Award No. 102
Case No. 102

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated February 14, 2011, W. O. Price, Manager Program Construction, instructed L. L. Minges ("the Claimant") to attend a formal Investigation on February 24, 2011, at the Ramada Inn in Nashville, Tennessee, "to determine the facts and place your responsibility, if any, in connection with an incident that occurred at approximately 0730 hours, on January 26, 2011, in the vicinity of Cincinnati, Ohio, when you reported a lower back injury that allegedly occurred the previous day while you were operating your assigned backhoe (BAM 386). Further," the letter continued, "it is alleged you did not provide a written statement of the incident until several days after being verbally requested to do so by your supervisor." In connection with the incident, the letter proceeded, the Claimant was "charged with failure to properly and safely perform the responsibilities of your assignment, failure to follow instructions, and late reporting of an injury. These infractions," the letter proceeded, "appear to be in violation of, but not necessarily limited to, CSXT Operating Rules General Rule GR-2; as well as CSX Safeway Rule GS-5." The hearing was subsequently postponed until the Claimant was medically able to attend the Investigation and was held on August 9, 2011, at the North

Crowne Plaza Hotel in Cincinnati, Ohio.

FINDINGS:

Public Law Board No. 7120, 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.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant, L. L. Minges, at the times here relevant, was employed by the Carrier as an Equipment Operator and operated a backhoe. His date of hire was July 21, 1975. Mike Elandt, Roadmaster, Cincinnati, Ohio, Queensgate Yard, testified that the morning of January 26, 2011, Claimant Minges came to him and said that he needed to get medical treatment for his back. He said, according to Roadmaster Elandt, that he woke up with discomfort in his back "and probably might have hit a pothole or something the day before on the backhoe." The Roadmaster called Mr. W. O. Price, Manager Program Construction, and the Charging Officer in this claim, to inform him of what the Claimant had told him. Mr. Price instructed the Roadmaster to take the Claimant to the hospital emergency room regarding his medical condition.

On the way back to the division office from the hospital to fill out paperwork, the

Roadmaster testified, they traveled the same route as the Claimant had come the day before in returning to the yard with his backhoe at the end of the workday. On the route Mr. Minges pointed out to the Roadmaster a manhole cover protruding a couple of inches above the surface of the roadway in front of a Gold Star Chilli restaurant where he said that he thought that the incident had occurred the day before. Mr. Minges also mentioned that he had prior back problems.

In the division office Mr. Minges filled out a form PI-1A Employee's Injury And/Or Illness Report. Among the pertinent items of information contained in the report were the following. The incident occurred on Dalton Avenue in Cincinnati, Ohio, near milepost BE 2.3 on January 25, 2011, at 4:30 p.m. His occupation is Equipment Operator in the Engineering Department and his supervisor is W. O. Price. There was daylight visibility, cloudy weather, and the "NATURE OF COMPLAINT" was "Low Back Injury." Medical care was provided at Good Samaritan Hospital.

To the question on the form "DESCRIBE MEDICAL /FIRST -AID TREATMENT RECEIVED," Mr. Minges wrote: "X-rays taken. Pain medication injected." In answer to "DESCRIBE THE INCIDENT," Mr. Minges stated, "While driving the backhoe on Dalton Ave. in heavy traffic I hit a bad spot in the road causing the backhoe to bounce 3 or 4 times." To the query "IS THIS A RECURRENCE?" Mr. Minges checked "No." He checked "Yes" in answer to "WILL INCIDENT RESULT IN LOST WORKDAYS?"; and "No" in answer to "WAS ANYONE AT FAULT?" and

"DID DEFECTIVE TOOL OR EQUIPMENT CAUSE INCIDENT?" To the question "LOCATION WHERE EMPLOYEE NORMALLY WORKS," he answered, "Floating (Program Construction)." Mr. Minges signed and dated the PI-1A form, and the Roadmaster signed as a witness.

In the division office, the Roadmaster testified, "there was a couple other people there and we were told that we needed to get a statement from Mr. Minges." Mr. Minges, according to the Roadmaster, "said he don't feel comfortable giving a statement until he talked to his union representative." He was unable, however, to reach any union representative, and the Roadmaster, as instructed by his superior, took Mr. Minges back to the Roadmaster's office.

W. O. Price testified that on January 26, 2011, after the Roadmaster informed him that the Claimant had reported that he was injured the previous day, the Roadmaster gave the Claimant the phone. The Claimant, Mr. Price stated, explained to him that he was driving the backhoe back in from the work site, that he hit a pothole, and that when he got up that morning, he was stiff, and he needed to be taken to the doctor.

