

PUBLIC LAW BOARD NO. 7048

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
(
(THE BURLINGTON NORTHERN SANTA FE RAILWAY
(COMPANY

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on January 4, 2006 when Claimant, L. D. Chavez, was assessed a Level S 30-day Record Suspension with 3 years probation for an alleged violation of Maintenance of Way Operating Rules 1.12-Alert and Attentive and 1.2.7-Furnishing Information and Maintenance of Way Safety Rule S-1-1.2.8-Reporting when Claimant failed to provide factual information regarding a personal injury; timely reporting of personal injury; and misrepresentation of the facts concerning personal injury report dated September 28, 2005 for injury occurring on September 9, 2005; and
2. As a consequence of the violation referred to in part 1 the Carrier shall immediately return the Claimant to service with seniority, vacation and all other rights unimpaired, remove any mention of this incident from Claimant's personal record, and make Claimant whole for all time lost commencing January 4, 2006.

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On Saturday, August 20, 2005, the Claimant's wife called the Roadmaster to report that the Claimant injured his lower back or hip at home doing yardwork. The Claimant himself called the Roadmaster the next day and said that the doctor said that he strained his back and had to be off work that week. Subsequently he presented a doctor's note dated 8/20/05 that said, "Acute low back strain with Sciatica left leg. To be off work 8/20 - 8/28 - may return 8/29/05."

On September 16, 2008, the Claimant told the Roadmaster after work that lately he hadn't been feeling good, that he was having problems with his diabetes, that his legs and back were hurting and his kidneys were failing. He said that that was why lately he had not been going back to help out the gang. The Roadmaster asked him if it was something that happened at work, and he said, no, that it was his diabetes that had been acting up and that he just has not been feeling well. The Roadmaster told him that it was fine, that if he had to take it easy that day to go ahead and do so and not make himself worse. The Claimant told the Roadmaster that he might want to take off the next week so that he could see his doctor and get another checkup. The Roadmaster told him that if he had to take the week off to go see his doctor, to go ahead and do so.

On Sunday, September 18, the Claimant's wife called the Roadmaster and said that they were going to see a doctor that week. The Roadmaster said that that was fine. The Claimant took off work, and on September 22, 2005, the Claimant's daughter called the Roadmaster and said that her father had an MRI that showed he had a pinched nerve in his lower back. The Roadmaster asked her if it happened at home or at work, and the daughter said that her father does not really work much at home, so that the only place

that they think it could have happened was at work. The Roadmaster asked the daughter when her father thought that the injury happened, and she said "two Fridays ago," which would have been September 9, 2005. The Roadmaster said that an injury report would have to be made out and that he would fax the Claimant the form for him to fill out.

On September 26, the Roadmaster spoke personally to the Claimant and asked him to relate exactly what happened. The Claimant said that on September 9 after they had finished laying track and he got off his machine, at about 11:15 or 11:20, he went back to help the guys who were cutting rail and picked up a rail saw. At that time, the Claimant told the Roadmaster, he felt a little discomfort in his back. The Claimant said that he then stopped working and relaxed a bit. On September 26 the Roadmaster faxed two forms to the Claimant for completion: an AUTHORIZATION FOR USE AND DISCLOSURE OF MEDICAL HEALTH INFORMATION and an EMPLOYEE PERSONAL INJURY/OCCUPATIONAL ILLNESS REPORT. According to the Roadmaster, on September 26th the Claimant asked for an injury report form, explaining that he had talked to the Union and been told that he would need to fill out a personal injury report.

The Employee Personal Injury/Occupational Illness Report dated 9-28-05 completed by the Claimant stated that he first noticed symptoms on September 9, 2005; that he was first treated or diagnosed on September 10, 2005, and that the injuries consisted of "pitch [sic, pinched?] nerve in lower back, constantly painful, cant [sic] sit or stand for long period of time." In answer to the question, "Describe fully how injury or occupational illness occurred," the Claimant stated, "Completed my duties as machine operator went back to help rail cutters. Pick up rail saw (weighs about 60 lbs.)." In answer to the question, "Type of medical attention administered," the Claimant wrote,

"Medicine (oral pills)." The name given for the attending physician was Arnold W. Valdivia. The Claimant also provided a Medical Status Form signed by Dr. Valdivia which gave a diagnosis of "Lower Back Pain with Radiculopathy."

The Claimant testified that on September 9, 2005 (a Friday), he picked up a saw and twisted his back and "so I just put it on the ground, I just put it on the truck." He went home, he stated, and went to the hospital on the weekend, where he was given Ibuprofen. He thought that he was better, the Claimant stated, and went back to work. The Claimant denied that he went to his doctor for a back injury on August 20th and testified that he just told the doctor that his legs hurt and that the doctor gave him Ibuprofen.

