Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30699
Docket No. MW-31120
95-3-93-3-91

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former
(Louisville and Nashville Railroad Company)

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

(1) The dismissal of Foreman L. W. Phelps, in connection with a personal injury sustained on February 6, 1992 and for alleged '* * * falsification of a personal injury, failure to properly report your alleged personal injury and falsification of information provided to your supervisor.' was without just and sufficient cause, on the basis of unproven charges and in any event excessive and harsh [System File 11(3) (92)/12(92-426) LNR].

(2) As a consequence of the violation referred to in Part (1) hereof, Claimant shall be reinstated with seniority and all other rights unimpaired, his record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Claimant was employed as a Section Foreman. He had 22 years of service. At times relevant to this dispute, he was assigned to work out of Doyle Yard, Owensburg, Kentucky. He worked under the supervision of Roadmaster J. L. Bell and Assistant Roadmaster J. T. Taylor.

On February 6, 1992, Claimant was part of a gang which was attempting to free a bulldozer which had become stuck. To do so, the employees used an engine chain, a heavy steel chain approximately 15 feet long. After the work was completed, Claimant and the Assistant Roadmaster dragged the chain from the dozer to a fuel truck, where Claimant and a Trackman loaded it into the truck, over the top of the raised liftgate, a height of approximately 5'6". Claimant raised that length of chain, which weighed 63 lbs./yard, and handed it to the Trackman, who was standing in the truck. The Trackman then pulled the remainder of the chain into the truck. Claimant testified that, as he lifted the chain, he became aware that he had "done something" to his back, but he testified that he "didn't realize at the time that it was gonna be as severe as it turned out to be." Accordingly, he testified that he did not "immediately" report an injury to the Carrier, as required by its Safety Rule 40, although he was familiar with the Rule. He also testified that the Assistant Roadmaster had left the scene before Claimant lifted the chain and that the Roadmaster was "down the track" and not immediately or easily available. It is not contested that Claimant did not tell his supervisors or any of his co-workers at that time that he had injured his back.

Claimant testified that, after he got home that evening, his back stiffened up and, by 1:00 A.M. that night, he experienced pain sufficiently severe that he was unable to sleep. Accordingly, upon reporting for work the next morning, Claimant advised the Roadmaster that he had either injured his back lifting the chain or was suffering kidney problems. He sought and obtained permission to obtain medical attention. Claimant was diagnosed with a severe lumbar strain.

According to the Roadmaster's testimony, Claimant stated that he was going to file his medical expenses through his insurance company, which the Roadmaster inferred meant that Claimant was going to treat the injury as not work related. Claimant did, in fact, report the injury that morning and filed, through the insurance carrier, for reimbursement as an on-the-job injury. Claimant took personal leave and vacation days to cover the five days of work he missed as a result of the injury, apparently in hopes of avoiding being charged with an on-the-job injury.

The record is unclear as to the precise procedure to be followed in submitting claims for reimbursement of medical expenses for on-the-job injuries, but the Organization submitted unrebutted testimony that medical expenses for both on-the-job and non work related injuries are submitted through the same negotiated insurance carrier.

The Roadmaster acknowledged that it was the practice of the Chicago Division to review all injuries and, he heard, charge employees who report such injuries. He told Claimant that, if he filled out an accident report, he would be charged. The Carrier interrogated Claimant's co-workers, one of whom subsequently testified that Claimant lifted weights, one of whom testified that Claimant had complained of back pain a couple of weeks before February 6, and one of whom testified that Claimant had complained of back pain earlier on February 6, while cutting in a rail.

The Carrier convened an Investigation on March 16, 1992 at which the above testimony was adduced. The Hearing was conducted by the Assistant Division Engineer. The Division Engineer found Claimant guilty of all charges and dismissed him from service. The Carrier subsequently furnished the Organization with the transcript, but failed to give the Organization the exhibits introduced at the Hearing.

The Carrier argues that the Organization's challenges on the basis of denial of due process are not properly before the Board, since they were not raised on the property.

The Carrier argues that the evidence established that Claimant violated his obligation to immediately report his injury. It asserts that the Roadmaster's testimony establishes that Claimant falsely told him that he was filing his claim for medical reimbursement under his negotiated health insurance, as a non work related claim, but then filed a claim as a compensable injury. The Carrier argues that the evidence is that Claimant was experiencing back pain before lifting the chain, that he had been lifting weights, and that his story as to how high he lifted the chain changed after his co-worker's testimony that Claimant only lifted the chain waist-high. It urges that the record provides substantial evidence in support of the inference that Claimant fabricated the story that he was injured lifting the chain.

