

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37381
Docket No. MW-37678
05-3-03-3-31

The Third Division consisted of the regular members and in addition Referee Joan Parker 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 [Level S suspension of sixty (60) days and a probation period of three (3) years] imposed upon Mr. J. R. Murphy on November 28, 2001 for alleged violation of Maintenance of Way Operating Rule 1.2.5 in connection with allegedly failing to comply with instructions in reporting a personal injury on January 19, 2001 while assigned as section foreman at Monroe City, Missouri was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement [System File C-02-S090-3/10-02-0109-D(MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, the discipline assessed upon Mr. J. R. Murphy shall be removed from his personal record and he shall be paid for any and all loss of wages and 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.

Claimant J. R. Murphy was regularly assigned as a Section Foreman at Monroe City, Missouri, when the incident involved herein occurred. On January 19, 2001, the Claimant and his crew were taking apart track panels and while using a steel claw bar to pull track spikes, the Claimant noticed a burning sensation in his stomach area and general stiffness. The Claimant did not report the incident to anyone, and he continued to work during the following months. In June 2001, however, the Claimant observed a "bubble" protruding from his stomach area. Again, he said nothing and continued to work even though this "bubble" did not disappear or shrink.

In early November 2001, the Claimant contacted J. Dillingham of the Carrier's Claims Department to inquire how that department handled hernia surgeries. Dillingham told the Claimant that he needed to report his injury and on November 8, also sent a memo to the Claimant's supervisors summarizing his discussion with the Claimant. In the meantime, the Claimant scheduled an appointment with a doctor who, on November 7, 2001, confirmed that the Claimant had a hernia. In explaining the history of his ailment to the physician, the Claimant identified January 19, 2001 as the date "when it all started." At that point, the Claimant completed a personal injury report, which was submitted to the Carrier.

On November 8, 2001, the Claimant was directed to attend an Investigation relative to his failure to promptly report a personal injury that allegedly occurred on January 19, 2001. Following the Investigation, which was held on November 15, 2001, the Claimant was found guilty of violating Operating Rule 1.2.5 (Reporting) which states:

"All cases of personal injury while on duty or on Company property must be immediately reported to the property 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 property manager as soon as possible. The injured employee must also complete the prescribed form before returning to service."

The Claimant was issued discipline in the form of a Level S suspension of 60 days and a probation period of three years. A claim was filed and duly handled on property. The matter was not resolved, however, and the Organization referred the dispute to the Board for adjudication.

The Carrier contends that the Claimant knew that he sustained an injury on January 19, 2001 and had no valid excuse for his failure to immediately report it. If there was any doubt in his mind about his injury, however, it was erased when the "bubble" appeared in June 2001. Moreover, in September 2001, the Claimant had an Employee Interview with his Roadmaster and Division Engineer concerning safety, and again he said nothing about his injury despite his bubble and hernia symptoms.

The Carrier emphasizes that the Claimant understood the Rules about reporting injuries. He had received training on these Rules and had previously experienced three non-reportable and four reportable injuries. But this time, he simply decided to ignore the Rules and wait some ten months from the date of the incident before he spoke up. And even then, the Claimant talked to the Carrier's Claims Representative prior to reporting his injury to his manager.

The Carrier submits that the Claimant made a "conscious decision" to violate the injury reporting Rules. Numerous Awards have recognized a Carrier's right to discipline and discharge employees for failure to promptly report an injury. Given the severity of the Claimant's offense, the Carrier argues that its response was both measured and justified. It therefore urges that the claim be denied.

The Organization contends that the Claimant did not knowingly or deliberately violate Rule 1.2.5. The Claimant simply did not realize until November

7, 2001 that he had a hernia. In fact, it was not until a physician examined him and diagnosed the hernia that the Claimant was able to pinpoint January 19, 2001 as the date on which he probably sustained the injury. Furthermore, the Organization submits that the hernia, in all likelihood, was not the result of any single incident, but instead was a "cumulative type injury," as Dillingham suggested in his November 8 memo.

In support of this position, the Organization points to the Claimant's testimony in which he stated that initially, he "didn't really know what was going on . . ." and he hoped his symptoms would disappear. According to the Claimant, the burning and irritation that began on January 19, 2001, were neither constant nor particularly painful. It was not until November 7, 2001 that the Claimant was aware that he had sustained a personal injury, and as soon as this realization was medically confirmed, he promptly filed an injury report. Given these circumstances, the Organization contends that there was no attempt by the Claimant to deliberately avoid the prompt reporting of his injury, and his claim, therefore, should be granted.

It is undisputed that the Carrier has a valid basis for requiring employees to immediately report personal injuries. Late reporting hinders the Carrier's ability to promptly address hazards in the workplace, interferes with its right to defend itself in a future FELA case, and frustrates its legitimate interest in preventing fraudulent injury claims.

In the instant case, the record amply supports the Carrier's position that the Claimant knowingly violated the Carrier's reporting Rule. The Claimant's only defense is that he did not know for some ten months that he was injured. Yet, he testified that on January 19, 2001, while at work, he experienced a burning sensation in his abdominal area and a general stiffness. While these symptoms did not incapacitate him, they periodically reappeared, and by June 2001, a "bubble" protruded from his stomach. Thus, if he had any prior doubt that he had suffered an injury, by June 2001 the Claimant surely knew that he had a hernia - or some other medical problem that needed to be reported. His failure to tell management was inexcusable.

While the Claimant testified that until November 2001, he "didn't really know what was going on," he also stated: "I didn't know I had a hernia until it had actually developed in my stomach. At the time, it was a small hernia." It is clear, therefore, that the Claimant suspected he had a hernia as soon as he saw the protrusion in his abdominal area, which was in June 2001. Moreover, he also knew that the genesis of the ailment was his work on January 19, 2001. As he testified:

"Q. Do you know what you were doing when you, when you got hurt, Mr. Murphy?

A. Yes, sir. I was taking apart truck panels from a crossing project earlier that year.

* * *

Q. And how can you be sure you are attributing this occurrence on January 19th to this bubble on your stomach later, that happened later in the year?

A. Well, because that's when all the burning and irritation began....

Q. Okay, so when did the burning and irritation start, Mr. Murphy?

A. January 19th."

The Claimant also testified that he was familiar with the procedure for reporting injuries. He had been trained in reporting injuries and, in fact, in the past, he had experienced three non-reportable and four reportable injuries. When asked when he reported his prior injuries, the Claimant replied, "Immediately."

Numerous Awards have upheld discipline and discharge based upon a failure to promptly report an injury. In Third Division Award 33382, for example, the Board upheld the dismissal of an employee with 28 years of service after concluding

that he had made a "conscious decision" not to report the first knowledge of injury. In Third Division Award 35711, the Board wrote:

"Although the Claimant admitted that he 'felt pain' in his lower back commencing March 26, 1998, he did not inform his supervisor of that on-the-job injury until five days later. The Rules for which the Claimant was cited are clear and unambiguous.

In these circumstances, the Claimant did not report his injury 'by the first means of communication,' nor did he report the injury 'immediately to the proper manager.' There is no question that the Claimant's failure or refusal to properly report the March 26, 1998 injury constitutes a violation of Rule 1.1.3 and 1.2.5."

The aforequoted language is equally applicable to the instant case. The Claimant felt a burning sensation on January 19, 2001 while working in the yard. His failure to report his injury for ten months gave the Carrier good cause to impose a 60-day suspension and three-year probation.

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 24th day of February 2005.