

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4979

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NATIONAL RAILROAD PASSENGER CORPORATION

AWARD NO. 35

Case No. 35

System Docket No. BMW-E-D-234

STATEMENT OF CLAIM

The Organization contends that the Claimant, Foreman Theodore Carter, in reference to an incident occurring on August 29, 1994, was improperly disqualified from the position of Foreman in all capacities and assessed a ten-day suspension to be deferred for a one-year period. The Organization seeks to have the Claimant's "record cleared and be paid for all lost wages and benefits that would accrue to him".

FINDINGS

The Claimant was subject to an investigative hearing under the following specification:

In that you were the foreman in charge of a gang working on Track #2, MP 131.5, on Monday, August 29, 1994 when you allegedly failed to report an employee's injury to your supervisor. Further, you were the foreman in charge of the injured employee, and allegedly failed to offer professional medical attention to the employee, or investigate the nature or the cause of the injury.

Following the hearing, the Hearing Officer determined the Claimant had violated rules which require prompt reporting of an injury to a supervisor and Rule R of the NORAC Operating Rules which requires inspection of equipment involved in an injury. The Hearing Officer did not support that part of the specification which accused the Claimant of failing to offer professional medical attention. The disciplinary penalty assessed was disqualification from the position of Foreman in all capacities and a ten-day suspension deferred for a one-year period. In assessing the penalty, the Division Engineer referred to "four previous assessments of discipline -- all of which have had safety implications". The Division Engineer also referred to the Claimant's own injury record over a 12-year period; on this point, the Board agrees with the Organization that this is not relevant to the matter here under review.

On August 29, 1994, an employee working under the direction of the Claimant and another Foreman was using an air hammer. According to the employee, the hammer slipped off the spike on which the employee was working and dropped on his toe. Shortly thereafter, the employee brought the matter to the attention of both the Claimant and the other Foreman but declined medical attention at the time, assuming there was no lasting injury.

The same evening, the employee developed more pain in his toe and went to a hospital for treatment. He also notified the Supervisor of Track, who had no previous knowledge of the incident

and who was the person to whom an injury report should have been directed. The charge against the Claimant followed.

Since the Carrier directs that all injuries be reported, the Claimant exercised poor judgment in failing to report the injury to his supervisor, after the employee had made him knowledgeable of the event. However, the employee's initial contention that no medical attention was required could have led to the conclusion that there was no actual "injury".

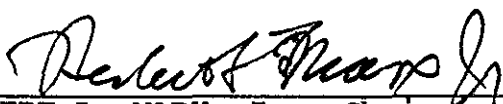
As to inspection of the air hammer, there was no contention that it was defective or inoperative and apparently another employee continued to use it without incident.

Given these circumstances, the Board finds the discipline based on fairly vague proof of guilt and therefore excessive. As to the 10-day suspension, if it was not served, it shall be removed from the Claimant's record; if it was served, he shall be reimbursed for straight time lost during such period.

The disqualification from the position of Foreman was based on the Carrier's analysis of the incident, combined with previous incidents involving safety. At this point, however, the Board finds that the Claimant's permanent disqualification as Foreman is not warranted. The Claimant thus shall not be barred from consideration for Foreman positions which may become available hereafter.

A W A R D

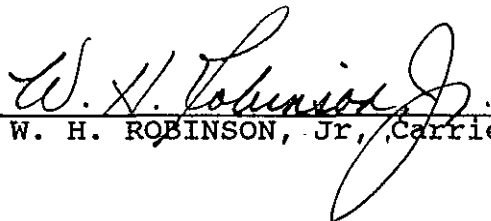
Claim sustained to the extent provided in the Findings. The Carrier is directed to make this Award effective within 30 days of the date of this Award.



HERBERT L. MARX, Jr., Chairman and Neutral Member



B. A. WINTER, Employee Member



W. H. ROBINSON, Jr., Carrier Member

NEW YORK, NY

DATED: 3-13-96