The Carrier contends that the Safety Rule was appropriate, that Claimant disregarded the Rule, and that Boards should be reluctant to overturn discipline for violations of reasonable Safety Rules. The Carrier argues that the penalty of dismissal for failure to report the injury was reasonable, in light of the important and absolute requirement of the Rule. It points to Claimant's long record of accidents as establishing both the appropriateness of the penalty and Claimant's familiarity with the

requirements of the Rule. It urges that the claim be denied.

The Organization argues, as an initial matter, that the argument of Claimant's familiarity with the Rule was not raised on the property and cannot be considered. It asserts, in addition, that the Carrier violated Claimant's right to due process by failing to furnish the exhibits accompanying the transcript, thereby interfering with the Organization's ability to process its claim. It also contends that the Carrier violated Claimant's due process by allowing the Division Engineer, who had not heard the case or observed the demeanor of the witnesses, to make credibility determinations, as he necessarily did in determining guilt.

The Organization argues that the Carrier failed to meet its burden to prove the charges against Claimant, in that the evidence failed to establish that Claimant gave false statements to the Roadmaster, failed to establish that Claimant improperly delayed notifying the Carrier, and failed to establish that Claimant was not injured lifting the chain. It observes that Claimant's back injury is not contested by the Carrier.

The Organization points out prior Awards to the effect that not every accident or injury is a violation of Rules; and it points out that neither the Assistant Roadmaster nor the Roadmaster observed Claimant violating any Carrier Rules. The Organization asserts that the Carrier's conclusion that Claimant was not injured as he claims is mere speculation, not sufficient to carry its burden of proof. It argues that Claimant did not demonstrate pain on February 6 while at work, or inform anyone about pain, because he was not experiencing the pain. It points out that Claimant did report the pain and did demonstrate discomfort on February 7.

The Organization charges that the Carrier disciplined Claimant because he sustained and reported a personal injury, which reflected unfavorably on the Carrier, not because Claimant committed any disciplinable offense.

The Organization also argues that the alleged incidents in Claimant's personnel record are made up and are not a part of the record. It asserts that consideration of Claimant's record is appropriate only after guilt is established, not as part of the Investigation. The Organization contends that, even if Claimant should have filled out an accident report at once, the failure represents no more than an error in judgment, without proven intent to deceive or defraud the Carrier. It points out that Claimant is a long-term employee, for whom the penalty of dismissal for an error of judgment was arbitrary and excessive. The Organization urges that the claim be sustained.

Safety is of the utmost importance in the railroad industry. Every employee has a duty to work safely and to comply with the

Carrier's Safety Rules. The Carrier is entitled to discipline employees who are unable or unwilling to comply with its Safety Rules. Numerous Awards of this Board have so held.

Claimant has been dismissed for three acts of misconduct: failing to file a report of his injury immediately - on the afternoon of February 6, rather than the morning of February 7; falsely claiming an on-the-job injury from lifting the chain, when he had, the Carrier asserts, sustained the injury previously; and making a false statement to his supervisor that he was filing the claim as a non on-the-job claim.

It was the Carrier's burden to establish the charges by substantial evidence, based on the record of the Investigation. The burden cannot be met by speculation or surmise. As with any charge of falsification, wrongful intent is a necessary element.

The Roadmaster's testimony was that Claimant told him that he would be submitting a claim through the insurance carrier providing the negotiated coverage, from which the Roadmaster inferred that Claimant was treating the claim as non work related. However, unrebutted testimony was that claims for both on duty injuries and non work related incidents are filed through the same insurance provider. Thus, the Roadmaster's inference was not warranted. If Claimant misled the Roadmaster, there is no evidence that it was intentional. Further, the Carrier was necessarily aware of how Claimant filed the claim because of his filing the accident report and the insurance coverage. It does not appear that Claimant derived any benefit, or would have derived any benefit, from telling the Roadmaster something different than he did, or that the Carrier was prejudiced by the Roadmaster's understanding, unless the Roadmaster was attempting to intimidate Claimant to keep him from filing the report. The Board is not persuaded that the Carrier met its burden of proof with respect to the charge.

