

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 3-38960
Docket No. MW-38777
08-3-NRAB-00003-050192
(05-3-192)

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

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(PARTIES TO DISPUTE: (
(Soo Line Railroad Company (former Milwaukee,
(St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [ten (10) working day suspension immediately effective on March 18, 2004] imposed upon Mr. M. S. Volden for alleged violation of General Code of Operating Rules 1.1.3, 1.2.5, 1.2.7 and Safety Instruction General Rule E in connection with alleged late reporting of an injury that occurred on February 4, 2004 was arbitrary, capricious and in violation of the Agreement (System File D-04-04-550-01/8-00456 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, but lost as a result of Carrier's arbitrary, capricious, and excessive discipline in suspending claimant for ten (10) days.”

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.

On February 4, 2004, the Claimant, a 12-year railroad employee, was a Section Laborer on the Tuesday through Saturday crew in St. Paul, Minnesota. His Foreman was R. Sather. His Supervisor was M. Olson. He was assigned to clear snow and ice from on and around power switches on the tracks at Hoffman Avenue. In performing the assignment he repeatedly struck frozen rocks and ice with a shovel and a bar, causing him to feel severe pain traveling up from his left elbow to his shoulder. He had injured his left elbow 15 months earlier, resulting in tendinitis and continuous pain in his left elbow, for which he had been taking Ibuprofen since that injury. He also endured severe pain in the arm the following week when he was working as a Flagman in extreme cold weather.

The Claimant did not report the injury to his Supervisor until February 20, 2004, when he came to his Supervisor and told him that he was injured. The Supervisor asked the Claimant if it had to do with his previous injury and the Claimant said that the pain was in his elbow and that it had worked up to his shoulder. They discussed whether the injury was reportable or if it was related to the previous injury. The Supervisor told the Claimant that he could not coach him in how to fill out the report, but that if the injury was caused by a different incident to fill out the report that way. The Claimant acknowledged that he was aware of the Carrier's Rules and policies regarding the proper reporting of injuries. The Personal Injury Report filled out by the Claimant on February 20 gave the

"Incident Date" as 2-4-04 and was checked "Yes" in answer to the question, "Are you reporting an injury?" The "injury/illness" was described as "left elbow and shoulder very pained limiting motion activity."

Asked whether he advised his Foreman on February 4 that he was injured, the Claimant stated, "I believe I mentioned it to him." A coworker of the Claimant's testified that on February 6, 2004, he was in the lunchroom with the Claimant, and the Claimant winced as if he were in pain. The coworker asked him what was wrong and the Claimant said that his shoulder was bothering him. The coworker offered the Claimant Aleve tablets for the pain, but the Claimant declined them, saying that he was going to take Ibuprofen later. The Claimant acknowledged that he did not notify his Supervisor that he felt that his shoulder had been injured at work until approximately two weeks later. The Supervisor testified that he asked the Foreman if he had received an injury report from the Claimant, and that the Foreman said no.

The Supervisor testified that they had a safety and health meeting in St. Paul on Wednesday, February 18 and that the Claimant was at the meeting. On February 19, the Supervisor stated, he (the Supervisor) was at Duluth, Minnesota. The Claimant went to the doctor on Tuesday, February 17 in the afternoon.

The Claimant was asked at the Investigation why he waited from February 4 to February 20 to report the accident and stated that he was taking Ibuprofen and "trying to stay away from the Doctor thing." He added, "I'm sure that is what he would be prescribing for me, so I just kept pounding down that Ibuprofen." The Claimant went to the Allina Medical Clinic in Cottage Grove, Minnesota, on the afternoon of February 17, 2004, for treatment of his injury. A medical report form filled out by the doctor who saw him gave a diagnosis of left rotator cuff tendinitis and restricted him to lifting up to ten pounds occasionally and no overhead reaching with the left arm. To the question "Work related?" the doctor checked "Unknown/Undetermined." As treatment he prescribed Ibuprofen and three to four weeks of physical therapy.

Following the March 5 Investigation, Service Area Manager M. S. Hanson, by letter dated March 18, 2004, notified the Claimant that his review of the transcript

revealed that testimony presented during the Investigation clearly established the Claimant's responsibility in connection with the charges. "The transcript clearly shows," the letter continued, "and by your own testimony, that you failed to report your February 4th injury until February 20th, even after seeking medical attention on the 17th of February." The Claimant was assessed a ten working day suspension for violation of General Code of Operating Rules 1.1.3, 1.2.5, and 1.2.7, and Safety Instruction General Rule E.

The Carrier contends that the evidence supports the discipline imposed. It notes the Claimant's acknowledgment that he was aware of the Carrier's policy requiring prompt reporting of injuries. It cites his testimony in which he explained that he was just "trying to stay away from the Doctor thing." The Carrier argues that by not reporting his injury, the Claimant prevented the railroad from inspecting and correcting conditions that may have been unsafe for other employees. In addition, the Carrier asserts, the Claimant may also have exacerbated his injuries by not taking advantage of the medical treatment available to him through the Carrier. The Carrier falls under the FELA, it points out, where it may be held liable for fault-based injuries arising within the scope of railroad employment, and, it asserts, the industry is very strict about prompt reporting of injuries so that dangerous conditions can be mitigated or eliminated. The Carrier contends that the discipline assessed in this case was lenient and well within industry norms for the kind of violation committed. It requests that the claim be denied.

