

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41385
Docket No. SG-41095
12-3-NRAB-00003-090410**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of S. W. Boone, for reinstatement to his former position with payment for all time lost and with his rights and benefits restored, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of dismissal against the Claimant without providing a fair and impartial investigation in connection with an investigation held on February 12, 2008. Carrier’s File No. 35-08-0029. General Chairman’s File No. 08-024-BNSF-20-C. BRS File Case No. 14180-BNSF.”

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 was terminated for a violation of Maintenance of Way Operating Rule 1.2.5, Reporting. Operating Rule 1.2 is titled "Personal Injuries and Accidents" and reads as follows:

"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. A personal injury that occurs while off duty that will in any way affect employee performance of duties must be reported to the proper manager as soon as possible. The injured employee must also complete the prescribed written form before returning to service."

At the time of his termination, the Claimant was a 25-year employee working as a Signal Maintainer on the Chicago Division out of Galesburg, Illinois.

On February 1, 2008, the Claimant submitted an Employee Personal Injury/Occupational Illness Report for torn rotator cuffs in both his left and right shoulders. The Report form has two different sets of boxes to complete, depending on the type of injury suffered. The Claimant filled out both areas. The first box states, simply, "Date of Injury," and is filled in "12/18/7," or December 18, 2007. The other area that the Claimant completed has two boxes. The first asks "If this is an occupational illness rather than an acute injury, when did you first notice symptoms?" It is also filled out "12/18/7." The second box asks "When were you first treated or diagnosed?" That box was completed "1-22-8," or January 22, 2008.

Pursuant to MOW Operating Rule 1.2.5, employees are required to fill out and submit reports for on-duty injuries immediately when they occur. Pursuant to BNSF's Policy for Employee Performance Accountability (PEPA) the reporting time for soft tissue injuries is extended to within 72 hours of the injury:

"d. Employees will not be disciplined for 'late reporting' of muscular-skeletal injuries, as long as the injury is reported within 72 hours of the probable triggering event, the employee notifies the supervisor before seeking medical attention, and the medical attention verifies that the injury was most likely linked to the event specified."

Because the Claimant submitted an injury report on February 1, 2008, for an injury that he identified as having occurred on December 18, 2007, the Carrier charged him with late reporting of an injury. The Carrier considers late reporting of injuries a serious violation of its Rules. Following an Investigation, the Carrier concluded that he was guilty of late reporting and terminated his employment.

The Carrier's position is that the Claimant knew that he was supposed to comply with its policies and procedures about reporting injuries, and he failed to do so. By failing to report his injury immediately, the Claimant denied BNSF the ability to prevent injuries to other employees that could have been caused by the circumstances that allegedly contributed to the Claimant's injury, as described in his injury report. Timely reporting of injuries is a fundamental requirement for the continued safe operation of any railroad. Prior Awards have upheld discipline up to and including termination when an employee fails to promptly report an injury. Under PEPA, two serious Rules violations in a three-year period are cause for termination, and the Carrier acted appropriately when it terminated the Claimant for his second serious Rules violation in three years. In addition, the Organization's procedural arguments are not persuasive. The fact that the same Manager charged the Claimant and conducted the Hearing is not impermissible unless there is a showing that there has been actual bias, prejudice, or unfairness in the process. There has been no such showing in this case, so the procedural objections must be rejected.

According to the Organization, the Carrier violated the Agreement when it failed to provide the Claimant with a fair and impartial Investigation, which was evident when it issued the excessive and unwarranted discipline of dismissal – particularly in light of the Claimant's 25 years of service. First, it was a procedural error for the same Manager to perform multiple roles in this disciplinary action, and the Carrier's decision was arbitrary and capricious as a result. Regarding the substance of the charges, the Claimant was diagnosed in January 2008 with a wear and tear type injury by an orthopedist, and cannot be punished because he did not know where or when it occurred. He reported the injury as soon as he knew he was injured. The Claimant did not initially feel that he had injured himself, and the Carrier cannot prove otherwise. Instead, it assumed that the Claimant knew in December 2007 that he was injured and failed to promptly report his injury. The Carrier's entire case is based on speculation and opinion, which are not adequate bases for discipline. The Claimant should be reinstated to his former position with pay for all time lost and with his rights and benefits restored.

