NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 183
AWARD NO. 177

PARTIES TO DISPUTE

CARRIER
Union Pacific Railroad

Carrier's File
1522912

AND

ORGANIZATION
Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File
D-0948U-205

STATEMENT OF CLAIM

1. The level three (3) discipline [five (5) day suspension without pay and a Corrective Action Plan] imposed upon Bridge & Builder (B&B) Truck Driver G.C. Kavanagh for violation of General Code of Operating Rules (GCOR), Rule 1.2.5 (Reporting) in connection with his failure to report an injury is based on unproven charges, unjust, unwarranted and in violation of the Agreement (System File D-0948U-205 / 1522912).

2. As a consequence of Part 1 above, we request that the discipline be reversed, that Mr. Kavanagh be made whole, his record expunged of any mention of this discipline and that he be paid for all straight time and overtime hours he would have worked absent the suspension.

STATEMENT OF BACKGROUND

On some unspecified date in and around March, 2008, Claimant Greg Kavanaugh, a Bridge & Building welder with thirty plus (30 +) years as a Maintenance of Way employee was working as a truck driver on Gang 6841 assigned along with other members of the Gang to clean up a mud slide (Cascade slide) at Oakridge, Oregon. Near the end of the work day in question, Claimant lifted a water hose by himself

weighing approximately one hundred (100) pounds for the purpose of putting the hose away in his truck. Expecting help from a co-worker located at the time nearby the truck to assist him in lifting the hose high enough to put it in his truck but not getting such assistance, Claimant lifted the hose by himself above his head, and put the hose in his truck. In so doing, Claimant noted that he felt a pull in his right arm. Claimant recounted that he massaged and stretched his arm and perceived that what had happened was just another ache he experienced at prior times in the course of performing his duties. According to Claimant, he shook off the incident and continued working for the remainder of the work day. Sometime thereafter, Claimant visited his personal physician, Dr. Matthew Lawrence affiliated with Three Rivers Family Medicine located in Richland, Washington for a general physical checkup and during the checkup Claimant informed Lawrence of the incident with his arm and explained that it was sore. According to Claimant, Lawrence examined his arm and opined that it appeared to be a pulled muscle and that it should heal. However, one (1) year later he visited Dr. Lawrence and informed Lawrence he felt a continuing discomfort in his right arm and asked Lawrence if a pulled muscle should last that long. Dr. Lawrence responded to Claimant's condition by referring him for a MRI test which resulted in a diagnosis of a partial biceps rupture or, in layman's terms, a separation of the muscle from the bone.

The record evidence reflects that based on the MRI results, Claimant submitted a REPORT OF PERSONAL INJURY OR OCCUPATIONAL ILLNESS (Form 52032) dated March 18, 2009. In describing the details of the accident/injury in Section III of the Report, Claimant identified ARASA Supervisor Dick Payne and co-workers Jim Bower, John Shields and Jose Paz as having knowledge of the accident/incident. Claimant also indicated that the next day after the accident/incident occurred, he informed Supervisor Payne that his right arm was sore as a result of the accident/incident. Additionally, Claimant indicated in the report he attributed the cause of the accident/incident in part to the fact that no mechanical lift was available to hoist the water hose into the truck and there was inadequate manpower, a reference to the co-worker who stood by without helping him put the hose in the truck. In Section V of the Report, Claimant described his injury as a torn bicep and his symptoms as being pain, soreness – loss of strength and motion. Claimant also indicated in response to the question of what treatment was given that, surgery was pending.

Although the Report was dated March 18, 2009, Claimant did not submit Form 52032 to the incumbent ARASA supervisor, Rodney Young until March 23, 2009. Rodney Young, in turn, informed Bridge Construction Manager, Chavez on March 23, 2009 that Claimant had submitted Form 52032 reporting a cumulative injury and that he would mail the report to Chavez. As Chavez went on vacation and then was out of town, he did not receive the report until his first day back at work on April 6, 2009. In turn, Chavez faxed Claimant's Form 52032 to Director of Safety Reporting, Brian Rowe in the Claims Department at Omaha, Nebraska. On April 8, 2009 Rowe informed Chavez that Claimant's Report indicated he had not incurred a cumulative injury but rather his injury was a discrete occurrence which required submission of a manager's report. It was

explained that a cumulative injury is one that is sustained over a very long period of time by incurring bumps, bruises, pulled muscles and other such mishaps in the course of performing one's regularly assigned duties, culminating at some point in time in a discernible injury to one's body whereas, a discrete injury, also referenced as a traumatic injury, is sustained as a result of an identifiable and specific occurrence of an accident/incident.

