PUBLIC LAW BOARD NO. 4244

Award No. 272
Case No. 281

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 June 14, 2002, when it dismissed the Claimant, Mr. R. T. Begay, from service for allegedly violating Rules 1.2.5 and 1.13 of the Maintenance of Way Operating Rules, when he failed to comply with instruction from his roadmaster and did not report a personal injury.
2. As a result of the violation referred to in part (1), the Carrier shall return the Claimant to service with seniority intact, remove the discipline mark from his personnel record and make him whole for all time lost." [Carrier File No. 14-02-0135. Organization File No. 170-13I3-023.CLMB.]

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. R. T. Begay, was hired by the Carrier on November 13, 1995. He was working as a Trackman and Truck Driver in the Carrier's Maintenance of Way Department on Friday, April 5, 2002, when he suffered a personal injury on the job. The injury was described in the record as a stress fracture of the ring finger metacarpal bone on his right hand.

The Claimant testified that although he felt pain, he did not know he had a fracture. When his discomfort persisted into the weekend, he visited a doctor on Saturday or Sunday (the record is not clear on the exact date and time). Having learned that he had fractured a bone, he called Roadmaster Ronnie Anderson's office on Monday, April 8, 2002, and reported his injury to a staff person, Mr. Anderson not being present at that time.

When his office notified Mr. Anderson of the injury, he contacted the Claimant's Foreman, Mr. Jeff Yazzie. Mr. Anderson did not know how to contact the off-duty Claimant. Although all the precise details do not appear in the record, it appears that a Mr. Reyes contacted the Claimant, and had him call Mr. Anderson. That call was made about 9:00 p.m. on Monday, April 8, the first direct communication from the Claimant to Roadmaster Anderson.

Because of the delay in reporting his injury, Foreman Yazzie and the Claimant were issued a notice of investigation on April 12, 2002, reading as follows, in pertinent part:

> "[T]o develop the facts and place responsibility, if any, in connection with possible violation of Rules 1.2.5 and 1.13 of the Maintenance of Way Operating Rules, . . . concerning your alleged failure to comply with instructions from Roadmaster Anderson on April 5, 2002 regarding injury reporting procedures."

Their investigation was scheduled for May 3, 2002, but postponed until May 17, 2002, by agreement of the Parties. A transcript of evidence and testimony taken in the investigation is in the record before this Board.

Maintenance of Way Operating Rules (MWOR) 1.2.5 and 1.13 read as follows:

> [MWOR 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."

> [MWOR 1.13]. "Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties."

With respect to the above Rules, Roadmaster Anderson's statement in the record reads as follows:

> "My instructions to my employees were to report injuries to me same day as of they have the information. We do not have any choice in covering up injuries. These injuries must be reported and I will start the paperwork the same day that it is reported to me. Those are the instructions to my people." [Transcript page 7].

Mr. Anderson further elaborated on this point at Transcript page 8:

> [Question] "Mr. Anderson, should every little scrape and scratch and mashed finger or something that takes place on property, do you feel it should be reported to the Carrier?"
> [Answer] "By my instructions, yes, it should be reported to me and I would start the paperwork, getting that paperwork taken care of. They will be entered as first-aid injuries, as long as they do not meet the FRA requirements for reporting. . . ."

The Claimant testified that Mr. Anderson had told him and other employees, collectively, at safety meetings, that injuries must be reported immediately. He also admitted that he was injured on Friday, April 5 and did not report the injury until April 8, but contended that he had complied with the Carrier's instructions in this regard. It was his position that he did not realize the injury was serious until the pain persisted into the weekend, he consulted a physician, and learned his hand or finger was broken, after which he promptly notified Mr. Anderson's office on Monday morning, April 8. [Transcript pages 16-17].

As the consequence of the investigation, on June 14, 2002, General Manager Greg A. White advised the Claimant that he was dismissed from the Carrier's employment for violation of MWOR 1.2.5 and 1.13. This decision was promptly appealed to the Carrier's Assistant Director - Labor Relations, denied by him, and thus progressed to this Board.

The Organization argues that the investigation was not fair and impartial because it was conducted by the same officer who had made the determination to issue the notice of charges, enabling him to ask leading questions, control the entry of evidence, and determine what witnesses would be called to testify. Furthermore, it contends, the officer issuing the notice of discipline was provided with input from the conducting officer.

The Carrier rebuts that leading questions were also asked by the Claimant's representative, who also had the opportunity to call witnesses, and to enter such evidence as deemed necessary.

The Board does not find any fatal error in the multiple roles played by the Conducting Officer. It is not at all uncommon in this industry for a charging officer to also conduct the investigation. He may not present testimony, however. Posing a leading question based on one's own knowledge might tread upon the border line which precludes a conducting officer's presentation of testimony, but no such instance appears in this record. The Claimant and his representative were not prevented from entering any testimony or evidence into the record, nor from calling witnesses. The Board also finds no fault in the alleged input of the Conducting Officer in the General Manager's disciplinary decision. The Conducting Officer has the opportunity to observe the demeanor of those testifying, and thereby assess their credibility. True enough, the General Manager may acquiesce in the Conducting Officer's preconceived notion of what discipline should be applied, but how would anyone know if such were the case, without an admission to that effect?