The Organization asserts that "[t]here is no dispute that Claimant Volden sustained an injury on February 4, 2004 or that the Claimant did not become aware that the injury was not attributable to his recurring tendinitis until February 17, 2004 or that he reported this injury to Supervisor Olson on February 20, 2004." Further, according to the Organization, there was no set procedure for adhering to the General Code of Operating Rules or the General Safety Rule that the Claimant was charged with violating.

The Organization notes the testimony of the Claimant that not every single bump, scrape, nick, or bruise requires that an accident report be filled out. The Organization argues that the Claimant at first thought that his shoulder pain was connected to a previous injury to his elbow and that it was only on February 20 that

he decided that the pain in his shoulder was not an extension of the tendinitis in his elbow. At that time, the Organization asserts, after speaking with the Supervisor, the Claimant immediately completed an injury report.

The Organization contends that the facts, as described above, establish that the Carrier's decision to impose any discipline in this case, especially a ten-day suspension, was arbitrary, capricious, and in violation of the Agreement. The Carrier simply did not prove undue delay in reporting the injury, the Organization insists. It is mere speculation or conjecture, the Organization argues, to assume that because the February 20 injury report pertained to an incident that occurred on February 4, the Claimant did not timely report his injury. Further, the Organization contends, even if the Carrier proved delay in reporting the injury, the circumstances surrounding the injury and the reporting thereof make the degree of discipline imposed arbitrary, capricious, and excessive. The Board has long held that the purpose of discipline is to rehabilitate, correct, and guide employees, the Organization argues, and a ten-day suspension of an employee with nearly 14 years of otherwise satisfactory service under the circumstances of this case serves no purpose other than to punish.

The Claimant's previous injury was to his elbow, causing tendinitis of that part of his arm. His shoulder was not involved. The present injury, although including his elbow, also involved the Claimant's rotator cuff in his shoulder, a distinctly different part of his arm and body. In addition there was a distinct supervening event which caused the pain to extend to the shoulder, where it had never previously existed, and to limit motion in his shoulder, also a new symptom. It seems to the Board that a reasonable person should have understood long before the expiration of 16 days, between the date of the injury and the date it was reported, that the severe pain in the Claimant's shoulder with limitation of motion was a different condition than the pain in his elbow, especially in light of the distinct supervening event of February 4, 2004.

The Organization argues that employees do not customarily report every nick, scrape, and bump. Without commenting on whether employees should or should not report such incidents, the Board notes that this was not a case of an apparently minor nick or scratch. According to the Claimant's injury report the

injury caused him "extreme pain" which he "somehow endured" as it continued into the next week when he was working as a Flagman in subzero temperatures. He also stated that "numerous times" during the night the pain would wake him up. Further, the injury report also refers to a limitation of motion in the injured arm.

From the Claimant's injury report it is clear that he was aware that the pain he was enduring came from the "jarring shock of repeatedly hitting the frozen rock" with a bar and a shovel in performing his work assignment of clearing snow from on and around the power switches on February 4. A reasonable person experiencing the severe pain described by the Claimant, with limitation of motion in his left arm, and aware of the applicable Rules requiring the reporting of injuries, would not have waited 16 days to report the injury that the Claimant sustained on February 4, 2004.

The Claimant acknowledged his awareness of these Rules. The Rules required immediate reporting of any injury. An injury means that someone has suffered physical harm or damage. The Claimant knew at the time that it happened, or certainly within hours thereof, that the work he did in clearing the snow and ice from the switches was causing him severe pain in his left shoulder area and limiting his ability to use his left arm. In other words, he knew that he had been injured at work on February 4. The applicable Rules, of which he was admittedly aware, required that he immediately report his injury. His failure to do so was a violation of the Rules. The fact that he had previously suffered an elbow injury was beside the point. This was a new work-related event that had damaged another part of his body and that had to be reported to management in order to comply with the Rules.

Nor did the Claimant provide any explanation for waiting from February 17 to February 20 to report his injury after seeing a doctor for his condition on February 17. The Claimant did not deny that he attended a safety and health meeting together with his Supervisor on February 18. Yet he did not mention the injury to his Supervisor until February 20. The Organization asserts, "Apparently, on February 20, 2004, Claimant Volden decided that the pain in his shoulder was not an extension of the tendinitis in his elbow and, after speaking with Supervisor Olson, immediately completed an injury report." However, the injury report itself,

which was completed on February 17, 2004, shows that the Claimant was aware that the supervening event of February 4 was causing the pain and limitation of motion in his shoulder. To have this knowledge and fail to report the injury was a clear violation of the Rules cited by the Carrier in the charge letter.

The Board finds that the violation in this case was clear and that the discipline imposed was not excessive for the Rules violations involved. It is very important that injuries be reported immediately both for the protection of employees, in that they will be more likely to receive necessary treatment promptly, and for the protection of the Carrier in terms of identifying and remedying dangerous conditions and investigating the incident before memories are dimmed and evidence lost should an FELA complaint later be filed. In terms of treatment, for example, who can say whether the fact that the Claimant continued to use the injured arm for 16 days without any medical restriction aggravated his injury and increased the amount of time that the Claimant was unable to perform the full duties of his job?

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 29th day of February 2008.