Having determined that Claimant by submission of the Form 52032 was reporting the occurrence of a discrete accident/incident and not a cumulative injury, Carrier issued Claimant a "Notice of Investigation" dated April 17, 2009 requesting his presence at an investigation scheduled to convene on May 7, 2009 in connection with the following charge:

> ***. . . for investigation and hearing on charges to develop the facts and place responsibility, if any, that while you were employed as B&B Truck Driver, on Gang 6841, in Oakridge, Oregon, near Milepost 581, you allegedly failed to report an injury.***

The investigation was held as scheduled and on May 27, 2009, after reviewing the evidentiary record established at the hearing and finding Claimant guilty as charged, Carrier issued Claimant a "Notice of Discipline" consistent with its Discipline Policy assessing Claimant a Level 3 Discipline (5 day suspension without pay, and a Corrective Action Plan) for having violated General Code Operating Rules (GCOR), Rule 1.2.5 (Reporting), which reads in pertinent part as follows:

> ***All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed written form completed.***
>
> * * * *
>
> ***Because railroads are required by Federal regulations to report injuries and occupational illnesses that meet certain medical treatment criteria, employees must report to their manager any medical treatment they receive that was directly related to their injury or illness, including any follow-up visits. * * ****

The record evidence reflects that although Claimant served the discipline assessed, the Organization nevertheless appealed the discipline on Claimant's behalf by letter to the Carrier dated June 15, 2009. As the Parties were unable to reach a mutually agreed upon resolution of the subject claim through handling on the property, the matter comes now before this Board for decision.

ORGANIZATION'S POSITION

The Organization advances three (3) separate challenges, two (2) procedural and one (1) substantive in support of its position the claim should be sustained.

FIRST PROCEDURAL CHALLENGE

The Organization submits Carrier violated Rule 48, the Discipline and Grievances clause of the controlling 2001 Collective Bargaining Agreement, specifically Paragraph (a) by failing to conduct the investigation within the thirty (30) days of learning of Claimant's alleged infraction. Paragraph (a) reads in pertinent part as follows:

> ***Except as provided in Paragraphs (k), (l) and (m) of this provision, an employee who has been in service more than sixty (60) calendar days whose application has not been disapproved, will not be dismissed or otherwise disciplined until after being accorded a fair and impartial hearing. Formal hearing, under this rule will be held thirty (30) calendar days from date of the occurrence to be investigated or from the date the Company has knowledge of the occurrence to be investigated, except as provided hereinafter.***

The Organization posits that Carrier's first knowledge of Claimant's injury was on March 23, 2009 the date Claimant submitted Form 52032 to ARASA Supervisor Young. Even if it were to be assumed that this knowledge did not come to Carrier's awareness until April 6, 2009 when Chavez reviewed Claimant's Form 52032 and then forwarded by fax to Safety Director Rowe, the investigation still failed to fall within the thirty (30) calendar day requirement as provided by Paragraph (a) having been held on May 7, 2009, 31 days later. The Organization rejects Carrier's assertion it was not aware Claimant had incurred a discrete injury and not a cumulative injury as first believed until April 8, 2009 when Rowe informed Chavez of same. As the hearing was not held in a timely manner thereby depriving Claimant of his due process right to a "speedy trial", the discipline assessed must be reversed.

SECOND PROCEDURAL CHALLENGE

The Organization asserts that Carrier, for whatever its reasons, failed to respond to the subject claim within sixty (60) days of the claim's filing, thereby violating Rule 49, the Time Limit On Claims clause of the controlling 2001 Collective Bargaining Agreement, specifically Paragraph (a)(1) which reads in pertinent part as follows:

> ***The date a claim is presented is the date the claim is sent, as evidenced by postmark, when the U.S. Mail service is utilized. Should any such claim or grievance be disallowed, the carrier will within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance***

(the employe or his representative)in writing of the reasons for such disallowance. If not so notified, the claim or grievance will be allowed as presented but this will not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances. The date a party is notified is the date written notification is received by the party. The date claim is filed is the date the claim is received by the Carrier's designated officer.

