Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38956
Docket No. MW-39156
08-3-NRAB-00003-050660
(05-3-660)

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The dismissal of Mr. H. Ryan on July 29, 2004, for alleged violation of Maintenance of Way Operating Rules 1.2.5, Personal Injuries and Accidents - Reporting following a formal investigation on July 8, 2004 concerning charges of alleged failure to properly report a personal injury on February 27, 2003 and alleged misrepresentation of facts in a Claims Department report on September 29, 2003 and in an interview with Division Engineer R. Roskilly on June 3, 2004, was arbitrary, capricious and in violation of the Agreement [System File C-04-D070-38/10-04-0324(MW) BNR].

(2) As a consequence of the violation referred to in Part (1) above, Mr. H. Ryan shall receive the remedy prescribed by the parties in Rule 40(G)."

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 at the time of his dismissal was a Machine Operator with a seniority date of March 21, 1977. He had also held the jobs of Welder and Laborer. On February 27, 2003, he was operating a Ballast Regulator that collided with a Hy-rail Truck. The Claimant acknowledged that he was at fault in the accident by signing a waiver. He tested positive in a drug and alcohol test administered following the accident and was suspended subject to the condition that he accept treatment in the Employee Assistance Program. He successfully completed rehabilitative treatment through the EAP.

By letter dated March 4, 2004, from the Corporate Medical Officer, Medical and Environmental Health, the Claimant was informed that the Carrier's Medical Department had "reviewed your medical information and you are being released with restrictions." The letter stated that the Claimant must arrange for a return-to-duty drug and alcohol screen by March 10, 2004.

A Fitness for Duty Recommendation form assessing the Claimant's functional ability was read into evidence at the Investigation and listed the Claimant's Activity Level as follows: frequent stooping, bending, or twisting; frequent climbing a ladder or scaffold; frequent working on unprotected heights; occasional lifting up to 60 pounds; occasional overhead lifting of up to 40 pounds; and occasional crawling.

It is division policy to interview employees who have been given a return to work, and Division Engineer R. L. Roskilly interviewed the Claimant on June 3, 2004. In the course of the interview the Division Engineer informed the Claimant that he had a return-to-work medical report that said that the Claimant had medical restrictions. He asked the Claimant what his medical restrictions were and what they were from. The Claimant told the Division Engineer that he had been involved in an accident on February 27, 2003, that involved a Ballast Regulator that

he was operating and a track inspector pickup. The Claimant stated that he was taken to the hospital after the accident but, at that time, did not believe that he was injured.

About three weeks later, he told the Division Engineer, he started feeling some neck pain and some back and shoulder pain. He could not remember when he first saw a doctor for the pain, he stated, and the Division Engineer had him call the doctor's office for this information. The Claimant was informed that he saw the doctor on July 31, 2003. Through further discussion of the accident and its aftermath, the Division Engineer learned that the Claimant had not filled out an injury report. Although the Claimant stated that he thought that the Roadmaster filled one out, there was no personal injury report on file for the Claimant, and the Division Engineer had the Claimant complete an Employee Personal Injury/Occupational Illness Report at the end of the interview.

By letter dated June 11, 2004, the Carrier notified the Claimant to attend an Investigation to be held in Centralia, Illinois, on June 17, 2004, "for the purpose of ascertaining the facts and determining your responsibility, if any, with your alleged failure to properly report a Personal Injury and your alleged misrepresentation of facts concerning the alleged Personal Injury that was reported by you, to the Claims Department on September 29, 2003, that you alleged happened on February 27, 2003, as was disclosed in an interview with Division Engineer, Rollie Roskilly on June 3, 2004." As a result of postponements the Investigation was not held until July 8, 2004.

Following the Investigation the Carrier, by letter dated July 29, 2004, notified the Claimant that as a result of a formal Investigation concerning his failure to properly report a personal injury and his misrepresentation of facts concerning the personal injury reported by him to the Claims Department on September 29, 2003, that he alleged happened on February 27, 2003, "you are dismissed from employment of the Burlington Northern Santa Fe Railroad, for violation of Maintenance of Way Operating Rules 1.2.5, Personal Injuries and Accidents - Reporting." The letter also stated that "[i]n assessing discipline, your previous record was taken into consideration."