The Organization further argues that the Claimant suffered the injury just before quitting time on Friday, April 5, and was unable to contact a supervisor. He therefore sought medical attention and reported the injury on Monday morning, April 8, well within the 72-hour window for reporting muscular-skeletal injuries in the Carrier's Injury Reporting Policy, General Notice No. 27. That Notice appears in the record, and reads as follows:

> "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."

The Carrier responds this was not a muscular-skeletal injury, but a broken hand or finger, and the Claimant did not call the supervisor before seeking medical attention. The Carrier rejects the argument that the Claimant did not have the supervisor's telephone number, since he called Mr. Anderson on Monday night.

The Board notes that the Claimant talked with a Mr. Reyes on Monday, who instructed him to call Mr. Anderson. It seems likely that if the Claimant did not have Mr. Anderson's telephone number before then, it was given to him by Mr. Reyes. That does not prove that the Claimant already had Mr. Anderson's number, as the Carrier contends. Nonetheless, the record is clear that the Claimant sought medical attention before contacting Mr. Anderson. General Notice No. 27, quoted above, requires that notification of a supervisor is required before seeking medical attention, even if the injury is of a muscular-skeletal nature.

The testimony of the Claimant and Mr. Anderson was inconsistent in the following respect: The Claimant said he did not know Mr. Anderson's telephone number. (Transcript page 18). Mr. Anderson testified that he provided his number to all employees on his territory. (Transcript page 23).

The Board is not persuaded that the Claimant was without means to contact a supervisor. The record indicates that he was observed holding his hurting hand on Friday by Foreman Yazzie, who seemed to show little interest in what was bothering the Claimant. Mr. Yazzie did state, however, that the Claimant told him his hand was hurting. (Transcript page 25). The Claimant could have asked his Foreman whether or how to report the injury, even though he supposed it to be a muscular-skeletal injury at the time. When the Claimant's pain became severe to the degree that he felt the need for medical attention during the weekend, he might have tried to obtain Mr. Anderson's telephone number from Mr. Yazzie or some other source. It seems incredible that he had no means of communication with the Carrier at all. In any event, the record does not disclose any attempt to contact anyone before Monday morning.

The Organization also argues that the Carrier did not produce sufficient evidence to support the charges, and even had it done so, the discipline is extreme, unwarranted, and not justified by the evidence.

The Carrier states that it did prove the violations charged. It states that the record shows that the Claimant injured his hand on Friday and he did not report the injury to a supervisor until

Monday. Furthermore, the Carrier responds, the evidence in the record shows that the Claimant was aware of the proper procedures when any injury occurs, and he did not follow those procedures.

The Board finds that the Carrier has borne its burden of proof that the Claimant failed to comply with Rules 1.2.5 and 1.13. Although it is plausible that the Claimant was not aware of the degree or precise nature of his injury, he was in pain, holding his hurting hand on Friday afternoon before the crew ceased work and returned to its headquarters at Holbrook, at least one hour before quitting time. (Transcript page 21). The Foreman was told that the Claimant's hand was hurting, yet neither of them discussed whether it should be reported to a supervisor or whether medical attention should be sought. The Board supposes that Mr. Yazzie knew how to contact a supervisor. Such would be the normal, practical, reasonable supposition for the transaction of the Carrier's business by a Foreman and his supervising Roadmaster.

Although the Claimant refused to acknowledge violation of the Maintenance of Way Operating Rules he was charged with violating, it was not shown in the record that he was not aware of the requirements of MWOR 1.2.5 and 1.13, nor that these Rules were inapplicable. Rule 1.2.5 requires immediate reporting of all cases of personal injury. The exception to immediate reporting permitted by General Notice No. 27 nevertheless requires that a supervisor be notified before medical attention is sought. Rule 1.13 requires employees to comply with instructions from their supervisors. The Claimant admitted that he was aware that Mr. Anderson had instructed those under his supervision that injuries must be immediately reported.

The Board has previously discussed the importance of Rule 1.2.5, in Award No. 269 of this Board. There we said, "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." The instant case illustrates how an injury thought to be relatively insignificant can turn out to be much more serious. Additionally, as the Carrier points out in this case, prompt reporting permits the Carrier to determine whether an off-duty injury is being fraudulently presented as an on-duty injury. Furthermore, when there is the possibility of defective tools or equipment implicated in an on-duty injury, the device can be promptly inspected and taken out of service if found to be defective.

The Claimant had about 5½ years of service at the time of his dismissal. His record shows only one previous disciplinary entry, a six-month deferred suspension in February, 2000, for failure to properly perform his duties. The Board finds that permanent dismissal from the Carrier's service is unreasonably severe for this type of offense and considering the Claimant's record of only one previous instance of discipline. The loss of work and compensation suffered by this Claimant should be instructive with regard to compliance with the Carrier's Rules.

The Board determines that the Claimant should be returned to the Carrier's service within thirty (30) days after the date of this Award, without pay for time lost, but with his seniority and other rights unimpaired.

AWARD

Claim sustained in accordance with the Opinion.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

Thomas M. Rohling, Carrier Member

January 10, 2023
Date