

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37584
Docket No. MW-38043
05-3-03-3-425**

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
(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 [five (5) calendar day suspension effective immediately] imposed upon Mr. M. S. Volden under date of May 10, 2002 for alleged violation of General Code of Operating Rules 1.1.2, 1.1.3, 1.2.5, 1.2.7, and 1.6 and Safety Instruction General Rules E, I, O and 45 in connection with alleged failure to prevent personal injury on April 9, 2002 and alleged late reporting of an injury that occurred on April 9, 2002 was arbitrary, capricious, excessive, discriminate and in violation of the Agreement (System File D-31-02-550-03/8-00431 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, all reference to this discipline shall now be removed from Mr. M. S. Volden’s record and he shall be compensated ‘. . . for all lost wages, including but not limited to all straight time, overtime, paid and non-paid allowances and safety incentives, expenses, per diems, vacation, sick time, health & welfare and dental insurance, seniority and any and all other benefits to which entitled. . . .’”**

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.

At the time of the incident, Claimant M. S. Volden had approximately 11 years of seniority within the Maintenance of Way Department. On the date in question, April 8, 2002, he was working with temporary Foreman D. A. Blim as a Track Laborer headquartered in Hastings, Minnesota. They were lubricating switches using a hand-type pressure sprayer to apply liquid graphite. During this process, the Claimant reached into the bed of the gang truck for the sprayer, which unexpectedly discharged and sprayed graphite on the Claimant's ear and hard hat. Apparently, some drops of graphite also landed on the Claimant's earplugs, which he was wearing around his neck.

The next morning, April 9, the Claimant was working under the supervision of Track Inspector S. Burshiem. At around 9:00 A.M., Burshiem noticed blood flowing from the Claimant's ear, and he recommended that the Claimant seek immediate medical attention. Burshiem drove the Claimant to his headquarters whereupon the Claimant used his personal vehicle to drive to the Allina Medical Clinic. At that facility, he was examined by Dr. C. Butler who found that the Claimant had sustained an "abrasion of the left external auditory external canal." Dr. Butler further determined that the injury was "probably work-related due to use of the earplugs."

After receiving medical attention and obtaining prescribed medication for his ear, the Claimant returned to duty at his headquarters and continued to perform his regular duties as a Track Laborer. The Claimant made no written report of his injury until April 17, 2002, when he met with Track Maintenance Supervisor E. C. Selchert, who gave him the forms to complete.

By letter dated April 19, 2002, the Claimant was notified to attend an Investigation on May 1, 2002 for the purpose of developing the facts and placing responsibility, if any, in connection with the Claimant's alleged failure (1) to prevent the injury that he sustained to his ear and (2) to timely report that injury. On May 10, 2002, the Claimant was found guilty of the charges and assessed a five calendar day suspension, which was challenged by the Organization. The claim was processed and ultimately denied following a conference held on April 22, 2003. Thereafter, the Organization submitted the claim to the Board for adjudication.

The Carrier contends that the Claimant had a full and fair Hearing and that the evidence supported both the finding of guilt and the discipline imposed. The Claimant failed to inspect his ear protection and used contaminated earplugs in violation of General Operating Code Rules 1.1.2, 1.6, and Safety Instruction I, O, and 45. Additionally, he admitted that he did not report his injury on April 9, 2002 and thereby violated General Code of Operating Rules 1.1.3, 1.2.5, 1.2.7, and General Safety Instruction E.

According to the Carrier, the Claimant knew that he was required to submit a written report immediately following his injury. Blank injury forms were available at his headquarters, but he never asked for one until April 17, 2002. In the Carrier's view, the Organization's argument that the Claimant received no training on injuries and how to report them is without merit and contrary to the Claimant's testimony that he had previously reported an injury.

The Carrier further contends that the evidence established the Claimant's responsibility for using a contaminated pair of earplugs and for failing to inspect the ones he used on April 9. In this regard, Messrs. Blim and Burshiem testified that fresh earplugs were available, and the Rules prohibited the Claimant from reusing earplugs that he had worn the prior day. Moreover, Track Maintenance Supervisor

Selchert testified that if the Claimant had replaced his contaminated earplugs as he should have, the injury never would have occurred.

As to the Organization's argument that the Claimant's supervisors knew of his injury, the Carrier submits that regardless of what the supervisors knew based upon their observations on April 9, the Claimant was required to follow the Rules regarding immediate submission of a written report following an on-the-job injury.

Based upon the credible evidence in the record, including the Claimant's admissions, the Carrier contends that the Claimant violated important and well-known Rules. Moreover, the penalty assessed was neither arbitrary nor capricious, but rather, a fair and reasonable response to the Claimant's infractions.

The Organization contends that the Claimant was denied a full and fair Hearing because the disciplinary decision following the Hearing was rendered by an official other than the Hearing Officer. The Organization further submits that the Carrier failed to meet its burden of proving that the Claimant violated any Rules regarding prevention of injury and reporting of injuries. In fact, Selchert's assertion that the Claimant could have avoided the injury by inspecting his worn earplugs and taking a fresh pair was based upon personal opinion rather than probative evidence.