The Organization, by letter dated September 9, 2004, of Vice General Chairman D. Willing appealed the decision, contending that it should be overturned

for the following reasons: 1) the charges were not proved; 2) the evidence showed that the Claimant reported his personal injury upon realizing that it was a personal injury; 3) there was no dishonesty; 4) the Investigation was not held in a timely manner because the Claims Department knew of the injury on September 29, 2003; 5) "[t]he investigation does not have any rule violations;" 6) the Claimant complied with all instructions from the Roadmaster, the Medical Department, and all other Carrier Officers; 7) Division Engineer Roskilly did not know about the injury because of a lack of communication between the Medical Department and the Engineering Department; 8) the discipline of dismissal was harsh.

The Carrier, by letter dated November 2, 2004, of General Manager F. D. Clifton, in response to the appeal, stated that the Claimant was given a fair and impartial Investigation and that his dismissal was fair and proper.

The Organization, by letter dated December 20, 2004, of D. D. Joynt, General Chairman, appealed the decision of the General Manager to uphold the dismissal of the Claimant. The General Chairman asserted that his review of the transcript and exhibits clearly showed that "the dismissal is excessive and that the Carrier has failed to prove the charges" against the Claimant. He noted that the dismissal letter stated that the Claimant violated Maintenance of Way Operating Rule 1.2.5 but that "this Rule was not listed in the notice of investigation nor was it ever read into or referred to during the investigation." As a result, the General Chairman argued, the Carrier failed to give the Claimant "an opportunity to address the charge during the hearing."

The General Chairman also discussed some of the factual elements of the case and argued that they showed that the Claimant was honest, that he did not know that he was hurt until some time after the accident, and was not aware that his injury was from the accident until his visit to the doctor. Citing transcript references, the General Chairman also argued that the Medical Department was aware of the Claimant's medical condition and work restrictions and had cleared him to return to work without another medical examination and with his current restrictions. The General Chairman suggested that because Division Engineer Roskilly was not the Division Engineer for the area where the accident occurred, he may not have been aware of what actually occurred and the injuries that the Claimant was being treated for while off duty.

The Carrier, by letter dated February 1, 2005, of its General Director Labor Relations, denied the Organization's December 20, 2004 appeal. The basis of the denial is found in the following paragraph of the General Director Labor Relations's letter:

> "The record contains direct evidence that the Claimant violated Maintenance of Way (MOW) Operating Rule 1.2.5 - Reporting. The record clearly shows the Claimant failed to timely report a Personal Injury to his neck and back that allegedly occurred on February 27, 2003 and that the Claimant misrepresented the facts concerning that Personal Injury in an interview that took place with Division Engineer Rollie Roskilly on June 3, 2004."

The remainder of the General Director Labor Relations's letter goes on to detail the bases of the Carrier's determination that the Claimant violated MOW Operating Rule 1.2.5 and misrepresented the facts in an interview with Division Engineer Roskilly.

Before addressing the merits the Board will consider the Organization's procedural arguments. The Board agrees with the Carrier's position that the notice of Investigation adequately informed the Claimant of the alleged violation that was being investigated. In the Board's opinion any reasonable person would have known exactly what was being investigated after reading the letter instructing the Claimant to attend the Investigation. Perusal of the transcript, moreover, shows that the Claimant and the Organization fully understood what was being investigated and were in no way handicapped in presenting their defense based on ignorance of the purpose of the Hearing.

On the other hand, however, good practice dictates that when a particular Rule is alleged to have been violated, a copy of the Rule be introduced as an exhibit to the transcript or at least be read into the record. See, for example, Third Division Award 31299. In that case among the procedural objections raised was the failure of the carrier to cite in the letter of charges the particular Safety Rule that the claimant was alleged to have violated. The Board rejected the argument, stating as follows:

"There is sufficient precedent to reiterate the Carrier's option of not citing specific Rule(s) violations in advance of the Hearing, but rather introducing them at the Hearing and disciplining the employees accordingly. Given the cases which support this view, the fact that the Hearing officer read the Safety Rules into the record cannot be deemed evidence that the Hearing was not conducted in a fair and unbiased manner."

In this case the Carrier neither cited the Operating Rule relied on, nor introduced or read it into the record. It should have done at least one of these. Nevertheless in the absence of a showing of resulting prejudice to the Claimant or citation of any precedent upholding the reversal of discipline for such reason, the Board will not disturb the discipline on the basis of the failure of the Carrier to cite, read, or introduce a copy of the Rule into the record.

