PUBLIC LAW BOARD NO. 4244

Award No. 269
Case No. 276

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:
1.The Carrier violated the Agreement on, August 7, 2001, when it issued the Claimant, Mr. J. Cuevas, a 30-day Record Suspension for alleged late reporting of, and failing to furnishing [sic] information about, an injury; in violation of Maintenance of Way Operating Rules 1.2.5 **Reporting,** and 1.2.7, **Furnishing Information.**
2. As a result of the violation referred to in part (1), the Carrier shall remove the discipline mark from the Claimant's personnel record and make him whole for any time lost." [Carrier File No. 14-01-0170. Organization File No. 10-13I3-0111.CLM].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Joe Cuevas, was a veteran employee of the Carrier, having been first hired on March 3, 1971. He was working as a Trackman in the Carrier's Maintenance of Way Department on May 25, 2001, when he suffered an injury on the job. As he described the injury, he was using a claw bar to pry a lag screw from a road crossing plank, and in doing so he felt a sharp pain in his back.

The record on the property indicates that he did not file an injury report until June 15, 2001. As the consequence, he was sent a notice on June 18, 2001, by Division Engineer B. P. Chatten, to attend an investigation on June 25, 2001,

> "[F]or the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to provide information regarding the reporting of and furnishing information of an alleged injury that was first reported on June 15, 2001, while assigned as Trackman."

By agreement of the Parties, the investigation was postponed until July 13, 2001, and held on that date. A transcript of testimony and evidence taken in that investigation is a part of the record before this Board.

The Claimant testified that he told his Foreman, on May 30, the day following his injury, that he was going to visit a chiropractor, but he did not tell the Foreman that he was injured on the job. He also attempted, several times, unsuccessfully, to contact his Roadmaster, Mr. Angel Alvarez. Not reaching Mr. Alvarez, he called another Roadmaster, Mr. Schoonover, and told him he was going to visit the chiropractor, but again, did not disclose that his pain was the result of an injury at work.

The record shows that May 26 and 27 were weekend days and the Claimant worked on May 28 and 29, and then was off, recorded as unexcused absence May 30 and 31, and June 1. He worked on June 4, but did not report for work after that date. His status was recorded as being on medical leave of absence without pay. On June 11, 2001, the Claimant was notified that he was placed on a medical leave of absence, to expire on July 2, 2001.

The testimony of the Claimant and that of Roadmaster Alvarez are inconsistent with regard to events between June 11 to 15, 2001, but the differences are not critical to the entire picture. The Claimant said he called Mr. Alvarez on June 11, but Mr. Alvarez denies it. On or about June 13 or 15, or perhaps on both dates, the Claimant discussed his injury with Mr. Bob Hosutt, the Carrier's Field Clinical and Rehabilitation Manager. When the Claimant described his inability to obtain lasting relief from the chiropractic therapy, Mr. Hosutt advised him to find a medical doctor of his own choosing. The record is unclear whether this conversation occurred before or after the Claimant filed an injury report.

One thing is clear, however. On June 15, 2001, the Claimant came to Roadmaster Alvarez and asked to fill out an injury report, which was done on that date. He recorded that the injury occurred on May 25, 2001.

Following the investigation on July 13, 2001, the Claimant was issued a Level S record suspension of 30 days for violation of Maintenance of Way Operating Rules 1.2.5 and 1.2.7. These Rules read as follows, in pertinent part:

> [1.2.5] "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."
>
> [1.2.7] "Employees must not withhold information, or fail to give all the facts to those authorized to receive information regarding unusual events, accidents, personal injuries, or rule violations."

That disciplinary decision was appealed by the Organization to the Carrier's highest designated officer. Denied at that level, the dispute was progressed to this Board.

The Organization argues that even if there were evidence to support the charges (but there is insufficient evidence), the discipline is excessive in proportion to the alleged offense. Without being more specific, the Organization also argues that the Carrier failed to comply with Agreement Rule 13, the discipline rule, and Appendix No. 11, three Letters of Understanding which amend Rule 13.