The Carrier's charge that Claimant falsified his injury is based on circumstance and conjecture. It is not disputed that Claimant was injured: the testimony that he suffered a severe lumbar sprain is undisputed. It is not disputed that, the afternoon before he was diagnosed with the lumbar sprain, he was lifting a very heavy chain. Claimant's testimony as to the incident was logical and consistent (the Carrier's description of Claimant's changing his testimony after being reminded of his co-worker's testimony mis-characterizes the testimony of both the Trackmen and Claimant). Neither said Claimant only lifted the chain to his waist. At most, the testimony leads to a conclusion that Claimant lifted the chain somewhere between his waist and his shoulder. Further, the Carrier's testimony, elicited from Claimant's co-workers, indicated that Claimant had told one, while handling heavy rail, that his back hurt. That does not lead to a conclusion that Claimant had previously injured his back and is not inconsistent

with Claimant's assertion that he injured his back lifting the chain. Claimant's weight lifting, particularly the light weights he testified to, does not warrant an inference that he injured himself lifting those weights. Further, the delay in reporting the injury was short and, under the circumstances, not unreasonable; certainly, there is insufficient delay to warrant a conclusion, on that basis, that Claimant was setting the Carrier up with a fictitious claim.

The Board finds merit in the Carrier's charge that Claimant violated Safety Rule 40 by failing immediately to report his injury. Claimant acknowledged that he knew, at the time he lifted the chain, that he had done something, even though he did not believe it serious at the time. He should have reported it, even if it was inconvenient. His failure violated the Rule. At the same time, there are clearly degrees of non-compliance with the Rule and extenuating circumstances excusing or mitigating the violation: first, the delay was extremely short - less than 18 hours. It cannot be said that the Carrier was in any way prejudiced by the delay. Second, Claimant's job required him to lift heavy items from time to time, almost certainly producing a certain amount of discomfort on a regular basis. Third, the dividing line between mere passing discomfort and injury is not always bright; the nature of Claimant's injury, as described, was such that he might not have realized it as serious, or even as an "injury," until it stiffened up. Fourth, the Carrier appears to have attempted to discourage employees from reporting injuries under probable penalty of discipline when they do. All of these factors mitigate the seriousness of the offense. Further, there is no evidence that the violation was intentional or for some wrongful purpose.

The evidence with respect to the Carrier's apparent practice of charging employees who report accidents is not sufficient, in this case, to constitute a basis upon which to resolve the dispute. Because of the Board's conclusions as to the merits of the charges, it is unnecessary to do so. However, the Carrier's apparent practice in that respect is sufficient to explain, to the Board's satisfaction, certain anomalies in the record, such as Claimant's use of personal time to cover his absence from work. It appears that employees are afraid for their jobs to exercise their right to seek treatment and compensation and to carry out their obligation to report on-duty injuries. Claimant was thus placed in an extremely difficult situation. The Board is persuaded Claimant responded on February 7 to the incident in the best way he knew and that he should not be severely penalized for it.

Of the Organization's argument that the Carrier acted improperly in introducing evidence as to Claimant's previous record prior to ascertaining his guilt, the Board is not persuaded. Although an employee's prior offenses cannot be used to establish

the conduct charged, it is not inappropriate that the Carrier introduce into the record of the Investigation evidence of employee work records for purposes of evaluating the appropriate penalty in the event that guilt is determined.

In the instant case, Claimant's record, dating back to the 1970s, includes a number of prior accidents. There is, however, no indication that Claimant was negligent or willfully improper in the conduct which led to those accidents. Indeed, there is no indication that Claimant was (or should have been) disciplined for his conduct in those accidents. Claimant was not charged with being accident prone; and the Carrier cannot support Claimant's dismissal on that basis, at least in the absence of charging him with the offense and establishing the unacceptability of his record and his failure to respond to progressive discipline and other corrective efforts.

More importantly, Claimant's record since 1989 is devoid of either accidents or discipline. Claimant's long seniority and lack of recent problems before this incident militate against a penalty of dismissal. The Board concludes that the penalty of dismissal was arbitrary and excessive and must be rescinded and that only a reprimand is appropriate. The Award so reflects.

In light of the Board's determination on the merits of the claim, we do not reach or resolve the due process issues.

The Carrier failed to prove that Claimant committed the violations of making false statements to his supervisor or of falsifying his accident. It did prove that he failed immediately to report the injury to his back; however, the mitigating and extenuating circumstances cited render the penalty of dismissal arbitrary and excessive. Claimant's dismissal shall be rescinded and he shall be reinstated to service. In substitution thereof, Claimant shall be reprimanded for violation of Safety Rule 40. Claimant shall be made whole for wages and contractual benefits lost as a result of the Carrier's action dismissing him. Claimant's record shall be amended so to reflect.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

National Railroad Adjustment Board
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of January 1995.