The Carrier terminated the Claimant for violating Rule 1.2.5 because he did not file an injury claim within at most 72 hours of the injury date of December 18, 2007, that is stated on the injury report he filled out. Rule 1.2.5 implicitly assumes that employees know with certainty that they are injured and when the injury occurred. Those two facts are probably not in doubt in most cases. As this case demonstrates, however, sometimes they are, particularly in cases of medical conditions that develop slowly over time. An employee can hardly be expected to file an injury report when he does not realize that he has been seriously injured. The Carrier's action in this case is premised on the assumption that the Claimant knew on December 18, 2007, that he had been injured on duty.

The role of the Board is not to try claims de novo, but to review the on-property proceedings so as to ensure that they comply with the parties' undertakings in their Agreement. The on-property findings should be upheld unless there is no substantial evidence to support them. In addition, the Board should not substitute its judgment for that of the Carrier regarding the level of discipline imposed unless ". . . it clearly appears that the disciplinary action was discriminatory, unjust, unreasonable, or arbitrary so as to constitute an abuse of sound discretion." (See, Third Division Award 374224, quoting Third Division Award 24229.) Accordingly, the Board must act with due deliberation before concluding that the Carrier's evidence is inadequate.

That being said, the evidence in the record developed on the property does not meet the "substantial evidence" standard for concluding that the Claimant knew that he was injured on December 18, 2007, and that his failure to file an injury report was either deliberate or inadvertent. The Claimant testified at the Hearing on the property that initially he did not think that he had done anything more than pull a muscle and that the strain would disappear: "I thought it was a pulled muscle. I wasn't sure of the severity of it and thought it would go away." The Employee Personal Injury/Occupational Illness Report form corroborates the Claimant's testimony. The form has one box for "date of injury" and another box that asks: "If this is an occupational illness rather than an acute injury, when did you first notice your symptoms?" (Emphasis added.) The question distinguishes between an "acute injury" – a single identifiable incident resulting in injury to the employee – and "occupational illness" – a health problem that develops on the job over time. Both boxes were filled out. The next question on the form is "When were you first diagnosed or treated?" That form is filled in "1-22-8," or January 22, 2008. The fact that the Claimant did not seek treatment for more than a month lends credence to his testimony at the Hearing that he did not initially think that he had injured himself on

December 18, 2007. He can hardly be expected to have filled out an injury report within three days of December 18, 2007, if he was not diagnosed until sometime in January 2008.

In the type of heavy physical labor done by Signalmen, the occasional slight strain or pull is all in a day's work, and nothing to be concerned about or to report to the Carrier as a "personal injury." The Carrier recognizes this in providing an exception in its policies by extending the time to report soft tissue injuries to 72 hours: sometimes such injuries do not show up immediately, or they can heal within 72 hours. The Claimant's condition, a torn rotator cuff, can be the result of either a single incident or repetitive stress, where the condition develops over time and cannot be attributed to any single event. This was attested to by the letter from his orthopedist: "The patient works for the railroad. He states his job requires cranking switching machines. There is no question this could be a causal connection if he does a lot of cranking with his arms and shoulders there." In effect, with repetitive stress injuries, it may not be possible to say with certainty, "I was injured on this specific date," or even to know the extent to which the injury is work-related. It may be entirely work-related, or it may be only partially work-related, depending on the activities the employee engages in during his non-work time.

There is no evidence in the record that establishes that the Claimant knew on December 18, 2007, that he had been injured and nothing to establish that, in fact, what happened on December 18 was more than a contributing factor to his medical condition. There is no proof that he realized on December 18, 2007, that he had injured himself that day; the date may only have come to mind at a later point in time, when he searched back in his memory, looking for an incident that triggered the need for him to seek medical treatment. The injury form establishes that he was not diagnosed with the torn rotator cuffs for which he filled out the form until January 2008.

Given the state of the evidence, there was no reasonable basis on which the Carrier could conclude that the Claimant had violated Rule 1.5.2 when he failed to file an injury report on December 18, 2007, or within 72 hours of that date. Accordingly, its decision to terminate him lacked a basis in fact and cannot be upheld. The cases in which the Carrier's decision is found to be "discriminatory, unjust, unreasonable, or arbitrary" are rare, but this is one of them.

The claim is sustained. The Claimant shall be returned to his former position with seniority unimpaired and made whole for lost pay and benefits.

AWARD

Claim sustained.

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 25th day of July 2012.