

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35711
Docket No. MW-35559
01-3-99-3-483**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level 2 requiring one (1) day of alternate assignment to develop a corrective action plan] imposed upon Mr. W.D. Myers for allegedly violating Rules 1.1.3 and 1.2.5 of the General Rules and Responsibilities effective April 10, 1994, in connection with a personal injury report, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File W-9848-154/1138499).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall remove all references of this discipline from Mr. W.D. Myers’ personal 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.

Sectionman W. D. Myers (Claimant) is employed at Frankfort, Kansas, and was under the direct supervision of Foreman G. Seematter when this issue arose.

On Thursday, March 26, 1998, the Claimant was a member of an M of W Gang assigned to repair track gauge in the vicinity of Sullivan, Kansas. According to the Claimant, at approximately 9:00 A.M., while pulling spikes with a hydraulic spike puller, he felt "pain" in his lower back. Nevertheless, the Claimant worked his normal hours, and did not report the incident at any time during the workday.

When the Claimant reported for duty on Friday, March 27, he told Foreman Seematter that he wanted to see a doctor and requested to do so that afternoon. Foreman Seematter, who was not informed of the reason behind the Claimant's request, released the Claimant at approximately 3:40 P.M. However, by the time the Claimant got to the office, the doctor had left for the day. Thereafter, the Claimant observed his Saturday - Sunday rest days (March 28 & 29), and returned to work, as scheduled, on Monday, March 30, 1998.

When the Claimant arrived at work on Monday, he advised Foreman Seematter that he had not seen the doctor on the previous Friday, and asked to be released early that afternoon. The Claimant went on to state that he had "hurt" his back and had "difficulty" getting out of bed that morning, but did not indicate how, or when the injury had taken place. Throughout the day the Claimant performed his duties as assigned, and at approximately 3:00 P.M. Seematter released the Claimant, instructing Truck Operator Hildebrand to transport him to the doctor.

On the evening of March 30, the Claimant called Foreman Seematter to tell him that he was diagnosed with two herniated discs in his lower back. The following morning, March 31, the Claimant finally admitted that he was injured on March 26, 1998, but offered no explanation regarding his failure to report the incident. Shortly after the Claimant made that admission, Foreman Seematter contacted the appropriate personnel, and the Claimant submitted the requisite written reports.

On April 15, 1998, the Carrier directed the Claimant to attend an Investigation regarding his alleged failure to properly report the March 26, 1998 on-the-job injury. (Of note, both the Claimant and Foreman Seematter were jointly charged). As a result

of the Hearing, the Carrier assessed the Claimant a Level 2 discipline (one day of alternate assignment with pay to develop a corrective action plan) under the Carrier's UPGRADE discipline policy.

On June 6, 1998 the Organization protested the discipline, maintaining that the Claimant was denied his contractual right to due process as contemplated by Rule 48 of the Agreement. Specifically, the General Chairman maintained:

"It appears to me that no charges should be sustained against these employees. As I have commented throughout the hearing, it appears to me that this is just harassment, because of an injury. And further intimidation trying to get people not to report injuries. Yet, this hearing has not been handled in a completely fair manner, as we were prohibited from asking questions, which would show further harassment of employees, and how Mr. Myers felt."

With respect to the merits of the dispute, the General Chairman asserted that the Carrier had failed to establish that: (1) the Claimant was familiar with the content of the Rules for which he was cited; (2) he had received a copy of the Rules prior to the Investigation, and; (3) those Rules had any relevance or materiality to the testimony presented. Premised on those "failures," the General Chairman contended that the charges leveled against the Claimant should be removed from his personal record and the claim sustained.

The Carrier denied the claim premised upon the Claimant's "failure to comply with Carrier rules regarding reporting injuries." Specifically, the Carrier noted that the Claimant injured himself on March 26, 1998, but did not report said injury until the morning of March 31, 1998, five days after the injury occurred. With respect to the discipline issued, the Carrier maintained that the Claimant's assessment of a Level 2 UPGRADE was commensurate with the level of discipline given to employees for violation of Rules regarding late reporting and could not, in the circumstances, be considered excessive.

At the outset, the Organization asserts that the Claimant's April 21, 1998 Hearing was not conducted in a fair and impartial manner. However, we find no evidence on this record which supports that assertion, nor do we find any evidence that the Claimant's rights were compromised during those proceedings.

Turning to the merits of this dispute, the Rules for which the Claimant was cited state:

“RULE 1.1.3 ACCIDENTS, INJURIES AND DEFECTS

Report by the first means of communication any accidents; 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 must be completed.

A personal injury that occurs while off duty that will in any way affect employee performance of duties must be reported to the proper manager as soon as possible. The injured employee must also complete the prescribed written form before returning to service.”

There is no dispute that on the morning of March 26, 1998, at approximately 9:00 A.M., the Claimant, while pulling spikes, felt a “pain” in his lower back. In fact, at the April 21, 1998 Investigation the Claimant admitted to the following:

“Q. Did you notice when this happened?

A. Yes, I was pulling the spikes the 26th because it has been hurting from that time.

Q. Did you feel the pain in your back, at that time?

A. Yes, I did.

Q. Did you notify anybody about it?

A. No, I did not.”

Although the Claimant admitted that he “felt pain” in his lower back commencing March 26, 1998, he did not inform his Supervisor of that on-the-job injury until five days later. The Rules for which the Claimant was cited are clear and unambiguous. In

these circumstances, the Claimant did not report his injury “by the first means of communication,” nor did he report the injury “immediately to the proper manager.” There is no question that the Claimant’s failure or refusal to properly report the March 26, 1998 injury constitutes a violation of Rules 1.1.3 and 1.2.5.

As to the question regarding the appropriateness of the discipline, the issuance of a Level 2 Discipline in these circumstances is appropriate for the proven offense, and therefore will not be disturbed.

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 19th day of September, 2001.