

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37581
Docket No. MW-38437
05-3-04-3-390

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Montana Rail Link, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline [removed from service on October 3, 2003 and subsequent ten (10) working day suspension without pay] imposed upon Mr. S. L. Johnson for alleged violation of Montana Rail Link General Code of Operating Rules 1.2.5 and 1.2.7 in connection with alleged failure to report an injury immediately was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MRL-189-O).
2. As a consequence of the violation referred to in Part (1) above, Mr. S. L. Johnson's record shall now ‘. . . be immediately cleared, without impairment. Restoration of loss is to include, but not limited to, wages loss, overtime opportunities lost, promotion opportunity and all fringe benefits lost such as insurance, railroad retirement contributions, etc.’”

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.

By letter dated August 18, 2003, the Claimant was notified to attend a formal Investigation to determine the Claimant's responsibility, if any, in connection with the alleged injury that he sustained on or about April 15, 2003, with the Carrier first becoming aware of this on August 11, 2003. After a postponement, the Hearing was conducted on September 8, 2003. On October 3, 2003, the Claimant was notified that as a result of the Investigation, he had been found guilty of violating General Code of Operating Rules 1.2.5 and 1.2.7, and he was being assessed a suspension of ten working days. 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 there is no merit to the instant claim, and it must be denied in its entirety. The Carrier argues that there is substantial evidence that the Claimant did not properly report his alleged on-duty injury, and the Rules require immediate reporting of any on-duty injury to one's supervisor. The Carrier maintains that the Claimant's F-27 report on August 11, 2003, was the first time that the Carrier received information from the Claimant about his alleged April 15, 2003, injury.

The Carrier insists that there can be no doubt that the Claimant's failure to timely and properly report an alleged personal injury violated Rules 1.2.5 and 1.2.7. The Organization, in fact, does not dispute the Claimant's failure to comply with the Rules. Instead, the Organization disputes the timeliness of the Carrier's August 18, 2003, notice of charge letter.

The Carrier maintains that the Claimant's testimony about the events of April 15 tangibly indicates that he knew he had been injured on that date. Even if the Carrier were to believe that the Claimant was unaware of his injury until he

received the MRI report on June 11, 2003, then the Claimant should have promptly filed the required report at that time. The Carrier points out that although the Claimant asserted that he assumed the Carrier would be aware of his injury through reports from his doctor, the Claimant acknowledged that he knew that he was required to fill out the necessary forms when a personal injury occurs. As for the Claimant's assertion that the effects of "heavy medication" prevented him from completing the personal injury report, the Carrier emphasizes that this did not prevent the Claimant from continuing to communicate with his attorney and with the Carrier's Claims Department to find out how he would be paid for any required surgery.

The Carrier argues that the Claimant has no legitimate excuse for failing to comply with his obligations under Rule 1.2.5, and he admitted as much during the Investigation. The Claimant's experience level, in addition, does not excuse him from knowing and complying with all the Rules. The Carrier further asserts that the Claimant's failure to advise the Carrier of his alleged personal injury until nearly four months after that injury purportedly occurred was a blatant violation of Rule 1.2.7. Withholding information concerning the Claimant's alleged injury deprived the Carrier of the opportunity to conduct a timely investigation into the cause of the Claimant's alleged injury and thereby engage in preventive measures, if appropriate, to protect other employees. The Carrier contends that this conduct is reprehensible and certainly deserving of the ten-day deferred suspension imposed upon the Claimant.

Addressing the Organization's argument that the Carrier violated the time limit provisions of Article 13, the Carrier maintains that the Organization erroneously imputes "first information" to the Carrier of the Claimant's alleged injury in several ways. The Carrier emphasizes that on April 14 and 15, the Claimant reported to his supervisors only that he was feeling sore; the Claimant never indicated that he had suffered an on-duty injury, and he even told his supervisors that the soreness was related to his earlier off-duty injury. The Carrier asserts that it cannot be deemed to have knowledge of an alleged injury at a time when the Claimant was not aware of one.

With regard to the Claimant's assumption that his doctors were keeping the Carrier informed of his status, the Carrier similarly asserts that it rightfully

believed that the Claimant's continued inability to work was the result of his prior off-duty injury. The Carrier further emphasizes that the Claimant's assumptions about what the Carrier did or did not know are completely irrelevant and do not trigger any time limit obligations under Article 13.

In connection with the correspondence sent by the Claimant's attorney to the Carrier's Claims Department, the Carrier argues that any information furnished by the Claimant's attorney does not satisfy the Claimant's personal obligation to report his alleged injury under the Rules. The Carrier additionally points out that the information it received was not specific and often was contradictory. Moreover, the information furnished directly by the Claimant was contradictory to the information provided by his attorney to the Claims Department. After the Carrier informed the Claimant's attorney that the Claimant never had reported an on-duty injury to the Carrier in April 2003, the attorney thereafter transmitted a copy of an F-27 report, dated August 6, 2003, to the Carrier, which was received on August 11. This report was immediately passed to the Chief Engineer's office, at which time the Carrier first became aware, for the purposes of Article 13, that the Claimant allegedly suffered an on-duty injury.

