Award No. 8
Case No. 8
NMB Case No. PLB-07602-000008

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION—IBT)
)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 11-10-0428
Organization File No. T-D-3768-T

Claimant — Aron K. Larned

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. **The discipline [Level S thirty (30) day record suspension and a one (1) year review period] imposed upon Mr. Aron K. Larned by letter dated June 18, 2010, for alleged violation of Maintenance of Way Safety Rule 5-27.14 (Policy for Employee Performance Accountability), and instructions outlined in the PEPA Policy for reporting of injuries, and Maintenance of Way Operating Rule 1.1.3 (Accidents, Injuries, and Defects) in connection with charges of alleged [failure] to follow injury reporting guidelines and late reporting of an injury on March 15, 2010 (referring to an alleged injury that occurred on approximately March 10, 2010) while working as a Head Welder, Mobile Crew TRWX1449 Sioux City, Iowa. The Carrier's first date of knowledge with regard to this rule violation was Monday, March 15, 2010.**

2. As a consequence of the violation referred to in Part (1)above, Claimant Aron K. Larned shall now receive the remedy prescribed by the parties in Rule 40(G).

BACKGROUND:

At the time of the events leading up to this discipline, the Claimant was a welder with the Carrier. He has been employed by BNSF since 1994, in a variety of positions; this is the first discipline on his record. On Monday, March 15, 2010, the Claimant reported to his supervisor, Roadmaster Thomas Leicester, that his neck had been sore and that he had visited a chiropractor the preceding Friday, March 12, hoping that he might get some relief. According to the Claimant, the chiropractor told him that the soreness was likely to resolve itself in a few days. However, Claimant was not feeling any better by Monday and decided that he should report the problem to Leicester. He was not sure if the injury was work-related or not: the chiropractor had told him that it might be, but there had been no "triggering event," or single incident, that resulted in the soreness. As testified by the Claimant at the investigatory hearing, muscle soreness is a routine experience, given the physical work he does, but it usually disappears after a short time. Claimant testified that he was concerned about reporting the problem promptly in case it was work-related.

Leicester and the Claimant telephoned Michael Leonard, Manager of Safety Rules for the Twin Cities Subdivision, to speak to him about whether Claimant should file an injury report. They agreed that it would be prudent to report the problem, and Leonard indicated that the timing should not be a problem. The Claimant filled out and submitted an Employee Personal Injury/Occupational Illness Report that same day, March 15, 2010. For illnesses or conditions, rather than acute injuries, the Report form asks when the employee first noticed symptoms. The Claimant filled in "mid-week." For the problem, he stated "pain in neck"; for how the "injury, illness or condition occurred," Claimant wrote "no specific incident, just had pain."

Later that same week, on Thursday, March 18, 2010, the Claimant visited his regular doctor, who diagnosed the problem as work-related, in that it appeared to be caused by Claimant's posture as he was welding.

The Carrier takes seriously employees' obligation to notify it of any injuries or illnesses, work-related or not, that might affect how they are able to perform their job duties. MOW Operating Rule 1.1.3, Accidents, Injuries, and Defects, requires employees to report accidents or injuries as soon as possible. MOW Operating Rule 1.2.5, Reporting, 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.
> A personal injury that occurs while off duty that will in any way affect employee performance of duties must be reported to the proper manager as soon as possible. The injured employee must also complete the prescribed written form before returning to service.
> If an employee receives a medical diagnosis of occupational illness, the employee must report it immediately to the proper manager.

Employees are given some latitude in reporting soft tissue injuries, however. The Carrier's PEPA Policy (Policy for Employee Performance Accountability) states, under General Information, paragraph d:

> Employees will not be disciplined for "late reporting" of muscular-skeletal injuries, so long as the injury is reported within 72 hours of the probably triggering event, the employee notifies the supervisor before seeking medical attention, and the medical attention verifies that the injury was most likely linked to the event specified.

At the investigation, the Claimant testified that he thought that he had complied with the 72-hour requirement and that he did not consider going to a chiropractor to be "medical treatment" the same as going to an actual doctor.

After considering the evidence submitted at the investigation, the Carrier concluded that the Claimant had violated the PEPA policy on reporting injuries as well as MOWR 1.1.3, Accidents, Injuries and Defects, and assessed him a Level S 30-Day Record Suspension, along with a one-year probation. The Carrier considered his

chiropractor visit to be "medical attention" within the meaning of the PEPA and determined that he had not notified his supervisor before seeking treatment, as required by PEPA General Information, paragraph d. BNSF also concluded that his failure to report his injury promptly and before seeking medical attention should be classified as a "Serious Rule Violation" under the PEPA standards, warranting a Level S 30-day record suspension.

FINDINGS AND OPINION:

The Public Law Board, upon the whole record and all the evidence, finds that the carrier 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. This Public Law Board has jurisdiction over the dispute involved herein.

After reviewing the entire record closely, the Board has concluded that the Carrier has not met its burden of proof to establish that the Claimant violated the PEPA standards or MOWR 1.1.3. The evidence is that when Claimant visited the chiropractor on March 12, 2010, he did not know if his sore neck was work-related, nor did the chiropractor make a diagnosis that it was. The evidence from all three witnesses who testified at the investigation is that as of March 15, 2010—the same date Claimant filed an injury report—no one knew whether his sore neck was a work-related injury. Indeed, his filing a report was a precautionary act agreed upon by Claimant, his supervisor and the Carrier's Manager of Safety Rules. It was not until several days later that the sore neck was diagnosed as a work-related condition. An employee cannot be found to have filed his injury report late if he files it *before* his medical condition is diagnosed as work-related.

Moreover, the Claimant understood that under PEPA, he had 72 hours to report the problem to the Carrier. The question begged by the Carrier's conclusion that Claimant had reported his injury late is: 72 hours from what? As a welder, the Claimant performs a physically demanding job. Aches, pains and sore muscles are routinely associated with hard physical labor like that performed by the Claimant. Equally, such aches and pains frequently resolve in a few days without medical diagnosis and treatment. There may be no "triggering event"—such minor "injuries"

are the result of repetitive stress and develop gradually. Under such circumstances, it is difficult, if not impossible, to pin down a specific date when the "injury" first manifested itself. It would not make sense for employees to report every ache and pain they felt at the end of the workday, because so many of them would not become serious and it could overwhelm the injury reporting system, but that is what would happen if employees like the Claimant were subject to discipline for not reporting their injuries on time.

Finally, the Claimant credibly testified that he did not think that seeing a chiropractor was seeking "medical attention" as that term is used in the PEPA policy. Chiropractors are not licensed medical doctors, they may not make formal medical diagnoses, and they are unable to prescribe drugs. To the extent that the Carrier wants to require employees to report injuries before they seek informal treatment for skeletal-muscular injuries, it must notify them of that fact. The Claimant had no such notice.

The evidence is that the Claimant made a concerted, good faith effort to report a suspected injury in a timely fashion. He and his Roadmaster went so far as to contact the Subdivision's Manager of Safety Rules about what to do, and he followed the directions that management gave him. Under the circumstances of this case, the Board finds that there was no basis to find him guilty of having violated the PEPA injury reporting standards or MOWOR Rule 1.1.3. The Level S suspension shall be removed from Claimant's personnel record in its entirety.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

Andria S. Knapp

Andria S. Knapp, Neutral Member

Zahn Reuther

Zahn Reuther, Carrier Member

Gary L Hart

Gary Hart, Organization Member

April 29, 2013
Date