

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37605
Docket No. MW-37486
05-3-02-3-561**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The discipline (formal reprimand placed in personnel file) imposed upon Mr. H. R. Henderson on August 10, 2001 for alleged violation of Maintenance of Way Operating Rule 1.1.3 in connection with allegedly failing to comply with instructions in reporting a personal injury of May 16, 2001 while assigned as welder at Toland, Illinois was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File C-01-D040-5/10-01-0393-D(MW) BNR].**
- 2. As a consequence of the violation referred to in Part (1) above, the discipline assessed Mr. H. R. Henderson shall be removed from his personal record and he shall be paid for any and all loss of wages and/or benefits.”**

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 or about May 21, 2001, the Claimant was notified to attend a formal Investigation to determine the Claimant's responsibility, if any, in connection with his alleged failure to comply with instructions when he failed to advise his Roadmaster that he allegedly had sustained a personal injury on or about May 16, 2001, at Toland, Illinois. After two postponements, the Hearing was conducted on July 10, 2001. On August 10, 2001, the Claimant was notified that as a result of the Investigation, he had been found guilty as charged and was being assessed a formal reprimand for violating Maintenance of Way Operating Rule 1.1.3. The Organization thereafter filed a claim, challenging the Carrier's decision to discipline the Claimant. The Carrier denied the claim.

The Carrier initially contends that the instant claim is wholly unsupported, and the discipline imposed was appropriate. The Carrier asserts that the Claimant certainly knew, after seeing a doctor on the evening of May 17, 2001, that his injury was sustained on May 16, 2001, yet the Claimant failed to immediately report his injury. The Carrier points out that the Claimant had a pre-existing back condition, and he admitted that his back was sore to the point of weakness. The Carrier argues that under these circumstances, the Claimant should have known, or suspected, that he was injured.

The Carrier emphasizes that the Claimant did, in fact, suspect that something was wrong with his back on the morning of May 17. The Claimant told Division Superintendent Duryea that he had taken a pain reliever that morning. The Carrier insists that the Claimant's excuse that he did not know he was injured is a lame one. The Carrier argues that the Claimant knew his back was sore to the point of weakness, knew that his back had stiffened up while he was driving, and he took a pain reliever on the morning of May 17 before reporting to a safety meeting. The Carrier maintains that the Claimant did know but chose not to comply with the Rules.

The Carrier then contends that contrary to the Organization's argument, there is no evidence of a request for a Hearing under the Safety Incident Analysis Process in this matter. The Carrier points out, in addition, that the Claimant had

no right to be handled through S.I.A.P. because the Investigation did not result from a safety incident, but instead from the Claimant's failure to immediately report his injury. The Carrier insists that late reporting of injuries are not safety incidents.

The Carrier asserts that the sole defense raised by the Organization is that the Claimant allegedly filed a personal injury report one day later, but the Carrier maintains that this is an admission that the Claimant failed to comply with Rule 1.1.3. The Carrier emphasizes that the Claimant testified that he sustained an injury on May 16, sought medical attention on the evening of May 17, and did not notify his immediate supervisor until after the fact. The Claimant's testimony shows that he was aware of the proper procedure for reporting an injury.

The Carrier points out that the Organization has not denied that the Claimant failed to comply with the Rules, instead asserting that the Rules are unfair and that a formal reprimand was not warranted. The Carrier emphasizes that the well established rule is to "obey now and grieve later."

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Organization initially contends that the record fails to support the Carrier's charge against the Claimant. The record clearly establishes that the Claimant's actions were prudent, thoughtful, and in compliance with Carrier Rules. The Organization maintains that there is no evidence that the Claimant was aware that he had sustained a personal injury until after he obtained medical attention during the evening of May 17. In light of the Claimant's testimony, the only conclusion that may be reached is that as soon as the Claimant became aware that he was injured, he reported his personal injury to his supervisor and promptly submitted the required written report. The Organization therefore argues that the Claimant did not violate Rule 1.1.3.

The Organization asserts that it is inconceivable that the Claimant could have reported the injury before he actually did so. The Organization points out that a number of Awards have held that not all injuries immediately manifest themselves, and that reporting such injuries when they are manifested is not untimely reporting. Moreover, there is no showing that the Claimant intended to disregard or otherwise avoid reporting a suspected injury. The Organization maintains that the Carrier failed to meet its burden of proof in this case.

The Organization then emphasizes that the Claimant was not dilatory in any manner in contacting the Carrier as soon as he was aware that he had been diagnosed with back spasms. The Organization points out that the Claimant could have waited until the following morning to advise the Carrier of his situation, but he instead called the Carrier only minutes after returning home from the hospital on the evening of May 17.

The Organization insists that until he saw the doctor, the Claimant was not aware that he would be advised to take a day off work to rest his back. The Organization points out that had no such recommendation been made, the Claimant would have reported for duty and nothing would have been made of the incident. The Organization argues that the Claimant exercised reasonable judgment in obtaining medical attention when it was necessary on May 17, 2001, during non-work hours, and he contacted his supervisor immediately upon learning of the need to remain off work the next day. The Organization therefore asserts that the Claimant clearly complied with the Carrier's stated Rules.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The parties being unable to resolve their dispute, this matter came before the Board.

The Board reviewed the evidence and testimony and finds that the Carrier failed to meet its burden of proof that the Claimant violated Rule 1.1.3 in connection with the injury he sustained on duty on May 16, 2001. The record reveals that on May 16, 2001, the Claimant experienced back pain after welding for a few hours and doing some lifting. His back stiffened up and he had to stop driving at one point that afternoon. On May 17, 2001, the Claimant told his Superintendent that he had taken a pain reliever before attending a safety meeting that morning. Subsequently that day, the Claimant went to see the doctor. When he returned from the doctor, he contacted the Carrier and informed them that he was suffering from back spasms. The record reveals that the Claimant had a pre-existing back condition and dealt with back pain on a regular basis. It is clear that the Claimant was not certain that he had actually sustained an injury on the job until he was diagnosed by his doctor that there was some injury.

The Board recognizes the importance of the Carrier's Rules with respect to promptly reporting an injury. Given the facts in this case, it is clear that the Claimant promptly reported the injury as soon as he was aware that he had been injured. Although the Carrier argues that it is ". . . firm in its belief that the Claimant did know he was injured prior to receiving medical attention. . . ," the record does not support that "belief." The Claimant reported the injury the next day after it had been confirmed by his doctor. He did not even wait until the following day but called on the evening after he had returned from the doctor's office.

The Carrier bears the burden of proof in all discipline cases. In this case, the Board finds that the Carrier failed to meet its burden of proof. Therefore, the claim will be sustained and the formal reprimand will be removed from the Claimant's personnel file.

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 22nd day of September 2005.