

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35608
Docket No. MW-35419
01-3-99-3-309**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Montana Rail Link, Inc.**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of employee D. M. Olson for alleged violation of Rules 518, 520, 528, 530, 538 and 542 of the Montana Rail Link General Safety Rules and BNR Maintenance of Way Operating Rules 1.1.3, 1.2.5, 1.2.7, 1.6 and 1.13 for his alleged failure to report a personal injury he incurred on November 25, 1998 was arbitrary, without just and sufficient cause and in violation of the Agreement (System File MRL-150).**
- (2) The dismissal of employee D. M. Olson for alleged violation of Montana Rail Link General Safety Rules 520 and 528 for his alleged falsification of his employment application was arbitrary, without just and sufficient cause and in violation of the Agreement (System File MRL-151).**
- (3) As a consequence of the violation referred to in Part (1) above, the Claimant's record shall be cleared of the charges leveled against him, reinstated to service with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered including overtime.**
- (4) As a consequence of the violation referred to in Part (2) above, the Claimant's record shall be cleared of the charges leveled against him, reinstated to service with seniority and all other rights**

unimpaired and he shall be compensated for all wage loss suffered including overtime.”

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.

This Docket consolidates two claims brought by the Organization on behalf of the Claimant. The first claim appeals the Carrier's dismissal of the Claimant because of the allegedly false and untimely reporting of an on-duty injury. During the Investigation of these allegations on December 17 and 18, 1998, information about the Claimant's prior injuries surfaced. As a result, the Carrier convened another Investigation to determine whether the Claimant had withheld such information from disclosure on his employment application. The Carrier's dismissal of the Claimant following the second Investigation generated the second claim. Although the two dismissals have been consolidated into one Docket before the Board, we must independently consider the merits of each claim.

Our review of the record does not reveal any procedural shortcomings of significance. The Organization's contention that the Claimant did not receive a fair and impartial Investigation must, therefore, be rejected.

In disciplinary matters of this kind, it is the role of the Board to apply what is known as the substantial evidence test. Our review of the evidence seeks to determine whether the record contains substantial evidence to support the Carrier's decision. It is important to note that the substantial evidence test does not require that the supporting evidence be conclusive. Nor does the test require that the record be free of

conflicting evidence that presents an alternative explanation that favors the Claimant's position.

On this record, the evidence shows that the Carrier posted its injury reporting requirements twice within the approximately two year period of time preceding the Claimant's alleged injury. The requirements called for prompt reporting and investigation of all injuries, ". . . no matter how slight, even if it is only a potential injury." The Claimant admitted that he was familiar with the applicable Rules.

The first claim arose after the Claimant reported sustaining an on-duty injury. He claimed the injury occurred at 2:00 P.M. on Wednesday, November 25, 1998. He felt a twinge of pain while lifting track machinery across ballast onto the tracks. The machinery, while weighing as much as 320 lbs., is designed to be moved manually and has integral handles for lifting and carrying by two to four employees.

The Claimant admitted that he did not report any injury to his Supervisor until 9:00 P.M. the following day. He thought the twinge was nothing more than the kind of aches and pains he had experienced many times before during his career.

Although the Claimant listed three co-employees as witnesses to his injury when he eventually completed a written injury report form, they did not corroborate his injury. All three testified at the Investigation. The Claimant finished the remainder of the workday. None of the three heard the Claimant say anything about sustaining an injury, nor did they see any indications that the Claimant had injured himself. One of the three claimed witnesses was the driver of the truck with whom the Claimant carpooled home from the worksite, a distance of some 150 - 160 miles. According to the driver, nothing was said about any injury or discomfort during the ride. Although a Supervisor testified that the Claimant told the Supervisor of difficulty exiting the truck at the end of the trip, the truck driver did not corroborate any such difficulties.

Although the Claimant testified that increasing discomfort caused him to return home early from dinner out with his wife on the day of his alleged injury, the Claimant did not report the injury at any time that evening. Although he admitted that he knew something was wrong the next morning, when he said he called a hospital emergency room to seek treatment, he did not report the injury. The Claimant was not seen in the emergency room until 3:00 P.M. on Thursday, November 26; still, he did not report any

injury. After returning home from the hospital around 4:00 P.M., he still did not report an injury until 9:00 P.M.

The record also includes emergency room records completed by a nurse and the treating physician. The nurse's assessment makes no reference to an injury being sustained the previous day. Instead, the assessment reflects that the Claimant reported "... Pain started approximately 3 months ago. . . ." The doctor's notes are similar. They do not reference any injury the previous day, but they do reflect that the pain was "... intermittent over the last 3 months."

Given the content and character of the evidence in the record, we are compelled to find that substantial evidence supports the Carrier's disciplinary decision. Given the gravity of the conduct thus determined, we cannot say that the Carrier's imposition of the dismissal penalty was an abuse of its discretion despite the Claimant's years of service and previous work record.

Because of our finding herein, we do not reach the merits of the second claim.

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 24th day of July, 2001.