The Organization maintains there is no dispute that the date the claim was filed was June 15, 2009 and that in accord with the provision of Rule 49 (I), a response from the Carrier disallowing the claim was to be received no later than August 14, 2009. By letter dated August 26, 2009 the Organization notified Carrier it had yet to receive a response to the subject claim and requested Carrier to notified it as to when the claim would be allowed as presented. The Organization refutes Carrier's assertion the claim was never received by its "designated officer" asserting that even assuming arguendo the validity of this assertion, Carrier was constructively put on notice via the receipt of the claim by its other officers who addressed the claim with it under the color of authority to fully dispose of the claim on Carrier's behalf. As is the case with respect to the first procedural challenge, this procedural failure to comply with time limits impacts adversely on Claimant's due process rights to receive fair and impartial treatment and thus warrants a reversal of the discipline and a sustaining award of the claim.

SUBSTANTIVE CHALLENGE

The Organization submits that even if both procedural challenges were not grounds for sustaining the claim which is not the case, the claim would still warrant a sustaining award predicated on the merits. The Organization avers there is a certain intuitive plausibility to Carrier's position that Claimant should have known to report his discrete injury immediately as he was able to recollect the circumstances that caused the injury until one considers the principle of "injury manifestation" which holds that, injuries may occur at a discrete place and point in time, but not become immediately reportable until such time as the injury in question becomes distinguishable from the ordinary aches and pains that attend hard physical labor such as the hard physical labor performed by Claimant in his everyday assignments which constitute Maintenance of Way work. In further explanation of this principle, the Organization avers that some injuries manifest themselves immediately and, thus, under the applicable operating rules, specifically here Rule 1.2.5 would become immediately reportable, whereas, other injuries such as the one incurred by Claimant when he lifted the one-hundred (100) pound water hose by himself, have a lag time between the occurrence of the injurious act and the emergence of bodily damage or pain. Even though Claimant was aware of the ache in his right arm after he managed to hoist the water hose above his head high enough to drop the hose into his truck, he nevertheless did not perceive at the time he had injured himself and therefore he was not impelled to report what had happened to him as an injury. Buoyed by Dr. Lawrence's initial diagnosis he simply had incurred a pulled

muscle, Claimant continued on through the next twelve (12) months feeling relatively good some days and not so good on other days. Then one day Claimant felt a definitive change in the physical condition of his right arm recalling the incident of his lifting the water hose without assistance and the discomfort he experienced as a result. This definitive change prompted him to consult a second time with Dr. Lawrence about his arm which led to the discovery through the MRI test that he had sustained an injury to his arm of a partial rupture of his bicep. Thus, it took the lapse in time of one (1) year for the pain to reach that threshold level where it became distinguishable from the rest of the aches and pains he regularly felt and incurred in the performance of his assigned duties. As soon as Claimant learned of his injury as the reason for his persistent pain in his arm, he reported the injury forthwith, in compliance with the operating rule requiring such report. Claimant acknowledged in his testimony at the investigation that had he known at the time he had injured himself as opposed to just experiencing an everyday ache and pain as a result of his lifting the one hundred (100) pound water hose, he would certainly have complied with the reporting rule, Rule 1.2.5 and reported the injury to his arm. The Organization submits that since he did immediately report the injury once he became aware of it himself, this is all that could and should be required of him.

The Organization deems Carrier's position that Claimant was obligated under the applicable rule cited to report the incurrence of his injury immediately to be disingenuous as carriers including this Carrier as no exception, do not encourage unnecessary or even in some instances necessary reporting of real injuries mainly due to the negative implications of such reporting before the Federal Railroad Administration (FRA). Furthermore, filing claims of normal aches and pains incurred in the course of performing assigned work that really do not constitute injuries would simply overwhelm the system of paperwork and have the effect of obscuring the filing of valid claims of injuries The Organization submits Carrier's interest of having Claimant timely report his injury is a pretense as evidenced by its entire course of mishandling this claim from holding an untimely hearing and then untimely responding to the claim after it was filed.

Based on the foregoing argument asserted, the Organization respectfully requests the subject claim be sustained.

CARRIER'S POSITION

Carrier refutes both procedural challenges raised by the Organization. As to the procedural challenge pertaining to the investigation not being timely convened, Carrier submits that it was not until April 8, 2009 that it became aware the injury Claimant had reported on Form 52032 pertained to a discrete injury as opposed to a cumulative injury which is the type of injury Claimant had represented to ARASA Supervisor Young he had incurred and was reporting. Thus, Carrier asserts, the formal investigation held on May 7, 2009 met the requirement under Rule 48 (a) to be held within thirty (30) days of when it had knowledge of the situation, noting that May 7th was the thirtieth day and the

last day possible for convening the investigation. As to the second procedural challenge of not timely responding to the claim within sixty (60) days of its being filed pursuant to Rule 49 (a)(1), Carrier avers that through a thorough check of its applicable business records, specifically its Time Claim Database and all other applicable files pertaining to the time frame of the Organization's claim date of June 15, 2009, it could find no record of the Organization's file number for this subject claim (D-0948U-205). Carrier asserts that since the claim letter was never received, it cannot be held liable for having violated Rule 49 (a)(1).