After the Claimant had seen the doctor in the emergency room, Mr. Price testified, he spoke to him again by telephone and asked the Claimant what the doctor told him. Mr. Minges, according to Mr. Price, said that the doctor told him that he had strained his lower back and was to take a couple of days off. Mr. Minges further stated, Mr. Price testified, that he already had a back doctor and that the doctor at the emergency room

instructed him to see his back doctor before he returned to work. Mr. Price then asked Mr. Minges if it was okay with him to go back to the office and fill out the necessary paperwork, and Mr. Minges said that it was.

The two rules that Mr. Price charged Mr. Minges with violating provide as follows:

General Safety Rules

GS-5 Reporting Injuries or incidents

A. On Duty Injuries

Any employee experiencing an on-duty injury must report the injury to a supervisor at the time of the occurrence prior to leaving the property on the day of the occurrence so that prompt medical treatment may be provided. A form PI-1A must be completed by the employee reporting the injury.

(Exception: An employee departing the property to obtain urgent medical attention for a serious injury must report the injury to a supervisor and complete the form PI-1A as soon as practicable.)

B. Medical Attention

Employees must immediately notify their supervisor of the decision to seek medical attention as a result of any on-duty injury. This requirement is intended to facilitate work coverage and timely regulatory reporting.

C. Off Duty Injuries

* * *

D. Information concerning injuries

> Employees with knowledge of information concerning an injury or accident to themselves, another or non-employee must report the information to their supervisor at the time of the occurrence so that emergency assistance and proper medical care can be promptly provided.

General Regulations

GR-2. All employees must behave in a civil and courteous manner when dealing with customers, fellow employees and the public. Employees must not:

> * * *
> 4. Be disloyal, dishonest, insubordinate, immoral, quarrelsome, vicious, careless, or incompetent.
>
> * * * , or
>
> 8. Conceal facts concerning matters under investigation.

Mr. Price testified that he charged Mr. Minges with late reporting of the incident because Mr. Minges got hurt on January 25th but did not report the injury until the 26th. He charged him with a violation of General Regulations GR-2, Mr. Price stated, because Mr. Minges refused to give a written statement when requested to do so. According to Mr. Price, Mr. Minges concealed the facts under investigation, failed to follow instructions, and was insubordinate by refusing to make a written statement on the day that he was first asked to do so. Mr. Price identified documentation showing that Mr. Minges was trained in the safety and the operating rules on January 18, 2011.

On January 28, 2011, Mr. Minges gave the following statement regarding the incident:

> On Tuesday, January 25th I was operating a backhoe for CSX and was returning to Queensgate Yards via roadway. About a ½ mile into the trip I hit a bad spot in the road causing the backhoe to bounce and slam me into the seat. I felt a pain in my low back immediately. I took the backhoe on into the Queensgate and parked and headed home. Wednesday morning when I woke up I couldn't straighten up and needed help getting my coveralls on. On the way to work my right leg felt numb and tingly, so when I got to yards I asked the Roadmaster to take me to the hospital.
>
> /s/ Larry L. Minges

Mr. Minges testified that he did not remember refusing to give a statement about the incident, that what he remembered was that he asked to speak to his Union representative. Regarding Rule GS-5, Mr. Minges stated that he did not report the incident on January 25th because "I didn't think that I was hurt." He testified, "I felt some pain at the time but I've bounced around on these backhoes for years and felt pain many times and the next day I was good to go; I assumed that this would be the case on this particular incident."

Asked by the conducting officer, "So you didn't report the injury the day it took place, is that correct?" He answered, "Correct." The hearing officer then asked, "So in summary Mr. Minges on the date and time of the incident they investigated, did you comply with these rules.?" He stated, "I complied with rules as soon as I realized I was injured."

Directing the Claimant's attention to his written statement dated January 28, 2011, the conducting officer asked the Claimant, "You didn't feel that when you were slammed into your seat that was enough for you to report an incident?" He answered, "I've been

slammed in my seat hundreds of times." The conducting officer inquired of the Claimant what he hit with his backhoe. He stated that he hit a manhole cover and that on the return trip from the hospital, he pointed out to the Roadmaster the area where the incident occurred, and there was a raised manhole cover there.

The conducting officer asked the Claimant if the Roadmaster's testimony was true that he told the Roadmaster that he had previous back problems. The Claimant said that it was true. An Employee History document introduced into evidence for Mr. Minges, in the section headed Record of Reportable Injuries, showed three prior injuries including an injury dated January 24, 2007, where he missed one day of work for a lumbar strain.