The Carrier rejoins that the evidence clearly shows that the Claimant did not file an injury report until 20 days after the injury occurred, and failed to notify the Carrier that the medical treatment he was seeking had any relationship to his alleged injury. The Carrier points out that the Claimant admitted by his own testimony that he had not complied with Maintenance of Way Operating Rules 1.2.5 and 1.2.7. The Carrier denied the Organization's appeal.

This Board also denies the appeal. The evidence could not be clearer that the Claimant did not comply with Maintenance of Way Operating Rules 1.2.5 and 1.2.7. Rule 1.2.5 requires that injuries must be immediately reported and the prescribed form completed. The modifying adverb "immediately" might be the subject of interpretation in some other instance, but here — the lapse of 20 days — requires no further interpretation; 20 days is not "immediately" under the circumstances of this case.

When the Claimant discussed his intended visit to a chiropractor with a Foreman and a Roadmaster, without mentioning that his need for therapy arose from an apparent on-duty occurrence, he clearly withheld information or failed to give all the facts in connection with a personal injury.

This Claimant was veteran employee who had previously suffered five on-duty injuries between 1980 and 1993. He was not ignorant of the necessity for prompt reporting and medical attention. Rule 1.2.5 is intended to make the employer aware of conditions which might be conducive to injury, for future avoidance, to ensure that medical attention is promptly and properly given to the injured employee, and to preclude worsening of the injury which might threaten the employee's general health and further liability by the employer.

One aspect of the Claimant's defensive posture bears comment. In his testimony, he offered a reason for not more promptly reporting his injury:

> "[I]t would make a black mark against the safety record of injury, plus you get, you know, harassed for being a (inaudible) and turning in an injury, muscle spasm, something like that."

If employees are "harassed" for reporting a personal injury, as the Claimant suggests, it is not surprising that an employee may risk the consequences of failure to report, especially when his injury is perceived to be minor in nature, and one which will heal itself with the passage of time. The Board is not unaware that middle-level supervisors are evaluated, in part, on their ability to control the rate of reportable injuries. This industry, and many others, proudly post signs which read something like this: "This shop has worked __ days without a reportable injury." Certainly, no supervisor wants to see a zero or any other low number in that blank space. Nor is unfavorable attention for excessive personal injuries limited to middle-level managers. Indeed, the Harriman Award is a coveted prize which might be at stake. This does not excuse an employee's failure to promptly report an injury, but the excuse submitted by this Claimant is not the first time it's been offered. Harassment or disapprobation of an injured employee for self-reporting does not encourage compliance with rules such as Maintenance of Way Operating Rule 1.2.5. While such unwelcome criticism might discourage reporting of an on-duty injury, it's unlikely it would have a greater impact on the real injury rate than an employee's personal interest in avoiding pain, risk, and expense. It is this Board's perception that avoidance of injury, rather than avoidance of reporting injury, is a worthwhile objective for the Carrier and the Employees, alike.

The Organization's allegation that the Carrier failed to comply with Agreement Rule 13 and Appendix No. 11 is not detailed in its appeal, but the Board notes the objection raised during the investigation to the introduction of the Maintenance of Way Operating Rules. We have addressed this issue several times before. In Award No. 262 of this Board, we said:

> "When Maintenance of Way Operating Rule (MWOR) 6.3.1 was read into the record, the Claimant's representative objected because this rule was not stated in the notice of charge. This issue has been addressed in Awards of Public Law Board No. 6102, involving the same Carrier and Organization, although a different agreement with different language is there at issue. In Award No. 9 of that Public Law Board, the Board held, 'Employees are deemed to have knowledge of the Rules which govern their employment. If unrelated Rules are raised for the first time during the course of the investigation, there might be merit to the objection, but not in this case.' Further, the Board in the instant case notes that the Claimant acknowledged that he knew and understood the applicable rules."

The Board's opinion with respect to this issue remains the same.

For all the reasons discussed above, the Claim must be denied.

AWARD

Claim denied.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

Thomas M. Rohling, Carrier Member

December 16, 2022
Date