As to the merits of the claim, Carrier submits that there are four (4) separate requirements set forth by Reporting Rule 1.2.5 it must establish in order to prove Claimant violated the Rule. These four (4) requirements are as follows:

1. The employee must have suffered an injury
2. The employee must have suffered an injury while on duty or on company property.
3. There must be a showing that the employee failed to immediately report the injury to the proper Carrier manager
4. The employee must fail to immediately complete the required injury report (Form 52032)

With regard to requirement **1**, Carrier relies on two (2) definitions of injury, the first according to Merriam-Webster's Online Dictionary which defines injury as, "an act that damages or hurts" and the second to Black's Law Dictionary which defines "Bodily Injury" as "physical damage to a person's body". Carrier asserts that what happened to Claimant fits under both definitions, that is, under Merriam-Webster's definition, he was hurt when he lifted the water hose without assistance and, under Black's definition, Claimant suffered bodily injury as evidenced by the diagnosis of a partial rupture of his bicep. At the investigation, Claimant admitted that following his having lifted the one hundred (100) pound hose and tossing it into the truck without assistance from a co-worker, he felt a definite pull in his right arm. According to Dr. Lawrence's written statement dated May 6, 2009 and made an exhibit at the investigation, he stated that Claimant "had his arm flexed at the time trying to lift it [water hose] up and over himself when he felt a **popping sensation** (emphasis by the Referee). Carrier finds significant that the two referenced definitions of injury do not require that the injury be severe but rather they both imply that injury means a physical damage to the body that causes some sort of pain. Moreover, Rule 1.2.5 does not require that the injured employee to believe the injury sustained is severe or know in advance the severity of the injury. Rather the Rule requires the injured employee to immediately report his or her injury and this requirement Claimant failed to comply with.

With regard to requirement **2,** Carrier asserts the record evidence establishes without any doubt that Claimant incurred the injury to his arm while on-duty and in the performance of his assigned duties during the clean-up of the mudslide.

With regard to requirement **3** which is an integral part of requirement **4**, as both demand compliance of the injured employee to immediately report the occurrence of being injured. Carrier asserts that because Claimant admits to having felt a popping in his shoulder he, being a reasonable person would have associated such a happening with having incurred an injury since a popping of a shoulder is distinctly different from the incurrence of ordinary pain arising from the general performance of assigned duties. Carrier notes that Claimant did not claim he learned of his injury at some future, distant point in time, but only that he learned of the extent and severity of his injury at a later point in time. Having established that Claimant had knowledge he had sustained an injury at the time the injury occurred, Carrier avers that the remainder of the inquiry about compliance with Rule 1.2.5 rests on a determination as to what constitutes the requirement of making an "immediate" report of the injury. Again, Carrier relies on the Merrian-Webster definition of the term "immediate" which is as follows"

> **a: occurring, acting, or accomplished without loss or interval of time instant <an immediate need> b (1): near to or related to the present <the immediate past> (2): of or relating to the here and now :current <too busy with immediate concerns to worry about the future>**

Based on the above definition, Claimant could not be said to have reported his injury "without loss or interval of time" after having suffered the injury as Carrier notes the record evidence establishes that it was not until one (1) year later that Claimant reported his injury. And although Claimant at the hearing asserted he informed Supervisor Payne the next day he had hurt his arm, Payne testified at the investigation that Claimant had made no such report to him. Even assuming arguendo that Claimant had confided to Payne he had hurt himself, such report does not comply with the requirement that he immediately file a formal injury report on Form 52032.

Based on the foregoing argument asserted, Carrier contends it is reasonable and logical for it to have concluded that Claimant did not immediately report his injury as required under Rule 1.2.5 and, as such, Claimant's actions ran afoul of the charged rule and his failure to promptly report his March 2008 injury warranted the assessment of the subject Level 3 discipline. Accordingly, Carrier requests the Board to deny the claim in its entirety.

FINDINGS

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

The Board is not persuaded by the argument advanced by the Organization that Carrier committed the two (2) procedural errors of not convening a timely hearing and not responding timely to the filed claim.