Permitted to make a closing statement, the Claimant stated that he has been on the railroad since 1975 and knows the rules. He cooperated with everybody and anybody who approached him for forms to be filled out, the Claimant declared, and regarding the written statement asked to speak to a Union representative. He was informed, he asserted, that it was his right to do so. He did not believe that he broke any of the rules that he is accused of, he stated.

The Organization was also permitted to make a statement on behalf of the Claimant. The Organization argues that when Mr. Minges's backhoe hit the raised manhole cover he was slammed into his seat, but, as he testified, he has been slammed into the seat hundreds of times. "Show me a backhoe operator that has never been slammed into a seat," the Organization declares, "and I'll show you a man who's never

done any work on the railroad with a backhoe." Therefore, the Organization argues, Mr. Minges just didn't think it was anything out of the way until he got up the next morning and felt substantial pain, at which time he reported it to his supervisor. If Mr. Minges wanted to be evasive, the Organization asserts, he could have called from home and said that he hurt himself off duty. Regarding the statement requested of Mr. Minges, the Organization contends that he had the right to have a Union representative before he gave a statement. The Organization requests that the charges against the Claimant be dropped.

Following the close of the hearing the Assistant Chief Engineer System Production, by letter dated August 29, 2011, notified Mr. Minges of the Carrier's determination that the hearing was conducted in accordance with his contractual due process rights and that all objections were properly addressed by the conducting officer during the course of the hearing. Regarding the merits, the letter stated as follows:

> Additionally, upon review of the transcript, the facts support and confirm that the Rule GS-5 charge placed against you was valid and proven. Based on the evidence and testimony presented by witnesses, as well as yourself during the course of hearing. sufficient proof exists to demonstrate you are guilty as charged and were in violation of the cited Transportation Operating Rules and Regulations. Therefore based upon my finding of guilt, the seriousness of the offenses, and a review of your personnel file, it is my decision that the discipline to be assessed is a fifteen (15) actual calendar day suspension beginning Monday, September 5,

2011 and ending Monday, September 19, 2011 being first day back to work.

The Board notes that the decision letter dated August 29, 2011, does not mention General Regulations GR-2, which the Claimant was also charged with violating. In addition, the Carrier's post-hearing submission argues only that the Claimant was guilty of violating Rule GS-5 and does not mention GR-2. The Board will therefore proceed on the assumption that the Claimant was found guilty only of violating Rule GS-5 and not GR-2.

The Carrier argues that all of the Claimant's contractual due process rights were protected and that the hearing was conducted in a fair and impartial manner. On the merits, the Carrier contends that it met its burden of producing substantial evidence of the Claimant's guilt. Rule GS-5, the Carrier asserts, states that employees must report on-duty injuries to their supervisor at the time of the occurrence, prior to leaving the property. Claimant violated that rule, the Carrier contends, by leaving work without reporting the injury to his supervisor.

The Carrier notes that, according to the evidence, the Claimant hit a raised manhole while operating his backhoe, bounced in his seat, and was slammed into the back of the seat, feeling pain immediately in his lower back. This was an injury to the Claimant, the Carrier argues, and he violated Rule GS-5 by leaving the property without reporting his injury. The Claimant's assertion that he didn't believe he was injured is not a valid defense, the Carrier contends, because Rule GS-5 specifies that any injury must be

reported to a supervisor. The rule, the Carrier argues, does not give an employee the latitude to decide if he injury is trivial or not. The Claimant, the Carrier maintains, violated Rule GS-5 by taking it upon himself to decide that the injury was not severe enough to require reporting.

The 15-day suspension assessed was appropriate and fully justified, the Carrier argues. Under the IDPAP, the Carrier asserts, the late reporting of an injury is a Major Offense for which dismissal may be assessed for a first offense. Employees have been consistently disciplined with lengthy suspensions for this type of rule violation, the Carrier argues, and the discipline given to the Claimant was not excessive. Considering the Claimant's years of service, the Carrier asserts, the discipline was extremely lenient. The Carrier requests the Board to deny the claim.

As the Board noted in Third Division Award No. 32708, the Awards regarding delay in reporting an injury, in a situation where the employee claims that he was not aware at first that he was injured, go both ways. "Each case is fact specific," the Board observed. There is authority involving these same parties where the Board found that a distinct sharp pain felt in the employee's lower back while performing a task of his job was an injury for which an injury report should have been filled out on the day that it occurred. Third Division Award No. 28357.

