

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32708
Docket No. MW-32506
98-3-95-3-400**

The Third Division consisted of the regular members and in addition Referee Jonathan S. Liebowitz when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Duluth, Missabe and Iron Range Railway Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline (letter of discipline) imposed upon Mr. H. P. Anderson for alleged violation of ' . . . Rule 11 of the General Rules and Code of Conduct by failing to report a suspected injury to yourself, on Tuesday, July 12, 1994.' was without just and sufficient cause and on the basis of unproven charges (Claim No. 34-94).**
- (2) As a consequence of the violation referred to in Part (1) above, the letter of discipline and any reference to the charges or transcript shall be removed from the Claimant's record."**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole 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 were given due notice of hearing thereon.

On August 5, 1994, the Carrier directed the Claimant to attend a formal Investigation on a charge of failure to promptly report an injury that occurred on July 12, 1994, in violation of Rules 1 and 11, General Rules and Code of Conduct, Rules of the Engineering Department.

By letter dated September 19, 1994, the Carrier notified the Claimant that the record of the Investigation showed that he had violated Rule 11 by failing to report a suspected injury to himself and that his record would be formally marked by inclusion of that letter.

Rule 1 provides: "SAFETY is of the first importance in the discharge of duty."

Rule 11 provides:

"Employees injured or becoming sick while on the property must report such injury or illness to the Supervisor in charge, at once. Employees must not leave the property at the end of their shift without reporting to their Supervisor any injury or suspected injury."

Claimant, a Track Laborer, had over 16 years of service and no prior disciplinary record. On July 12, 1994, while attempting to move a generator to the rear of a truck bed in order to get a track jack used for raising a rail, a tamping gun rolled in front of the generator causing it to suddenly stop. Claimant felt then a "very little warm sensation on my lower right side, no pain or un-ordinary feeling at that time."

Claimant continued to work and did light duty work the following day drilling holes in bolts to insert cotter pins. But when arising at 4:00 A.M. to report on July 14, he felt "real stiff and in pain" and "noticed my lower right side protruding out." On July 14, Claimant informed a co-worker that he needed to see a doctor and asked him to advise Supervisor Barber and to bring Claimant an accident report form. According to Claimant, the co-worker was told at that time that he did not need a report form.

On July 14 at 7:00 A.M., Claimant left a message for Track Foreman Macenski that he was absent because of a pain in his side. He did not mention an injury then. Mr. Macenski testified at the Investigation that he found out about Claimant's injury on July 14. Claimant left a voice mail message about the injury for Supervisor Barber on July 15 at 8:26 A.M. Engineer of Track Moore testified that he became aware of Claimant's

injury when he received a call from Claimant a little after 2:00 P.M. on Friday, July 15. Claimant indicated then that the injury had occurred on the morning of July 12. Claimant submitted an accident report stating the above symptoms to the Chief Engineer on July 26, 1994. Claimant wrote there and testified that on Monday or Tuesday of the following week (July 18 or 19), he called Mr. Moore and informed him of the accident, and that Moore replied that there was a problem because Claimant had not reported it within a 24-hour period. Claimant responded that he did not feel that he was injured until Thursday, July 14.

Mr. Moore denied telling Claimant not to fill out an accident report or saying that he would not accept one and testified that he told Claimant that according to the Rules, he should have filled out a report on the day that he thought that he was injured. According to Claimant, his first indication that something was wrong was on the morning of July 14. Claimant testified at the Investigation that the warm sensation was very brief and did not recur, that he had no pain, and that he did not think much of it at the time. A statement from Claimant's doctor says that Claimant's type of presentation is consistent with an injury which could result in a hernia and that the sequence of events is "entirely plausible."

The Organization contends that the Carrier failed to substantiate its charges by presentation of substantial evidence and that the discipline of a formal reprimand must be set aside. The Organization maintains that this is a type of injury which took time to manifest and that Claimant reported it promptly when he became aware of it.

The Carrier cites the language of Rule 11 about "any injury or suspected injury..." and maintains that the Investigation was fair and impartial and that its findings should not be disturbed because not unreasonable, arbitrary or capricious.

There are a number of Board Awards both ways on the subject matter at issue, whether or not an injury was promptly reported as required by Rule. The decisions reveal that each case is fact-specific. In this instance, this Board must determine whether Claimant failed to report his injury promptly as required by Carrier's Rule 11. The requirement for prompt reporting of an injury or suspected injury is clearly established in the precedents for a number of perfectly valid reasons which need not be listed here.

But the Board believes that on the facts of this case, Claimant was not immediately aware of the injury or suspected injury, that that type of injury, a hernia, may take time

to manifest itself, and that promptly upon feeling pain, stiffness and a protuberance in his side, Claimant did take steps on that day, July 14, 1994, to report the suspected injury to supervision. He did not delay once it became clear to him that he had sustained an injury on the job.

The "very little warm sensation" first felt by Claimant could be consistent with an injury or not consistent with an injury. The Board notes that there is no evidence that the light duty work performed by Claimant on the day following his injury aggravated that injury.

Therefore, on review of the entire record, it is our opinion that Carrier's determination that Claimant violated Rule 11 in failing to promptly report his injury or suspected injury is not supported by substantial evidence in the record. Accordingly, the record demonstrates that this claim should be sustained. See Public Law Board No. 4219, Award 5 where that Board found that the Carrier erred in finding that Claimant did not promptly report an injury that did not immediately manifest itself.

AWARD

Claim sustained.

ORDER

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 19th day of August 1998.