

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7394
AWARD NO. 11, (Case No. 11)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

**BNSF RAILWAY COMPANY
(Former St. Louis - San Francisco Railway Co.)**

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
R. C. Sandlin, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on October 15, 2009 when Mr. Nickolas O. Risley was assessed a Level S 30-day Record Suspension with a 36-month review period for his violation of Maintenance of Way Operating Rules 1.1.3 (Accidents, Injuries, and Defects) and 1.2.5 (Reporting) in connection with his alleged failure to immediately report to the proper manager a personal injury he alleged occurred July 13-15, 2009 but which he did not report until October 28, 2009 when he completed a formal report of personal injury.
2. As a consequence of the Carrier's violation referred to in part (1) above, we request that the Level S 30-Day Record Suspension be removed from Mr. Risley's personal service record and he be paid for all time lost and expenses which occurred."

(Carrier File No. 12-10-0045) (Organization File No. B-3381-1)

FINDINGS:

Public Law Board No. 7394, 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 have participated in accordance to the Agreement that established the Board.

The facts indicate that on November 10, 2009, Division Engineer, B. D. Teel, sent the Claimant a letter which stated in pertinent part the following:

"This is to advise that you are being issued a Level S 30-day Record Suspension with a 36-month review period for your violation of Maintenance of Way Operating Rules 1.1.2 (Accidents, Injuries, and Defects) and 1.2.5 (Reporting) in connection with your failure to immediately report to the proper manager a personal injury you allege occurred July 13-15, 2009 but which you did not report until October 28, 2009 when you completed a formal report of personal injury."

On November 19, 2009, the Organization protested the Carrier's action and pursuant to Discipline Rule 91(b)(1) it requested a formal Investigation. The Investigation was set for December 2, 2009, which was mutually postponed until December 17, 2009, concerning in pertinent part the following charge:

"...to ascertain the facts and determine your responsibility, if any, in connection with your alleged failure to immediately report to the proper manager a personal injury you alleged occurred July 13-15, 2009 but which you did not report until October 28, 2009 when you completed a formal report of personal injury."

On December 28, 2009, Claimant was notified that he had been found guilty as charged and his suspension and probation period remained intact.

It is the Organization's position that the Carrier erred in its discipline of the Claimant. It first argued that the Claimant was denied a fair and impartial Hearing as the Hearing Officer restricted its questioning of various witnesses. Additionally, it argued that the record indicates that the Claimant was elevated to a Foreman's position on July 13, 2009, and during the period covered by the subject incident (July 13 - 15) he had no one under his direction and was assigned to work with a Welding Gang who were the employees in charge of the work program on the aforementioned days. It stated that when the vehicle driven by the Claimant became disabled he was instructed to ride with the welders on the three days sitting on an ice chest in the rear cab as the truck only had two front seats. Claimant testified that after three days he complained to the crew members including the Employee in Charge (EIC) that his back was hurting, but after alternative transportation was arranged his back improved and he did not feel an accident report necessary plus he didn't want to end the areas outstanding safety record of accident free days. Subsequently, during an interview on October 28, 2009, with a Human Resources Officer on a different matter he inadvertently mentioned the back problem at which time he was advised to file an accident report (which he didn't want to file) or face disciplinary action. Based upon those instructions he filed the report and was then rewarded with a record suspension. It concluded by requesting that the discipline be rescinded and the Claim be sustained as presented.

It is the position of the Carrier that the record verifies that the Claimant failed to immediately report to the proper Manager a personal injury that allegedly occurred on July 13-

15, 2009, until October 28, 2009, in violation of its Rules. It argued that it is vital that all employees properly and promptly report injuries once they know they have been injured and it is clear in this instance Claimant failed in that regard. It further argued that the discipline assessed was also consistent with its Policy for Employee Performance Accountability (PEPA) and the Claimant's record. It closed by asking that the discipline not be disturbed and the Claim remain denied.

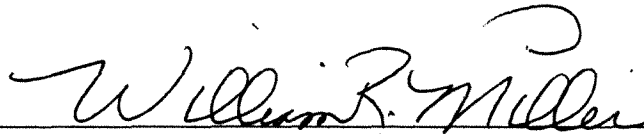
The Board thoroughly reviewed the transcript and the record of evidence and will first address the Organization's procedural argument regarding the behavior of the Hearing Officer. The Organization objected to his disallowance of various lines of questioning while he justified his rulings on the basis that some questions were not directly related to the charge that the injury report was filed in an untimely manner. The Hearing Officer was technically correct in this instance, but he came dangerously close to inhibiting the Organization's defense and is forewarned that restricting the defense of an employee should be exercised with caution as it could lead to a procedural reversal of discipline. Nonetheless, the Board finds that the formal Investigation was held in accordance with Rule 91 the Discipline Rule and the Claimant's "due process" Agreement rights were not violated.

Turning to the merits it was not refuted that the Claimant suffered back problems which was substantiated by the fact that he reported on the Injury Report that he had Chiropractic care. The record is clear that the craft has a Rule concerning soft tissue injuries, that allows its members up to 72 hours after an incident to report an injury which allows them sufficient time to determine whether or not they have actually suffered a reportable injury. Despite the various reasons offered as to why Claimant did not file a timely report it is clear that he believed he suffered an on-duty injury between July 13 - 15, 2009, and should have filed a report. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant was a short time employee with one year of service. A review of Serious Rule Violations under the Carrier's Policy for Employee Performance Accountability (PEPA) requires that an employee in this situation will receive a 30-day record suspension with a three year probation period unless they qualify for the 12-month probation period. Because the Claimant had not completed at least five years service, he did not qualify for the reduced probationary period. The discipline assessed was in accordance with PEPA, therefore, the Board finds and holds that it will not be disturbed as it was not arbitrary, excessive or capricious.

AWARD

Claim denied.

A handwritten signature in cursive script, reading "William R. Miller", is written over a horizontal line.

William R. Miller, Chairman & Neutral Member

Award Date: 12-13-10