Another Third Division case involving these same parties is Award No. 28837. In that case the employee, in carrying a cross tie, felt a "pull," which he described as a "kind

of a shocking sensation go from the lower part of my back down my left leg." He thought that it was not a "major problem" and did not make an oral or a written report of the incident that day. The employee also felt some discomfort when he got home after a long drive but minimized the pain. He reported the incident two days later when he became convinced that he had injured himself. The Board upheld a 15-day suspension of the claimant, explaining its holding as follows:

> Certainly all of us have experienced momentary and fleeting discomfort which would hardly be classified as an "injury" as such, and we cannot state that every instance of slight pain would fall within the immediate notification proscription of the Rule. Nonetheless, when an employee remains silent in such a circumstance, he assumes a risk, and each individual event must be weighed in its own context. Here, the Claimant described something other than a mere trivial jolt to his body. Even if we could justify his silence on May 25, 1989, his continued suppression of the information after the distress continued can hardly be tolerated in light of the rather clear and precise Rule.
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> The letter of charges advised that the Claimant's personal record would be reviewed, and, in fact, it was. The document shows a February 16, 1988 Letter of Reprimand for failure to report an injury. Certainly the Claimant had been forewarned in this type of circumstance.

In the present case the Claimant's written statement of January 28, 2011, describes

an event where he went over an obstruction in the road that caused him to bounce from his seat and then be slammed into his seat, at which time he immediately felt a pain in his back. It is important to note, moreover, that the Claimant acknowledged that he has had back problems. He had also previously lost time from work as the result of on-duty injury to his back resulting in a back strain. Under these circumstances, the Board believes, the Claimant should have taken the incident of January 25th, which involved a forceful blow to his back accompanied by immediate pain, more seriously– especially in light of his history of back problems. In deciding not to report the injury when it occurred, he assumed the risk that it would not heal by itself or eventually disable him from performing his normal duties. For these reasons the Board believes that the Carrier properly charged and found the Claimant guilty of a violation of Safeway Rule GS-5.

There is another consideration that applies in a case of this kind that was well expressed by the Board in Third Division Award No. 28950, also involving these same parties and a late report of an on-duty injury:

> The Board recognizes the need of the Carrier to protect itself against the fraudulent filing of injury claims. One of the ways to assure that on-duty injury claims are legitimate is to have the injury reports filed on the same day the injury occurs. Otherwise an employee could sustain an off-duty injury and file a claim against the Carrier once s/he returns to work. Safety Rule 37 is important and vital to the operations of the Company.

This Board does not for a moment suspect the Claimant of filing a fraudulent report of injury. But the Carrier must apply its rules evenly to all employees. In the past some employees have falsely claimed that off-duty injuries were sustained on the premises. An important means for the Carrier to protect itself against such fraud is to require that an injury be reported to a supervisor at the time that it occurs before the employee leaves the property.

In addition to the fact that discipline was assessed in this case partly on the basis of an erroneous belief that the Claimant had significant, recent discipline on his record, there are strong elements of mitigation in the case. First, the nature of the Claimant's job as a backhoe operator exposed him to frequent bumps and jolts so that the event that caused his injury was not different in kind, as opposed to degree, from what he experienced on almost a daily basis as part of his job. That is not true of many of the reported cases where discipline was upheld for a late report of an injury. Second, the Claimant reported the injury within approximately 15 hours after the event occurred, and a PI-1A report was filled out shortly thereafter. Many of the reported cases in which discipline was upheld involved a much longer time span from the time of the injury until it was reported. Third, the Claimant performed no work from the time of the injury until he reported it and therefore had not aggravated the injury in the interim period. Fourth, there was no evidence of fraud on the Claimant's part. He was able to point out to the Roadmaster on the date that he reported the injury the raised manhole cover which caused the accident.

For the foregoing reasons the Board has decided to reduce the discipline in this case to a five-day overhead suspension effective for a one-year period beginning on the date that the actual suspension assessed by the Carrier began to be served by Claimant Minges. That is more severe discipline than the written reprimand assessed against the claimant before his 15-day suspension in Third Division Award No. 28837, supra, and identical to the discipline assessed by the Carrier against the Claimant in Third Division Award No. 29735 involving these same parties. As previously noted, cases of this kind are fact-specific. Had the Carrier not relied on an erroneous disciplinary record in assessing discipline or any of the mitigating elements listed above not been present, we would here have a different case.

AWARD

Claim sustained in accordance with findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
January 10, 2012