

Award No. 11
Case No. 11

PUBLIC LAW BOARD NO. 5696

PARTIES Burlington Northern Railroad
TO
DISPUTE:

AND

Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- 1) The dismissal of Mr. D. L. Dismuke for his alleged failure to report a personal injury and for his alleged responsibility for this injury was unwarranted and without just and sufficient cause.
- 2) As a consequence of the Carrier's violation referred to above, Claimant should be reinstated to his former position with all rights unimpaired and the charges against him shall be expunged from his record, and he shall be compensated for all wage loss suffered.

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

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Claimant herein was a first-class B&B carpenter. He had been in this position with Carrier for approximately 21 years. On June 29, 1994, while working on a bridge, the incident involved herein occurred at approximately 10:30 in the morning. According to Claimant, while walking across the bridge to perform a jacking operation, he stepped on some chat (ballast) and almost fell. He caught himself but twisted his back in the course of that step, and when he got to the other side, he told the other trackmen who were walking alongside him that he had hurt his back. Claimant continued to work on that Wednesday and went home. He also worked Thursday and on Friday. He then made an appointment with his doctor, since he had considerable pain, and the doctor, a chiropractor, told him that he had a ruptured disk. The weekend in question was the 4th of July weekend, and on the 5th of July, Claimant called his foreman, Mr. Avery, and told him of the back injury. At the time that he talked to his foreman, the foreman gave him the phone number to contact the B&B supervisor, Mr. McCain. He attempted to reach him on the 5th and was unable to do so. He then contacted the supervisor on July 6. Claimant indicated that he was going to take some vacation time and would probably be all right, and could return to work after some rest. Subsequently, he called the supervisor again and asked about the doctor bills which had to be paid. He was told to call the insurance company and thereafter was told that it was necessary to have an accident report filled out. The accident report was actually filled out on July 14, 1994.

The record indicates that Mr. McCain testified that he did not instruct the Claimant to fill out an accident report on July 6, since he indicated that he was going to be on vacation and there may not have been a need for such report. Mr. McCain's testimony is particularly relevant. He stated:

Under the circumstances and the other information I received from Mr. Dismuke at that time, I felt that there was — I agreed with him this was a temporary problem, and after he was off for a few days on vacation, that he would be ready to come back to work. And I did agree, whether it be right or wrong, I did agree with Mr. Dismuke at that time that under the circumstances, there would be no need to fill out any kind of an accident report after the information that I received from him.

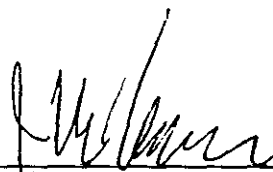
The record also indicates that when Mr. Dismuke, the Claimant, was hired, it was indicated that he needed glasses. There was testimony to the effect that he did not wear glasses at the time that he stumbled over the ballast and incurred the injury.

As the Board views the record of this matter, it is apparent that the Claimant here believed that he might not have to file an injury report. He decided to wait rather than file such a report or even talk to his foreman when the accident occurred. This was done allegedly because he felt that if he reported the incident, he would be taken out of service. The Board cannot credit this point of view. Claimant in this matter was not a neophyte. Furthermore, his record indicates that he had injuries in the past and filled out accident reports and was well aware of the rules.

He should have known that the incident should be reported to his foreman immediately, and the accident report filled out shortly thereafter. In this instance, he did not conform to the company's rules. Therefore, Carrier was correct in its decision that he had violated the rules. In addition, he was at least partly culpable for the incident, since he was not wearing glasses at the time that he tripped. The mitigating circumstance in this matter was the action of his supervisor. It is clear that Mr. McCain indicated to the Claimant that it was alright not to file the accident report on July 6. He attempted to report the matter initially on July 5, when he felt that he had been injured and he had waited the weekend and had not recovered. However, it was due to the supervisor's recommendation that he desisted from following through in filing the accident report. From this series of circumstances, the Board concludes that Claimant was at least partly culpable for the injury and also failed in not reporting the accident immediately to his foreman. However, the late preparation of the injury report cannot be attributed to him. Therefore, he should have been found guilty only for his alleged responsibility for incurring the injury and failing to discuss it with his foreman in a timely fashion. In view of all these circumstances, the Board believes that dismissal in this instance was unwarranted and unduly harsh. It is more appropriate, as the Board sees it, for this employee to be reinstated to his former position with all rights unimpaired, but without compensation for time lost as penalty for his culpability in the entire matter and for his not following the Company's well-established rules.


AWARD

Claim sustained in part; Claimant shall be reinstated to his former position with all rights unimpaired but without compensation for time lost as penalty for his infractions.



I. M. Lieberman, Neutral-Chairman

Carl J. Wexel
Carrier Member


E. R. Spears
Employee Member

Fort Worth, Texas
October , 1995