

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39621
Docket No. MW-40166
09-3-NRAB-00003-070410
(07-3-410)

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

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
**(Soo Line Railroad Company (former Chicago, Milwaukee,
(St. Paul and Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed under date of August 17, 2006 upon Mr. T. Tisdale for alleged violation of General Code of Operating Rules 1.1, 1.1.3, 1.2.5, 1.2.7 and Core Safety Rules - Rights and Responsibilities in connection with reporting a personal injury that occurred on June 28, 2006, was arbitrary, capricious, excessive and in violation of the Agreement (System File D-21-06-550-07/8-00497 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, this discipline shall be removed from Mr. T. Tisdale’s record and he shall be compensated for any and all lost wages and he shall have all rights and benefits restored that may have been lost as a result of this suspension.”**

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 was dismissed for late reporting of a personal injury and for failing to furnish a statement of the incident as instructed by his Track Maintenance Supervisor on July 19, 2006. At the time of the matters in question, the Claimant had some 17 years of unblemished service. In addition, he had never before sustained a work-related personal injury.

The testimony of the Carrier's main witness and the Claimant was sharply conflicting during the Investigation. The conflict created several issues of material fact which required a credibility assessment by the Conducting Officer to resolve the matters. However, no such assessment appears in the record. Indeed, the Carrier's disciplinary decision was made by a person who was not at the Investigation and, therefore, could not have been in a position to make a valid credibility assessment.

In addition to the lack of a proper basis for resolving credibility in the Carrier's favor, the record provides significant reasons to question the veracity of the Carrier's main witness. A brief review of the facts will illustrate.

The Claimant was operating a front-end loader on June 28, 2006 when he was called to assist in the correction of two sun kinks in Track 6 at Muskego Yard. The work required him to use his loader bucket to bump the buckled rail back into place so it could be secured. Because of cars on Tracks 5 and 7, he had to come at the kinks from an angle and rotate the loader clockwise to bump the rail. It is undisputed that this jostled him around sharply within the cab of his loader despite wearing his seat belt and all required safety equipment. Both locations required multiple bumping movements before the buckles could be corrected. The Claimant reported experiencing back pain and difficulty sleeping to his Foreman on July 3. His supervisor was on vacation until July 5. On July 5, the Claimant verbally

informed his supervisor that his back was still hurting. During their discussion, the Claimant informed the supervisor about the nature of his pain and how it occurred on June 28. The supervisor thereby knew about the injury on July 5, but did not require the Claimant to complete a written injury report. According to the supervisor's testimony, the Claimant informed him that his back was fine and everything was OK. That is why no written report was filed. By July 19, 2006, the Claimant was still experiencing some back pain and wanted to seek treatment. He gave his supervisor a written report that had been prepared with the assistance of another employee who did the handwriting. When the supervisor asked the Claimant for a written statement in addition to the report, the Claimant said he thought everything was in the report. The Claimant did not write out another statement.

The record clearly reveals that the Claimant did inform his Foreman of his back pain. In addition, the Foreman verbally reported the injury to the supervisor upon the supervisor's return from vacation on July 5. The Claimant also verbally reported his injury to the supervisor later that same day. Because of the Foreman's alert, the supervisor was already aware of the general circumstances. The Claimant and the supervisor discussed the matter further. Significantly, as previously noted, the supervisor did not require the Claimant to complete a written report on the prescribed Carrier forms at that time.

Rule 1.1.3 deals with the reporting of injuries and closes with the following sentence:

"Where required, furnish a written report promptly after reporting the incident." (Emphasis added.)

When the supervisor testified as the Carrier's main witness at the Investigation, he denied having any awareness of the Claimant's injury before July 19, 2006. Question 23 and its answer read as follows:

"23. Q. Prior to July 19, 2006, were you aware Mr. Tisdale had sustained an injury on June 28, 2006?"

A. No."

Yet, as previously noted, the supervisor had been informed of the injury by both the Claimant and the crew Foreman not later than July 5, 2006. The supervisor did not acknowledge these facts until later in his testimony.

The issue about the Claimant failing to provide a written statement in addition to the written report he submitted on July 19, 2006 also produced an interesting colloquy in the supervisor's testimony. The additional information the supervisor wanted became a moving target. When initially asked what additional information he wanted, he said he wanted more information about what happened. When it was pointed out that page three of the Claimant's injury report provided that information, the supervisor responded that he wanted information such as, "Temperature and all this and that." When it was pointed out to him that a temperature of 92 degrees was shown on page one of the report, the supervisor then changed to say he was looking for information about who was present. When it was pointed out to him that the names of two witnesses were listed on page three, the supervisor again changed the nature of his information request. At the end of this exchange, the supervisor finally settled on wanting to know information about working distances and which bucket the Claimant had on the loader. There is a significant problem with this. On page 17 of the Hearing transcript, the supervisor admits he never asked the Claimant for this type of information. Without being told what additional information the supervisor wanted, the record does not show how the Claimant could have known what was needed beyond what was already in the written report he had submitted. It appears, therefore, that the Claimant was entirely justified in thinking he had already provided all pertinent information.

After careful review of the record before us, we are compelled to find that the Carrier did not satisfy its burden of proof to establish that the Claimant had violated Carrier Rules and instructions as alleged in the notice of charges. Accordingly, the claim must be sustained. The Claimant must be provided the remedy requested consistent with any limitations specified by the Agreement.

AWARD

Claim sustained in accordance with the Findings.

**Form 1
Page 5**

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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 1st day of April 2009.