With respect to the Claimant's alleged failure to report his injury, the Organization submits that three supervisors were aware of the Claimant's medical condition, but failed to question or instruct him in regard to completing injury forms. The Organization argues that there is no question that the Carrier was aware of the situation, and the Claimant should not bear full responsibility for the failure of his supervisors to deal with his injury. This contention is buttressed by the fact that the Carrier failed to provide proper training and guidelines to both supervisors and employees in connection with the completion of accident and injury reports. In this regard, the Organization asserts that Messrs. Blim and Burshiem, as well as the Claimant, testified that they were not trained in how to fill out an injury form. Given this testimony, and the fact that the Claimant immediately completed an injury report after Supervisor Selchert gave him the form, the Organization contends that there was no basis for the Carrier to impose any discipline.

Having reviewed the record at length, the Board finds that the Claimant had a full and fair Hearing. He received the required notice of the charges, had Organization representation, and exercised the right to present witnesses on his own behalf and to cross-examine those of the Carrier. Furthermore, the Hearing was conducted in a fair and impartial manner. While the Organization argues that the Claimant's due process rights were violated because the Hearing Officer did not issue the discipline, this argument is rejected. There is no evidence in the record proving that the Hearing Officer did not make findings of fact. Moreover, there is also no evidence demonstrating that anyone raised this alleged procedural deficiency during the appeal process while the case was handled on the property.

Based upon the credible and largely uncontested evidence in the record, the Claimant sustained a preventable injury and then delayed in making a timely report of the incident. Undisputedly, the earplugs he was wearing around his neck on April 8, 2002 were contaminated when liquid graphite accidentally splattered on them. When Dr. Butler examined the Claimant on April 9, he determined that the bleeding in the Claimant's ear was the result of his wearing contaminated earplugs, which were the ones that the Claimant used the preceding day. The Claimant should have inspected his earplugs after the graphite sprayed on his ear and helmet and, in this case, he certainly should have used fresh ear protection. In these circumstances, he had no valid reason to wear a used pair of earplugs, particularly since unworn earplugs were readily available at headquarters in Hastings. By failing to inspect and discard his defective earplugs, the Claimant violated Safety Rules the purpose of which is to prevent employees from injuring themselves and others.

The Claimant's failure to promptly submit a completed injury report was also a violation of the Carrier's long established Rules on the reporting of accidents and injuries. The Organization's contention that the Claimant was never trained in how to file an injury report was undermined by his testimony that on a prior occasion, he did, in fact, submit a written injury report. Furthermore, the testimony of some witnesses that they were not taught how to fill out an injury report was not significant because the task of filling out an injury form is so basic that formal instruction is hardly required. But in any event, the Claimant confirmed that he passed the test wherein such reporting requirement was explicitly set forth. Additionally, the fact that the Claimant never asked any supervisor to assist him in

completing the form, and was able to complete the paperwork immediately upon getting it on April 17, 2002, also undercuts the Organization's argument on this issue.

It is clear that the Claimant simply neglected to submit an injury report in violation of the Carrier's Rules which state that employees who are involved in accidents or who sustain injuries must promptly file written reports. Blank injury forms were available at the Claimant's headquarters, and there was no valid reason why the Claimant did not submit a report until more than one week after the April 8 incident.

Regardless of whether the Claimant knew immediately that the graphite irritated his ear, once he was examined by Dr. Butler the next day, there was no doubt that he had sustained an on-the-job injury that had to be reported to the Carrier. Although the Organization contends that the Claimant was blameless because Messrs. Blim and Burshiem knew his circumstances, their knowledge of the incident did not relieve the Claimant of his duty to file a written report. General Code of Operating Rule 1.2.5 states:

"All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed."

Contrary to the Organization's suggestion that the Claimant's superiors should have made certain that he filed the required documentation, they were not responsible for ensuring the Claimant's compliance with established work Rules. Regardless of the fact that supervision knew the Claimant had injured his ear, the Claimant was required to adhere to the Rule that obligates every employee to promptly file a written report of all accidents and injuries. The Claimant has not offered a compelling reason as to why he neglected to file such a report until more than one week had elapsed. As was held in Public Law Board No. 5206, Award 11:

"The prompt reporting of on-duty injuries in the railroad industry is a given. Few would dispute that a carrier needs the earliest possible notice of such events so that it may arrange for appropriate medical treatment of the injured employee, investigate the injury-causing

event quickly, correct any dangerous condition that may exist and minimize potential liability.”

The same point has been made in numerous other arbitration Awards in the railroad industry. See, for example, Public Law Board No. 6041, Award 2 and Public Law Board No. 2995, Award 64.

Given the determination set forth above, it is the further holding herein that the discipline imposed on the Claimant was neither excessive nor arbitrary. The Claimant could have avoided his injury had he inspected and discarded his earplugs and instead used new earplugs rather than those he was wearing when the graphite splattered. He was familiar with the Rules regarding prompt reporting of work related injuries, and the Organization has not cited any mitigating factors that would justify a reduction of the Claimant's five-day suspension. While the Organization asserts that the penalty imposed was unduly harsh, the Carrier was within its rights in fixing the length of the Claimant's suspension at five days, and it may not be found that said suspension constituted an abuse of managerial discretion.

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 August 2005.