it should have been apparent to both Claimant and his Foreman that a report should have been filed if for no other reason that to protect Claimant's and the Carrier's interests.

The Carrier, however, has offered no evidence of any intent to deceive nor can it refute the Claimant's reliance on superior medical examination and diagnosis obtained in November and December of 1986. If the Carrier's position was accepted, an employee could never correct an unreported situation no matter what the circumstances without risk of discharge.

It is the opinion of the Board that Claimant, while not evincing an intent to defraud or harm the Carrier, used poor judgement in failing to make a timely report in the spring of 1985 at a time when he experienced discomfort in reasonable proximity to the March 22nd incident. Any question of the validity of the January 2, 1987, report or issues arising therefrom are not for our consideration. Therefore, the penalty of discharge is excessive. Claimant will be restored to service in accordance with the Agreement, but without backpay.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1989.