

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36230
Docket No. SG-36464
02-3-00-3-727

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

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway (former Atchison,
(Topeka & Santa Fe Railway)

STATEMENT OF CLAIM:

"Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Atchison, Topeka & Santa Fe Railway (ATSF):

Claim on behalf of J.E. Parten for reimbursement of all expenses and removal of any reference to this matter from the Claimant's personal record. Account Carrier violated the current Signalmen's Agreement, particularly Rule 41, when it issued a Level S - 10-day deferred suspension - against the Claimant. Carrier failed to meet the burden of proof and failed to conduct a fair and impartial investigation in connection with an investigation held on September 21, 1999. Carrier File No. 35 00 0001. General Chairman's File No. BRS 9904341. BRS File Case No. 11542-ATSF."

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.

The Claimant in this case was a short-time employee having been first employed on January 18, 1999. On Thursday, July 15, 1999, the Claimant was working as a Signalman Helper with a tour of duty from 7:00 A.M. to 6:00 P.M. (One hour lunch). At approximately 11:30 A.M., July 15, the Claimant was performing his assigned duties which at that time consisted of transferring boring tools from one truck to another. During the performance of this work, the Claimant allegedly injured his shoulder. The Claimant made no mention of the alleged injury at the time and, in fact, continued and completed his tour of duty without comment or complaint to anyone relative to an alleged injury. Thursday, July 15, 1999 was the last work day of the Claimant's work-week.

The Claimant was next scheduled to work on Monday, July 19, 1999. On that date, the Claimant advised his Foreman that he could not report for service because he had injured his shoulder and had obtained an appointment with a physician for diagnosis and treatment. This July 19 conversation with the Foreman is significant and will be addressed later in these Findings. The record reveals that the Claimant did not work on July 19, 20, 21 or 22, 1999. There is no clear evidence to indicate exactly when the Claimant eventually did return to service. There is a suggestion found in the Foreman's testimony to indicate that on July 22, 1999 the Claimant did call the Foreman "to let me know he was going back to work" but this is not proof of when he actually did return to service. Eventually, on July 27, 1999 the Carrier received a "fax" copy of the completed personal injury report from the Claimant.

By notice dated August 13, 1999 the Claimant was instructed to attend an investigatory Hearing on August 23, 1999 in connection with the alleged injury and the Claimant's alleged failure to properly and promptly report the injury. At the Organization's request, the Investigation was rescheduled to and was held on September 21, 1999. The Claimant was present and represented throughout the Hearing. He acknowledged that he had been properly notified and was aware of the purpose of the Hearing. The Claimant testified on his own behalf and his representative was permitted to cross-examine the witnesses who testified. In short, the Claimant was accorded all of the due process rights to which he was entitled under the terms of the Rules Agreement.

Following completion of the Hearing, the Claimant was notified by letter dated October 7, 1999 that he was disciplined by assessment of a ten-day deferred suspension

for violation of Operating Rules 1.1.3, 1.2.5 and 1.2.7. There is no evidence in the case record to indicate that the deferred suspension was ever served.

The Operating Rules referenced herein read as follows:

“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.

Employee on whom the responsibility most naturally falls must assume authority until the proper manager arrives.

When an accident occurs at a road crossing do not cut trees, weeds or make any other changes to the scene until representatives from the General Claims Department have investigated.

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 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.

1.2.7 Furnishing Information:

Employees must not withhold information, or fail to give all the facts to those authorized to receive information regarding unusual events, accidents, personal injuries, or rule violations.”

In discipline cases, the Board has consistently held that it is the responsibility of the Carrier to adduce substantial probative evidence to support its conclusions to assess

penalty discipline. The "substantial evidence" Rule is clear and well established. The Supreme Court of the United States has defined it as follows:

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion (Consol. Ed. Co. vs Labor Board 305 U.S., 197, 229)."

In this case, the relevant evidence which is found in the Hearing record gives the Board serious pause. The chronology of events as developed in the investigatory Hearing shows that the incident in question occurred on July 15, the last work day of the workweek. The record shows that the Claimant did not complain of or mention the alleged injury on that date. However, on the first day of the following workweek, July 19, the Claimant did, in fact, notify his Foreman that he had experienced a situation that required medical attention. The Foreman testified that he had no less than four separate conversations with the Claimant on July 19 during which he candidly admitted that he had tried to convince the Claimant to consider the situation as an "off duty" injury. The Foreman readily testified that on July 19 he had notified at least two other supervisory employees relative to the situation involving the Claimant.

Is this late reporting? The Board thinks not. On this property, a Division Superintendent publicly opined as follows:

"What is late reporting? If an individual feels excruciating pain after an incident at work for a few minutes and then it goes away, I suggest that he/she report the incident to their supervisor before the end of their current tour of duty – based solely on the level of pain experienced.

If someone bumps their knee or elbow but doesn't think a lot about it, there is no need to report that as an injury at that point. But, if in a couple of days, the individual begins feeling discomfort because of a buildup of fluid on the knee or elbow, they should immediately report that to their supervisor.

Is that late reporting? No, as we have all experienced bumps and bruises in our careers, and in cases similar to that, I do not consider that late reporting."

The record shows that on July 21, the Manager Signals sent a "Medical Status" form to the Claimant, which form was to be completed and returned to the Carrier prior to returning to duty. Clearly the Carrier was aware of an injury situation involving the Claimant.

From the record as developed in this case, there is not found such relevant evidence as a reasonable mind might accept as adequate to support a conclusion of dereliction by the Claimant. Therefore, the discipline as assessed cannot be permitted to stand and must be removed from the Claimant's record.

As to the portions of the "STATEMENT OF CLAIM" dealing with "reimbursement of all expenses," the applicable rule on this issue is Rule 41(g) which refers only to compensation for "actual wage loss" suffered as a result of the discipline as assessed. As previously indicated, there is no evidence in this record to indicate that the suspension as assessed was ever, in fact, served. Therefore, there was no "actual wage loss" suffered as a result of the discipline assessed and that portion of the claim is denied.

AWARD

Claim sustained in accordance with the Findings.

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 24th day of September 2002.