The Carrier maintains that any reasonable reading of Article 13 would provide that before the seven-day time limit begins to run, the information must become known to a Carrier officer who has the authority to invoke the disciplinary process. The Carrier points out that, otherwise, mere knowledge by any Carrier employee, including the Claimant's fellow BMW-represented employees, arguably could be attributed to the Carrier and trigger Article 13's time limits. The Carrier insists that this is not what the parties intended when negotiating this Rule, and Article 13 never has been applied in such a manner. The Carrier argues that it did not have first knowledge of the Claimant's alleged on-duty injury until the F-27 report reached the Chief Engineer's office on August 11, so the fact-finding notice issued on August 18 was in compliance with the requirements of Article 13.

The Carrier ultimately contends that there is substantial evidence in the record to support the charges for which the Claimant was disciplined, and the instant claim therefore should be denied in its entirety.

The Organization initially contends that the Carrier failed to schedule a hearing within seven days of the date it first received information of the Claimant's on-duty injury, as required by Article 13 of the parties' Agreement. The Organization maintains that contrary to the Carrier's assertion that it first received information of the Claimant's injury on August 11, the Carrier actually had first information of this injury no later than June 23, 2003. The Organization points to June 23, 2003, correspondence between the Claimant's attorney and the Benefits Coordinator which documents that the Carrier was provided with information of the Claimant's injury. Moreover, on June 27, 2003, the Claimant's attorney again informed the Carrier of the Claimant's on-duty injury. Subsequent correspondence between the Carrier and the Claimant's attorney also references the Claimant's April 15 on-duty injury.

The Organization argues that the record clearly confirms that the Carrier was informed and unquestionably was aware of the Claimant's on-duty injury as early as June 23, 2003, yet the Carrier chose not to direct the Claimant to attend an Investigation until August 18, 2003, approximately 55 days after it first received information regarding the Claimant's on-duty injury. Even assuming that the Claimant did not properly report his injury to the Carrier, which the Organization adamantly denies, the record unquestionably shows that the Carrier was fully aware of the Claimant's injury well prior to August 11, 2003.

The Organization then emphasizes that it is well established, through a number of Awards, that where time limits are specified in an Agreement, all parties must strictly adhere to them, and failure to do so is considered a fatal procedural error. In this matter, the Carrier unquestionably was in violation of Article 13's time limits, and the instant claim therefore should be sustained.

Turning to the merits of the dispute, the Organization contends that upon returning to duty on April 14, 2003, after being physically unable to perform his duties for an extended time period because of injuries suffered during an automobile accident, the Claimant made several references to his supervisors about pain and soreness that he was experiencing in his neck. The record demonstrates that on April 15, 2003, the Carrier relieved the Claimant from his regular duties and assigned him to less strenuous activity. On April 16, 2003, the Carrier removed the Claimant from duty pending another medical evaluation, which revealed that

the Claimant had suffered a herniated disc in his cervical spine. The Organization asserts that based on these facts, it is inconceivable that the Carrier was not aware of the Claimant's medical condition.

The Organization goes on to emphasize that on July 30, 2003, through a letter from his attorney, the Claimant filed an "official" injury report with the Carrier. The Organization insists that the record undeniably demonstrates that the Carrier was notified of the Claimant's on-duty injury on June 23, June 27, and again on July 3, 2003. The Organization asserts that the Carrier is asking the Board to correct its mistakes and overlook its blatant violations of the Agreement. The Organization maintains that the Carrier was aware of the Claimant's injury for approximately 55 days prior to issuing the Notice of Investigation, thereby violating the time limit set forth in Article 13.

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 we conclude that there is sufficient evidence in the record to support the finding that the Claimant was guilty of violating the Carrier's Operating Rule which requires the immediate reporting of any injury on duty. The record reveals that the Claimant was injured at approximately 10:45 A.M. on April 15, 2003. The Claimant did not file the appropriate injury report known as the F-27 until August 6, 2003, nearly four months after the accident. Although the Claimant asserts that he was not initially sure that he had been injured on April 15, 2003, there were subsequent letters from his attorney which made it clear that the Claimant was considering what occurred on April 15, 2003, to be an injury on the job. The attorney's letters were confirmed by the filing of the F-27 form on August 6, 2003. That late filing was a clear violation of the Carrier's Rules. Consequently, the Claimant subjected himself to discipline.

The Organization contends that the discipline is not appropriate because Article 13(a) states that a fact-finding is required and that the Claimant must be

charged within seven days of the date after the first information is received by the Carrier that the Rules had been violated. The Organization claims that the several letters that were sent by the Claimant's attorney in the months prior to August constituted that first information, thereby requiring the Carrier to issue a Notice of Investigation at that time. The Board finds, however, that the information furnished by the Claimant's attorney to the Claims Department did not satisfy the Claimant's obligation of reporting his injury under the Rules with the F-27 form. That form puts his immediate supervision on notice that he was injured on the job. As stated above, that F-27 form was not filed until August 6 and it was not received by the Carrier until August 11, 2003.

The Board finds that because the Notice of Investigation was issued on August 18, 2003, it met the requirements of Article 13. The previous letters sent by the Claimant's attorney to the Claims Department did not constitute the appropriate notice to the Carrier to trigger the requirements of Article 13. Once the Claimant filed his F-27 form, the seven-day requirement set forth in Article 13 commenced and we find that the Carrier issued the Notice of Investigation within the appropriate period of time on August 18, 2003.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case was assessed a ten-day deferred suspension for his failure to promptly report an alleged injury on the job in violation of the Carrier's Rules. That type of a violation often leads to termination or a much longer suspension. Given the seriousness of the Rule violation, the Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it issued a ten-day suspension to the Claimant in this case. Therefore, the claim will be denied.

AWARD

Claim denied.

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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 August 2005.