PUBLIC LAW BOARD NO. 6102

Award No. 16
Case No. 17

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
Burlington Northern Santa Fe Railway
(Former St Louis - San Francisco Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:
1. The Carrier violated the Agreement when on October 5, 1999, Mr. M. D. Lindsay was assessed a Level-S, 20-day suspension for allegedly failing to properly report his alleged hearing loss that occurred in July of 1997, but the Carrier was not made aware of the alleged hearing loss until notified by the Claimant's attorney in 1999.
2. As a consequence of the Carrier's violation referred to in part (1) above, the discipline shall be removed from the Claimant's personal record, and he shall be compensated for all wages lost in accordance with the Agreement."
[Carrier's File 12-00033. Organization's File B-2786.]

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 over the dispute herein.

The Claimant, Mr. M. D. Lindsay, was employed as a trackman at the Carrier's Springfield (Missouri) Rail Complex. He was first hired on December 27, 1994, and his record was clear of any disciplinary entries until the suspension which is the subject of this Claim.

The record indicates that the Claimant became aware that he was experiencing some degree of hearing loss when he was tested in June or July, 1997. The Carrier's Medical Department subcontracts a "hearing van" which periodically visits employment sites and tests employees for hearing loss. The record further indicates that the test results are reported to the Carrier's Medical Department but the Carrier's principal witness, Rail Complex Manager D. E. Hiett, stated that such information is not transmitted from the Medical Department to the Carrier's Maintenance of Way supervisory officers.

The Claimant said that he was given a printout of the test results, showing that he had suffered a significant degree of hearing loss since his employment in 1994. He was subse-

quently sent a questionnaire by the Carrier, in early 1999, with respect to his hearing loss, which he completed and returned to the Medical Department.

After learning that his test showed a loss of hearing, in 1997, the Claimant retained an attorney to represent him. As the consequence, the Carrier's Claims Department contacted Mr. Hiett on September 29, 1999, requesting copies of any reports in his possession pertaining to the Claimant's hearing loss. Mr. Hiett had no such reports, nor did any of his subordinate supervisors. He then interviewed the Claimant on October 4, 1999, and determined that no report had been made up until that time. Mr. Hiett followed up the interview with a letter to the Claimant assessing discipline for certain rule violations. That letter, dated October 5, 1999, reads as follows:

"Maintenance of Way Rule 1.1.3 States:

> Report by the first means of communication any accidents; personal injuries; defects in tracks, bridges or signals; or any unusual condition that may affect the safe and efficient operation of the railroad. Where required, furnish a written report promptly after reporting the incident.

Rule 1.2.5 States:

> 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.

Rule 1.2.7 States:

> Employes 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.

I was informed that BNSF received notice from an outside party that you had allegedly lost hearing due to exposure at work. This was the first notice received by the company that you are claiming your hearing may have been impaired by your job. No report has ever been made by you to appropriate supervisors concerning this alleged loss. Failing to report your alleged loss of hearing is a clear violation of the above rules.

Therefore, you are assessed a level S suspension of 20 days, beginning October 6 and ending October 25, 1999. Your first day back will be October 26. You will be assigned a one year probationary period."

Mr. Hiett stated that he could have assessed a 45-day suspension at Level S, but in view of the Claimant's clear record at the time, he applied a lesser degree suspension. The Claimant's personal record reflects an additional 25-day deferred suspension, which is not alluded to in the disciplinary letter quoted above. It was added by the conducting officer after the investigation on November 30, 1999.

The Parties' Agreement permits an employee to be disciplined without an investigation; however, if an investigation is timely requested, it must be afforded, and a precise statement of the charges must be provided in writing. The Union's General Chairman promptly requested an investigation, which was held on November 30, 1999, following two agreed-upon postponements.

The Claimant admitted to Mr. Hiett, and also acknowledged at the investigation, that he had not rendered an oral nor a written report of his hearing loss, which he attributed to his work in the vicinity of noisy equipment on a tie gang in 1996.

The Claimant's defenses are three-fold. First, he indicated some confusion as to whether hearing loss or impairment is a "personal injury" as contemplated by the Maintenance of Way Rules quoted above. In his October 4, 1999 interview with Mr. Hiett, the Claimant said he felt that "injury" was defined as an event such as a broken limb, a cut, or such like. While such confusion is not entirely unreasonable, however, upon becoming aware of his hearing loss, which may have had a gradual onset, it seems a prudent act to inquire whether job-related hearing impairment constitutes "injury."

Second, it was suggested that since the Carrier's Medical Department had knowledge of the Claimant's hearing impairment, by reason of his hearing van test and its subsequent questionnaire, then that fact would satisfy the requirements of the referenced Rules with respect to reporting. While this conclusion is also not entirely unreasonable on its face, close examination of Rules 1.2.5 and 1.2.7 require reporting on the "prescribed form" to the "proper manager" and "those authorized to receive information." These rules require something more specific from the individual employee than reliance on a third party's report to a Carrier department outside the employee's direct chain of command.

Third, both the Claimant and his General Chairman asserted that other employees did not report their own hearing losses prior to "settlement" for such losses. (While "settlement" was not defined in the record, the Board presumes that such "settlements" refer to agreed-upon compromise payments in satisfaction of lawsuits founded upon the Federal Employers'

Liability Act). Mr. Hiett responded that, to his knowledge, no other employee had failed to file a report of hearing loss prior to filing suit. At the same time, he acknowledged that a report is usually made when an employee first has knowledge of his hearing impairment, which must necessarily become known after the damage has been sustained.

The Claimant, being questioned by his representative, the Organization's General Chairman, stated that he was aware of five employees with hearing loss claims who did not file accident reports. He was unable to name such individuals, however, nor could he offer any proof to support his assertion. Mr. Hiett denied knowledge of any such instances. The Claimant's assertion may well be correct. But even so, this does not excuse his own failure to render the required reports.

The Board finds there was compliance with the applicable provisions of Rule 91, the Discipline Rule, of the Agreement between the Parties. Substantial evidence was adduced at the investigation to support the charges. The 20-day actual suspension is not excessive. However, the Board is troubled by the additional 25-day deferred suspension imposed by the conducting officer after the investigation, leaving the unpleasant implication that it was added because the Claimant asserted his right to an investigation.

The one year of probation has now expired, and with its expiration the deferred suspension is now inactive. If, however, the deferred suspension was activated by a subsequent infraction during that one-year probation, the Board orders that the Claimant be compensated for any lost time within sixty (60) days from the date of this Award, and the deferred suspension be removed from his record. The 20-day actual suspension assessed in Mr. Hiett's October 5, 1999 letter shall stand.

AWARD

Claim sustained with respect to the 25-day deferred suspension, in accordance with the above opinion. Claim denied with respect to the 20-day actual suspension.

Robert J. Irvin, Referee

November 17, 2000
Date