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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37265
Docket No. MW-37395
04-3-02-3-427**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Burlington Northern and Santa Fe Railway Company
(former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S suspension of twenty (20) days beginning upon return to full duty] imposed upon Mr. D. L. Lauenroth for alleged violation of Rule 1.6 and Rule 1.2.5 in connection with alleged dishonest behavior and failure to provide factual information on September 13, 1999 in regard to filing of Employee Personal Injury Report on February 28, 2000 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File C-00-S090-2/10-00-0583 (MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, Mr. D. L. Lauenroth shall now have any mention of the discipline removed from his personal record and he shall be made whole for any losses he may have or will suffer on account of this discipline.”

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 established and holds seniority as a CDL Truck Driver on the hump section at the Hobson Yard in Lincoln, Nebraska. At the time of the incident, he had 22 years of service with the Carrier.

Shortly after the start of work on September 13, 1999, the Claimant felt tingling, pain and stiffness in his arm and shoulder. When the Claimant's immediate supervisor inquired about the cause of the Claimant's tingling, the Claimant indicated that he had slept on his arm "wrong." The Claimant was asked if his injury was work-related and he replied that it was not.

The Claimant continued to work for the Carrier without restrictions until October 6, 1999. At that time, the Claimant presented a list of severe medical restrictions to the Carrier that prevented the Claimant from performing the essential functions of his Truck Driver position. The Claimant provided Roadmaster G. Odenbach with medical documentation following each of his visits with his physician. The Claimant underwent an MRI on October 6, 1999 that revealed a herniated disk at C6 and C7. On October 19, 1999, the Claimant underwent surgery to alleviate his pain. On November 23, 1999, the Claimant's attorney advised Claims Representative J. Landon of the Claimant's allegation that he was injured while at work on September 13, 1999.

On February 25, 2000, the Claimant called Roadmaster Odenbach to inquire if the Claimant's attorney had obtained a personal injury report from the Carrier. This was the Carrier's first direct knowledge that the Claimant was asserting an on-the-job injury. The Claimant prepared an injury report on February 28, 2000, claiming that he was injured on the job.

By letter dated February 28, 2000, the Claimant was directed to "Arrange to attend investigation in the Burlington Northern Santa Fe Railroad, Third Floor Conference Room, 201 North 7th Street, Lincoln, NE, at 1000 hours Friday, March 10, 2000, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged dishonest behavior and failure to provide factual information on Monday, September 13, 1999, and in regards to conversation and filing of Employee Personal Injury Report SAF51662, (on) Monday, February 28, 2000. Company's first notice February 25, 2000."

In a letter to the Claimant dated April 20, 2000, Division Engineer T. G. Koeniguer notified the Claimant as follows:

"This letter will confirm that as a result of the Investigation afforded you on March 23, 2000, you are issued a Level S Twenty (20) day Suspension, beginning when you return to full duty for violation of Rule 1.6 (Conduct 4. Dishonest) and Rule 1.2.5 (Reporting) for dishonest behavior and failure to provide factual information, as discovered during the investigation afforded you on March 23, 2000."

The Organization claims that the discipline imposed upon the Claimant was unwarranted, harsh, and excessive. The Organization contends that the burden of proof in a discipline matter such as this is on the Carrier; that burden of proof has not been met. The Organization claims that the Claimant attempted to inform the Carrier that his injury was suffered on the job, but that the Carrier rebuffed this attempt. In addition, the Organization claims that the Investigation was not completed in a timely manner. The Organization argues that the Carrier was on notice as early as November 23, 1999 through the Claimant's counsel that the Claimant was injured while at work. According to the Organization, the Carrier should now be required to clear the Claimant's record of any mention of the incident, to compensate him for all of his lost wages, including lost overtime and to make him whole for vacation, holidays, and seniority.

Conversely, the Carrier takes the position that it met its burden of proof. According to the Carrier, it is clear that the Claimant did not properly notify the Carrier that he was injured while at work. While the Claimant contends that his

supervisor rebuffed him, the evidence adduced at the Investigation clearly shows that at no time prior to February 2000 did the Claimant indicate that he was injured on the job. While his counsel did send a letter to a representative of the Carrier in November 1999, the Claimant did not follow proper notification procedures to alert his immediate supervisor until February 2000. According to the Carrier, a review of the transcript developed during the Investigation leaves no doubt that the Claimant violated the applicable Rules.

In discipline cases, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might or might not have done had it been ours to determine, but to rule upon the question of whether there is substantial evidence to sustain a finding of guilty. If the question is decided in the affirmative, we are not warranted in disturbing the penalty unless we can say it appears from the record that the Carrier's actions were unjust, unreasonable or arbitrary, so as to constitute an abuse of the Carrier's discretion. (See Second Division Award 7325, Third Division Award 16166.)

In the instant case, the Claimant is charged with not properly reporting an on-the-job injury. Rule 1.2.5 clearly provides that "All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager, and prescribed form completed."

After a review of the evidence, the Board finds that there was substantial evidence in the record to sustain the Carrier's position that the Claimant did not promptly report his injury of September 13, 1999. While it is true that a representative of the Carrier did receive a letter from the Claimant's counsel in November 1999, the Claimant's reporting officer was not informed of the claim until February 25, 2000. In the instant case, the Carrier has proven that the Claimant engaged in the violations alleged. See Public Law Board No. 4104, Case No. 76.

In sum, the Board finds that the discipline imposed was reasonable and will not disturb it.

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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 5th day of November 2004.