As to the alleged Carrier violation of Rule 48 (a), the Board finds the record evidence to have established that it was Claimant who represented to Supervisor Young that the injury report he was going to submit involved a cumulative injury and not a discrete injury. That representation was passed on to Manager Chavez by Young and, in turn, that representation of a cumulative injury was not refuted at the time Chavez forwarded the injury report, Form 52032 to Director of Safety Reporting, Brian Rowe. Even if Young and Chavez had awareness that Claimant's representation of his injury as a cumulative one was incorrect, there is nothing in the record evidence to prove that their knowledge, given their position in Carrier's organizational hierarchy would have set in motion the thirty (30) day time limit for convening the formal investigation. Rather, it seems appropriate that Rowe, in his position as Director of Safety Reporting at Carrier's Nebraska Headquarters would be the person to determine the type of injury that is reported on Form 52032 and that once Rowe makes this determination, it is from that date that sets in motion the thirty (30) day time frame within which to convene a formal investigation, assuming such investigation is required as it was in the case at bar.

As to the alleged Carrier violation of Rule 49 (a)(1), while the Board accepts as fact, the Organization filed the letter of claim on the date of June 15, 2009 based on its mere existence as part of the written evidentiary record, the evidence falls short of showing as fact that the claim letter was filed with the designated proper Carrier official to receive the claim either on June 15th or anytime thereafter. On the other hand, the Board is persuaded that Carrier has shown through the presentation of applicable business records that the claim letter of June 15th had not been received by the proper Carrier authority through its well established procedure and, therefore, its failure to respond within the sixty (60) day time limit provided by Rule 49 (a)(1) cannot be found to constitute a violation of the Rule.

With regard to the merits, the Board finds that the argument presented by the Organization pertaining to the "principle of injury manifestation" is particularly applicable to the surrounding circumstances of this case; but rather than supporting the Organization's position, the stated principle instead is found by the Board to support the Carrier's position. The core of the principle as advanced here is that in order for an employee to discern whether a discrete injury has occurred as opposed to a cumulative injury is the ability of the employee to determine that what he or she has experienced is very different and distinct from the everyday bumps, bruises, soreness and other such occurrences one suffers as a result of simply performing the duties of one's position. The Board is persuaded by Claimant's own admission that after he sustained the injury from having lifted the water hose by himself over his head, he recognized that what he experienced was not the incurrence of an ache associated with the ordinary course of performing his duties as the pain was instantaneously of such degree that it caused him

to immediately massage and then stretch out his arm. Additionally, as Dr. Lawrence noted in his letter dated May 6, 2009, based upon the description of the accident/incident Claimant related to him, "Claimant had his arm flexed at the time trying to lift the hose up and over himself when he felt **a popping sensation**". When one experiences the average bump, bruise, or soreness in the course of performing one's duties, it is highly unlikely that such occurrences are accompanied by a "popping sensation". The Board is convinced that with thirty-two (32) years on the job, Claimant knew very well that he had incurred and experienced something beyond and greater than just another ordinary bump or bruise when he felt a popping sensation associated with having lifted the one hundred (100) pound water hose by himself without any assistance. The Board is further convinced that Claimant continued to work even though injured out of sheer disdain and being miffed that one of his co-workers who was in a position to assist him in lifting the water hose just stood by without helping him. The most telling evidence that Claimant knew he had injured himself is the fact of his testimony that he informed Supervisor Payne the next day that he had hurt himself, even though Payne in his testimony denied that Claimant told him any such thing. Even though Claimant's testimony was refuted by Payne, the fact that he would even think that he had made such a report to Payne signifies that he knew that what he had experienced was something far different than the usual bumps, bruises, aches, and pain suffered in the course of performing his assigned duties. Additionally, the record evidence clearly shows that Claimant resisted filing an injury report sooner rather than later as it must have occurred to him, even a few months after Dr. Lawrence told him his pain would go away based on the initial diagnosis of a pulled muscle as opposed to his waiting a full year before consulting with Lawrence a second time and informing him that he was still suffering pain in his arm. When it became evident the pain did not go away, was the time to have a re-check with Dr. Lawrence rather than waiting a full year and to then file an injury report so many months after the fact of having sustained the injury. The fact that a full year elapsed before filing the injury report is proof positive that Claimant failed to comply with the requirement of making an immediate report of his injury as required by Rule 1.2.5. Accordingly, the Board rules to deny the claim in its entirety.

AWARD

Claim Denied

George Edward Larney
Neutral Member & Chairman

B. W. Hanquist
Carrier Member

T. W. Kreke
Employee Member

Chicago, Illinois
Date 10/25/10