The Claimant testified that he saw a doctor on Saturday, September 10, for his September 9 injury. The Claimant gave contradictory testimony regarding when he first reported the injury to the Roadmaster, admitting that he did not remember the dates when he did different things and that this information was on a paper that he left at home and neglected to bring to the Investigation with him.

The Organization contends that the testimony given at the hearing by both the Roadmaster and the Claimant was confusing with regard to dates and that the Roadmaster presented hearsay instead of firsthand testimony. The Organization further argues that the Claimant did not communicate very well in the English language and was difficult to understand. The Organization asserts that the Claimant was injured on the job while loading a rail saw into the back of a truck, attempted to communicate this fact to his Roadmaster, sought medical treatment, and requested the proper forms to report the incident to the Carrier. The discipline issued was "extreme, unwarranted and

unjustified," the Organization contends, "and is not supported by the flagrant abuse of any of the Carrier's rules." Even if the Carrier's evidence supported the charges, the Organization argues, "the discipline issued is excessive in proportion to the Carrier's allegations. . . ."

After careful scrutiny of the record, this Board is satisfied that there is substantial evidence that the Claimant was aware that he injured his back on the job on September 9, 2005, while picking up a rail saw weighing approximately 60 pounds. He immediately stopped putting away the tools on the truck, thereby showing that he knew that he had been injured. No intervening incident occurred between the back injury from lifting the saw and his visit to the doctor the next day. The Claimant therefore must have known that he was going to the doctor for an on the job injury, but nevertheless, contrary to Carrier rules, he did not report the injury to his manager or supervisor before seeking medical treatment.

Nor did any intervening incident occur between the Claimant's back injury on September 9 and his MRI on or about September 22, 2005. According to the Claimant's testimony, his back was hurting him continuously between September 10, when he went to the doctor, and September 22, when he got the results of his MRI. It was only after the MRI that the Claimant notified the Roadmaster that he injured himself on the job on September 9. However, if, on September 22, the Claimant was able to attribute his back pain to the September 9 work incident, he must have known many days earlier that this was the cause of his back discomfort. This is so because there was no intervening incident after September 9, and the Claimant was experiencing continuous back pain since that date--severe enough for him to go to the doctor on September 10 and to take

medication for the pain. There is no evidence that the Claimant saw a doctor for his diabetes condition at any time between September 9 and September 22, 2005.

This Board finds that the Claimant first reported his on the job back injury of September 9 to the Carrier on September 22, 2005, when he had his daughter call the Roadmaster to report it. The Claimant knew, or should have known, as early as September 9, or September 10 at the latest, when he sought medical treatment for his back pain, that he had injured himself at work on September 9. His failure to notify the Carrier of his injury until September 22, 2005, was a violation of Maintenance of Way Operating Rules 1.2.5 and 1.2.7 and Maintenance of Way Safety Rule S-1.2.8.

The Carrier contends that the Claimant also violated Maintenance of Way Rule 1.1.2 because he had been back to work for only nine days after suffering an acute low back strain and sciatica of the left leg on August 20, 2005, when he attempted to lift a rail saw. In the absence of evidence that the Claimant had been placed on work restriction or was not fully recovered from the August 20 injury, this Board believes that there is not substantial evidence of a violation of Maintenance of Way Rule 1.1.2. Nor is there any substantial evidence that the Claimant misrepresented facts concerning the Employee Personal Injury/Occupational Injury Report dated September 28, 2005, submitted by him. Any reference to a violation of MOW Rule 1.1.2 or to misrepresentation of facts concerning the present incident should be removed from the Claimant's personal record.

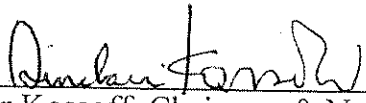
This Board finds that the rules violations that the Claimant did commit were serious violations covered under Appendix B, item 7) of the Policy for Employee Performance Accountability and that they justified the imposition of a 30-day record suspension with a 36-month review or probationary period as provided for in that Policy.

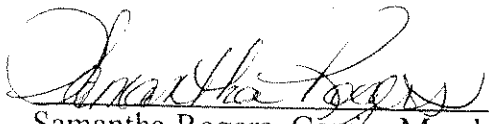
A W A R D


Claim denied in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.


Sinclair Kossoff, Chairman & Neutral Member


Samantha Rogers, Carrier Member


David Tanner, Organization Member

Chicago, Illinois
Dated: October 19, 2007