

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32772
Docket No. MW-32724
98-3-95-3-637

The Third Division consisted of the regular members and in addition Referee Richard R. Kasher when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline (suspension from service from May 25 through June 21, 1993) imposed upon Machine Operator C. Blackmon in connection with the charge of ' . . . possible late reporting of alleged injury to yourself on March 18, 1993. . . . ' was unwarranted, on the basis of unproven charges and in violation of the Agreement [System File 93-233/12(93-1201) CSX].**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant's record shall be ' . . . cleared of all reference to this incident, and that he be made whole for any and all wage and fringe benefit loss suffered as a result of the Carrier's actions.'"**

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 September 7, 1993 the Carrier assessed the Claimant with a 28 day "actual suspension;" and in that letter the Carrier observed that it believed that the Claimant had suffered an alleged injury on March 16, 1993, and that "the only person you told was your assistant foreman on Tuesday [March 16, 1993]." Apparently, the Claimant continued to work through the end of the week, and then visited his physician on Friday, March 19, 1993 contending that he was suffering "pain."

The record evidence further establishes that the Claimant spoke to his Supervisor by telephone on March 19, 1993 and requested to "be off a couple of days," and indicated that he would provide a doctor's note.

The Claimant was then absent from work for a two month period, and when he returned the instant discipline was assessed as the Carrier asserted that the Claimant could not "wait two months to report an alleged injury."

Both the Carrier and the Organization raised defenses regarding compliance with the time limits in the Agreement for filing claims and appeals and responding to such claims and appeals. The Organization contended that the Carrier "defaulted" when it failed to render a decision within the 60 day time limit of the parties' Agreement following a conference held on March 21, 1995. The Carrier contended that the Organization failed to appeal the matter to the Carrier's highest designated officer within the 60 day time limit as required by Agreement Rules 39 and 40. Specifically, the Carrier asserts that the discipline, which was assessed by letter dated September 7, 1993, was not appealed until December 1, 1993. Additionally, the Carrier argued that the Organization failed to progress the claim to the Board in a timely manner.

A review of the record persuades the Board that neither the Carrier nor the Organization strictly complied with the time limits in the Agreement, and thus by their actions mutually waived the requirements of the Agreement in this regard. Additionally and importantly, neither the Carrier nor the Claimant will be prejudiced by the Board's consideration of the merits of this dispute.

The Board is not persuaded that the Claimant was deprived of a fair and impartial Hearing because he knew or should have known the nature of the charges, and

the failure of the Charging Officer to appear at the Hearing was not a fatal procedural defect. Thus the merits of the claim will be considered by the Board.

While the Claimant should have made a more strenuous effort to record and/or report his injury to a higher level Supervisor, he did timely report the injury to an Assistant Foreman, the only authority at the site at the time the injury was sustained.

There is reason to conclude that the Claimant made a good faith effort to comply with the Carrier's Rules regarding the filing of injury reports, and thus the Board concludes that the Carrier failed to present substantial and convincing evidence that the Claimant was guilty of the charges leveled against him. Accordingly, the claim will be sustained.

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 23rd day of September 1998.