The Carrier has not specifically responded to the procedural argument made in the Organization's first appeal letter dated September 9, 2004, that the Investigation was not held in a timely manner because the Carrier knew of the Claimant's injury on September 29, 2003. An argument by the Organization based on timeliness in a discipline case is clearly an affirmative defense for which the burden of proof is placed on the Organization. The only references in the record to the September 29 claim are the cursory mentions of it in the notification letter to the Claimant regarding the Investigation and in the post-Investigation decision letter notifying him of his dismissal. The record is completely silent about the nature of the claim filed by the Claimant on September 29, 2004, or what transpired in the processing of the claim. The Organization has not sustained its burden of proving its timeliness defense.

With regard to the merits, the Board carefully reviewed the record in this case and studied the arguments of the parties and the precedents cited. We find that there is substantial evidence of a violation by the Claimant of MOW Rule 1.2.5 but that the Carrier has not proved by substantial evidence that the Claimant misrepresented the facts regarding his alleged personal injury in an interview with Division Engineer Roskilly.

Although MOW Operating Rule 1.2.5 was not made part of the record, the Organization has not challenged the statement in the Carrier's appeal answer dated

January 25, 2005, that "MOW Operating Rule 1.2.5 requires that the employee 'immediately' file a written report for any on-duty or on-company-property personal injury." In the present case it is not disputed that at least as of July 31, 2003, the Claimant was aware that his alleged injury was caused by the accident of February 27, 2003, that he had on company property. Yet he did not fill out and sign a report of an on-duty injury until June 3, 2004. None of the arguments made by the Organization to excuse his failure to file an Employee Personal Injury/Occupational Illness Report for an on-duty or on- property injury until so long after the Claimant's knowledge of his injury can stand up to analysis.

The Organization argues in its appeal that the Claimant reported the accident immediately, filled out some paperwork at that time, and "felt that all paperwork had been completed [on] account he had reported this to Roadmaster Quinn and paperwork was completed at that time." The obvious question, however, is how could he possibly have believed that he filled out a report for an on-duty injury at the time of the accident if he did not know that he was injured on duty until he saw the doctor five months later? The explanation offered by the Claimant and the Organization for his failure to complete and turn in to the Carrier the form required for reporting an on-duty injury is simply not credible.

It is clear, moreover, that the tribunal below credited the testimony of Roadmaster Quinn that the Claimant never reported an injury to him, but, on the contrary, stated that he was not injured. The investigating tribunal did not accept the testimony of the Claimant that three to five weeks after the accident he came in and spoke with Roadmaster Quinn, told him that he (the Claimant) was feeling some discomfort and was going to see the doctor, and asked if he should fill out a personal injury report before he left. The Board notes that the Claimant's testimony that he came in and spoke to the Roadmaster about his injury is contradicted not only by Roadmaster Quinn's testimony, but by Division Engineer Roskilly's testimony that the Claimant told him that he called in but did not come to the Roadmaster's office. The Board finds ample basis in the record for finding that the Claimant neither completed nor made any effort to complete, an employee personal injury report of an on-duty injury prior to June 3, 2004.

It is extremely important that personal injuries be reported promptly for protection both of employees and the Carrier. Prompt reporting of injuries increases the probability of timely and effective treatment for the protection of the

injured employee and enables the Carrier to act swiftly to identify and remedy dangerous conditions and prevent further accidents that not only can harm employees but expose the Carrier to liability. It also permits the Carrier to investigate the incident before memories are dimmed and evidence lost should an FELA or other claim later be filed.

Even if we accept the Claimant's version of the facts, the very latest time that he should have filled out an Employee Personal Injury/Occupational Injury Report was on July 31, 2003, or as soon thereafter as he could make his way from the doctor's office to the Carrier's office to report an on-duty injury. His failure to do so until many months after that date was a clear and serious violation of MOW Operating Rule 1.2.5, Personal Injuries and Accidents - Reporting.

The dismissal letter, however, cited not only the violation of Rule 1.2.5 as the basis for dismissal but the Claimant's "misrepresentation of facts" concerning his alleged personal injury. It is not clear from the dismissal letter what alleged misrepresentation of facts the Carrier was relying on in support of its dismissal action, but this was clarified in the Carrier's letter of February 1, 2005, in answer to the Organization's appeal. That letter states that "the Claimant misrepresented the facts concerning [his alleged] Personal Injury in an interview that took place with Division Engineer Rollie Roskilly on June 3, 2004."

