

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35970
Docket No. MW-36304
02-3-00-3-537

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis 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 Mr. S. D. Slyder for alleged violation of ‘... Montana Rail Link General Safety Rules 1, 528, 538, 539, 542, 552 and MOW rules 1.1, 1.1.1, 1.1.2, 1.1.3, 1.2.5, 1.2.7 and 1.6 ***’ for allegedly failing to properly report an injury while on duty on November 2, 1999 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File MRL-165 MRL).
- (2) The discipline [five (5) day deferred suspension] imposed on Mr. R. J. LaFlex for alleged violation of General Safety Rule 530 and MOW rule 1.13 in connection with allegedly failing to report an injury sustained by Mr. S. D. Slyder on November 2, 1999 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File MRL-164).
- (3) As a consequence of the violation referred to in Part (1) above, Mr. S. D. Slyder’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.
- (4) As a consequence of the violation referred to in Part (2) above, Mr. R. J. LaFlex’s record shall be cleared of the charges leveled against him and he shall be compensated for any and all wage loss suffered.”

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.

Two claims have been consolidated before the Board. The first is on behalf of Claimant S. D. Slyder, who was dismissed for late reporting of an injury allegedly sustained on November 2, 1999 and thereafter filing a false personal injury report concerning the nature and extent of the alleged injury. The second claim is on behalf of Claimant R. J. LaFlex, Slyder's Foreman. LaFlex was assessed a five-day deferred suspension for failing to report the injury allegedly sustained by Slyder.

At the time of the incident discussed herein, Slyder was a Laborer performing service near Big Timber, Montana. On that date, he reported to LaFlex that he had "tweaked" his back while opening the door on a ballast car. LaFlex asked Slyder whether he thought the injury should be reported, and Slyder responded in the negative. Slyder continued to experience pain throughout the remainder of the shift, but when questioned a second time by LaFlex, he again declined to report the alleged injury.

That evening, Slyder continued to experience discomfort. He stated that he took a hot bath and Ibuprofen to help relieve the pain. The next day, he reported for work and told LaFlex that he was still in pain, but neither employee reported the alleged injury.

Slyder then exercised his seniority and took a Laborer's position in Laurel, Montana. He worked that position until his seasonal furlough on December 23, 1999. Despite the fact that he continued to experience pain in his back, Slyder never informed the Carrier of his alleged injury.

Slyder was recalled to service on March 9, 2000 and worked approximately six days. On March 17, 2000, he visited a doctor. Medical records from this visit indicate that Slyder complained of lower back pain that he began experiencing about five years earlier.

A question on Snyder's medical history directed to the cause of his pain, including specifics as to date, time and place, went unanswered.

Slyder again visited his doctor on March 28, 2000, at which time he was diagnosed as having spondylolysis, which is a defect in the configuration of the vertebrae in the spinal column. Snyder's doctor indicated that the cause of this condition was "probably congenital." His medical records confirm that in 1993 and 1994, prior to his employment with the Carrier, he was diagnosed with spondylolysis.

The next day, March 29, 2000, Snyder notified LaFlex that he would be filling out a personal injury report with the Carrier based on the alleged injury occurring on November 2, 1999. LaFlex in turn contacted Roadmaster T. L. Benson that evening and advised him of Snyder's intentions. On March 30, 2000, the Roadmaster arranged to have the Claimant fill out the proper personal injury forms.

By notice dated April 4, 2000, Snyder and La Flex were instructed to attend a fact finding to determine their responsibility in connection with Snyder's alleged injury on November 2, 1999 which was not reported until March 30, 2000. The instant claims arose after both Claimants were found guilty of the charges leveled against them.

The Organization asserted several defenses to the Claimants' actions in this case. It first contends that the Carrier failed to provide a fair and impartial Hearing. Specifically, the Organization maintains that the Carrier "entrapped" the Claimants by having them testify first before calling the Carrier witnesses.

The Board reviewed this procedural argument and finds it to be without merit. The governing Agreement does not prescribe that witnesses must be called in a certain order. The purpose of the Investigation is to ascertain the facts, and the ultimate burden is on the Carrier to prove its case by substantial evidence, regardless of the order of the witnesses. In that sense, the Claimants' right to a fair and impartial Hearing was not compromised by the order of the witnesses called in this case, nor do we perceive that the Claimants were "prejudged" or "entrapped" at the Hearing.

Turning to the merits, the Board finds that there is sufficient evidence in the record to support the finding that the Claimants were guilty of the charges leveled against them. With respect to Claimant LaFlex, it is clear that he did not comply with Carrier Rules that required him to report Snyder's injury to his Supervisor. Although the Organization contended that Snyder had merely "tweaked" his back, the instructions to employees require that "all injuries, no matter how slight, are to be reported immediately" to management. Moreover, even if Snyder's first report of his injury did not cause La Flex

to report the incident to his Supervisor, then the continuing reports of pain by Slyder unquestionably triggered his responsibility to do so. LaFlex's failure to comply with this obligation was a clear breach of Carrier Rules.

The five-day deferred suspension assessed LaFlex is reasonable under these circumstances. Absent any legitimate reason to relieve LaFlex of his responsibilities under Carrier Rules with regard to reporting injuries, we find no basis to disturb his discipline.

So, too, does Slyder bear significant responsibility for not properly reporting his alleged injury. By not reporting his alleged injury, Slyder deprived the Carrier of the opportunity to timely investigate the incident and to take necessary safety precautions. He also unnecessarily subjected himself to potential aggravation of that alleged injury. Without question, Slyder's actions amounted to a significant breach of his obligations under the Carrier's numerous Safety Rules.

Equally important, the Claimant was aware of pre-existing back problems, but chose to withhold that information from the Carrier. His actions when viewed as a whole were egregious and, as many prior Awards have held, warranted summary discharge. See Third Division Awards 22936, 26232, 26282, 31917; Second Division Awards 11189, 13096.

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 8th day of March, 2002.