

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33382
Docket No. MW-34235
99-3-97-3-794**

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

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The forty-five (45) day suspension assessed B&B Truck Driver G. L. Mossberger for his alleged failure to timely report an injury that occurred in March, 1996 was without just and sufficient cause, excessive and in violation of the Agreement (System File T-D-1162-B/MWB 960912AA BNR).

(2) As a consequence of the aforestated violation, B&B Truck Driver G. L. Mossberger shall “. . . be paid for the time that he was held out of service (45 days) as well as all overtime lost and any benefits lost, and he should have his record cleared of any reference to the investigation and the discipline set forth in the May 13, 1996 letter from F. J. Bennett, Road Foreman of Engines.”

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.

Claimant, an employee of the Carrier for approximately 28 years, was assessed a 45 day suspension following the hearing for violation of rules 1.1.3, 1.2.5(A), 1.6, and 1.13 of the Safety Rules and General Responsibilities for All Employees.

The applicable rules of the Carrier's Safety Rules and General Responsibilities for All Employees read as follows:

1.1.3 Accident, Injuries, and Defects

Report by first means of communication any accident; personal injuries; defects in tracks, bridges, or signals; or any unusual condition that may affect the safe and efficient operation of the railroad. Where required, furnish a written report promptly after reporting the incident.

Rule 1.2.5 Reporting

All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form.

Rule 1.6 Conduct

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome or
7. Discourteous

Rule 1.13 Reporting and Complying With Instruction

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with the instructions issued by managers of various departments when the instructions apply to their duties.

The Claimant in a deposition held on March 20, 1996, on an unrelated matter, acknowledged that he pulled muscles in his back during the first couple of days of early March while moving furniture and that no accident report was filled out. The date for the pulled muscle injury was described as "the last couple days of February, or the first week in March" at Claimant's investigation regarding the charges in this case. On March 21, 1996, the day following his acknowledgment of the early March, or late February, incident, he reported this injury to the Carrier.

On the Personal Injury Report, an incident involving a March 18 injury was described as "[W]hile arranging equipment on back of truck, felt muscle in my back pull, made worse by performing other duties." At the hearing investigation, the Claimant explained the statement that a muscle pull was "made worse by performing other duties" was meant to refer to his early March, or late February, injury. He testified that, after this injury, his muscles were "sore and tight," and sometimes he could hardly shift his truck, calling it a "frustrating" and "lingering injury." He testified that he did not "relate this to be as--quite as serious" as a former injury, but knew "there was probably a potential there." Apparently, between the first alleged injury and the March 18 alleged injury, there were other occasions when the initially alleged injury was aggravated, including one specific incident on March 14 or 15.

The Claimant gives numerous reasons why he didn't report his initial injury, including that he did not think it was that serious; that the injury occurred while he was performing tasks he was ordered not to perform; that there was strong peer pressure for high safety performance and the rewards that such brought; and that there was fear and intimidation caused by management.

Additionally, the Claimant believed the delay in reporting the injury was due partially to the unavailability of his supervisors. After his alleged injury on March 18, he said he went to the doctor and returned for work on March 19, allegedly with a doctor's note, but his Foreman was not there. On March 20 he took the day off and attended a deposition. On March 21, he reported to his foremen that he had an injury

that he had tried to report two days earlier and that injury was an aggravation of a prior injury occurring in early March. On March 22, an "injury review" was conducted concerning the reported injury.

The Organization has raised two procedural objections: the Carrier conducted an "investigation" on March 22, 1996, with no advance notice to the Claimant and without the opportunity to secure union representation in violation of Rule 40 of their agreement, and the manner in which a Carrier witness, during the hearing on this case, was allowed to read from some notes.

Regarding the Organization's first procedural objection, the Carrier has argued that the Organization is asserting an "affirmative defense" of "double jeopardy," and that the Organization has the burden of substantiating their contention, citing Awards for their position. The carrier asserts that "injury reviews" are common and do not violate Rule 40 and that the "double jeopardy" element of the Organization's objection was squarely addressed by Special Board of Adjustment 925, Award 64 on this property.

Regarding the Organization's second procedural objection, the Carrier asserts that a witness "reading from notes to aid him in his recollection of important events is clearly permissible in disciplinary proceedings," citing Third Division Award 12492. Additionally, the Carrier cites Third Division Award 20099 for the position that a "witness reading statements into the record is not a fatal procedural error."

This Board finds that the Organization's procedural objections are without merit.

The Organization asserts that the Carrier has "failed to present any evidence to prove a violation" of the rules at issue; that, if the Board finds that any of the rule violations are not proven, the discipline should be set aside, citing various Awards in support of its position; and that, in the event the Board finds sufficient evidence to support the imposition of discipline, the 45 day suspension should be deemed excessive due to the pressure placed on employees not to report injuries.

The Carrier primarily cites the Claimant's own testimony in support of the charges concerning rules 1.1.3, 1.2.5, and 1.13 and as evidence of the Claimant's knowledge of the rules and admissions of rule violations.

The Board's review of the record, and particularly the Claimant's testimony, make it clear that the Claimant, assuming he was testifying truthfully concerning the initial alleged injury, knew he was injured and made a conscious decision not to report the injury. The Claimant's testimony in the hearing investigation does seem inconsistent with the statements made in a deposition on March 20, 1996, on two points: the timing of the last doctor's visit and there being no mention of the March 18, 1996, injury which he claimed he was in the process of trying to report. Additionally, the reasons the Claimant advanced for his delay in reporting the alleged March 18 injury are not convincing.

The numerous reasons given by the Claimant for not reporting the injury in "early" March make it impossible to ascribe the rationale advocated by the Organization that it was due to management pressure on employees not to report.

The Carrier cites numerous awards concerning the serious nature of failing to report on-duty injuries, and perhaps most succinct is Third Division Award 26483, involving the same Carrier and Organization:

"All Divisions of this Board have commented many times on the serious nature of failing to report on-duty accidents immediately. Carrier has a right to know when an accident takes place. Failure to notify Carrier can, in the final analysis, be costly to both Carrier and the injured employee. Maintenance of Way employees are fully aware of the requirement to report an accident immediately."

This Board cannot find sufficient support in the record for a violation of Rule 1.6. However, we do find substantial and credible evidence that the Claimant violated Rules 1.1.3, 1.2.5 and 1.13. Due to the seriousness of the proven rule violations and the numerous awards upholding dismissal and lengthy suspensions for violation of these types of rules, as well as for other distinguishing factors, this Board does not find the Awards, cited by the Organization concerning not upholding any discipline if one charge fails, to be on point.

Based on our review of the entire record, this Board finds that the Claimant committed serious rule violations and that the discipline assessed, while severe, was within management's discretion.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of July 1999.