The Carrier's letter of February 1, 2005, goes on to detail what in its opinion constituted misrepresentation of facts. According to the letter "the Claimant was not injured," from which it follows that all statements by him to Division Engineer Roskilly indicating that he was injured were misrepresentations. Thus the letter asserts, "According to medical authority an injury, such as the Claimant's alleged neck and back injury, should have been apparent to the Claimant within the 72 hours specified by the revised PEPA Policy."

Absolutely no medical evidence was presented at the Hearing supporting the Carrier's assertion that neck and back injuries, such as those alleged by the Claimant, should have been apparent to the Claimant within 72 hours after the accident. The Carrier has the burden to prove misrepresentation on the part of the Claimant. It does not meet that burden by unsupported assertions of medical facts. If the Carrier wishes the Board to find that symptoms of neck and back injuries will generally manifest themselves within 72 hours after a triggering event such as a

vehicular collision, it must provide the Board with credible medical evidence supporting such a finding. The record in this case contains no such evidence.

The Carrier also argues that the Claimant's assertion that he did not file an on-duty injury report because he was unaware that he was hurt until some time later is a misrepresentation because he provided inconsistent testimony concerning the date when he became aware that he was allegedly injured. The inconsistency, according to the Carrier, is that in answer to one question at the Investigation he stated that he informed the staff at the hospital that he felt "stiff," but later testified that it was from three to six weeks later that he felt significant discomfort.

The Claimant's testimony about stiffness was that he told the nurse at the hospital, when she asked if anyone was hurt, that he "felt some stiffness," but did not think that "it was any big deal just a sudden jolt." No hospital records were introduced into evidence to contradict the Claimant's testimony of what he told the nurse in the hospital. No Carrier witness was present when the Claimant was interviewed by the nurse. The Claimant also testified that three to six weeks later he began to feel pain and discomfort. The Board does not find any necessary contradiction between that testimony and the Claimant's earlier testimony that he "felt some stiffness" immediately after the accident. His testimony can reasonably be interpreted as describing a progression of his symptoms over time.

It is unusual that someone who claims to have been injured on February 27, 2003, should not have gone to see a doctor until July 31, 2003, even making allowance for the fact that the Claimant may have had to wait some time to get an appointment. The delay, however, does not necessarily indicate that the Claimant was not injured. The long delay would certainly suggest that his injuries were not very serious or painful. But he could have had a low level of pain and discomfort that persisted for a long enough period of time so that he finally decided to go see a doctor.

The undisputed fact that cannot be swept under the rug is that the Carrier's own Medical Department found sufficient symptoms in the Claimant to place him under medical restrictions limiting him to occasional lifting of up to 60 pounds, occasional overhead lifting of up to 40 pounds, and occasional crawling. Those restrictions are consistent with someone with back and neck injuries. There is no evidence that prior to his accident the Claimant had any medical work restrictions.

Nor is there any evidence that he was involved in any accident or suffered any trauma following his on-duty accident. These facts lend credibility to his claim that he sustained personal injuries in his on-duty accident of February 27, 2003.

In addition, in the Investigation, when Division Engineer Roskilly was asked on cross-examination whether the Claimant was "straight forward and honest towards, and helpful in answering your questions," he answered, "As far as I know, yes." The Board, for the reasons discussed, finds that the Carrier has not established by substantial evidence that in an interview by Division Engineer Roskilly the Claimant misrepresented the facts concerning his alleged on-duty personal injury of February 27, 2003.

The Carrier rested its dismissal of the Claimant both on his failure to report his alleged injury of February 27, 2003, promptly and on his alleged misrepresentation of facts concerning the injury to Division Engineer Roskilly. The Carrier established the first ground for its dismissal action by substantial evidence, but not the second ground. The violation that the Board has sustained was a serious one for which, under the circumstances of this case, the Claimant was properly subject to substantial discipline. The Board is not convinced, however, that the Carrier would have decided on dismissal as the penalty but for the additional alleged offense of misrepresentation. Because the Carrier failed to prove the charge of misrepresentation by substantial evidence, its dismissal action will not be upheld.

The Claimant is to be offered reinstatement with seniority unimpaired but without backpay. See Third Division Award 29424.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of February 2008.