

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7048
AWARD NO. 38, (Case No. 38)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing January 7, 2008, when Claimant, D. J. Whalen (6597850), was issued a Level S 30-day record suspension with 3 years probation concerning dishonesty of not reporting an on duty injury of another employee on November 20, 2008. The Carrier alleged violation of Maintenance of Way Operating Rule 1.6, 1.1.3, and 1.2.5; and**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing January 7, 2008, continuing forward and/or otherwise made whole."**

FINDINGS:

Public Law Board No. 7048, 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.

On December 12, 2008, Carrier notified Claimant to appear for a formal Investigation on December 19, 2008, which was mutually postponed until January 7, 2009, concerning in pertinent part the following charge:

"...to develop the facts and place responsibility, if any, in connection with possible violation of Rules 1.6, 1.1.3 and 1.2.5 of the Maintenance of Way

Operating Rules, in effect October 31, 2004, as supplemented or amended, concerning your alleged dishonesty of not reporting an alleged on duty injury of another employee on Thursday, November 20, 2008 while working as Foreman on TSCX0246 in Phoenix, Arizona."

On February 5, 2009, Claimant was notified that he had been found guilty as charged and was issued a Level S record suspension of 30 days with a three year probation period.

It is the Organization's position that the Hearing Notice charged the Claimant with events that occurred on November 20, 2008, and the Carrier's Roadmaster, Mr. Winans testified on page 14 of the Transcript that Claimant had nothing to do with anything that transpired on that date, therefore, after that admission the Organization asked the Hearing Officer for a cancellation of the Investigation which was denied. It argued that refusal to cancel the Hearing denied the Claimant a fair and impartial Investigation and on that basis alone the discipline should be rescinded. On the merits it argued that the facts indicate that one of the Claimant's subordinates (Mr. Samuels) told him on November 13th there had been an incident wherein he got hit in the leg with a clip while working on a switch. It argued that the employee advised the Claimant he was not injured, did not seek medical attention, and did not want to report it. It further argued that in a letter of November 16, 1998, by the former CEO, he stated: **"If first aid/minor aches/pain occur due to work related activity but no medical treatment is requested, there is no requirement for any form to be completed by the employee.** It went on to argue that same letter also said if the severity of the injury changed the employee must notify their Supervisor. It additionally argued that the craft has a Rule concerning soft tissue injury, that allows them up to 72 hours after the incident to report an injury. Lastly, it argued that the Claimant reported the injury of Samuels to his Supervisor on the same day November 17th that he was advised by that employee he needed medical attention, therefore, he was in accordance with Carrier Rules. It concluded by requesting that the discipline be rescinded and the Claim be sustained as presented.

It is the position of the Carrier that Claimant testified that he knew Mr. Samuels was struck on the leg on Thursday, November 13th, but did not relay information of that injury incident to his Supervisors until Monday, November 17th which was a clear violation of Rules 1.1.3 and 1.2.5.

In response to the Organization's allegation concerning the Notice of Investigation being fatally flawed because it had the improper date on it, the Carrier argued there was no showing that any technical error deprived the Claimant of his right to have a fair and impartial Hearing nor that the Claimant and Organization did not understand the charges which is evident by their defense. It closed by arguing that during the Hearing substantial evidence was developed which substantiated that the Claimant did not report the injury in a timely fashion to any other

Supervisor and because of that it asked that the discipline not be disturbed and the Claim remain denied.

The Board thoroughly reviewed the transcript and the record of evidence has determined that the Investigation was held in compliance with the applicable provisions of Rule 13(a) the Discipline Rule and Appendix No. 11 and the Claimant was not misguided by the reference date in the Notice of Investigation nor was he denied his "due process" Agreement rights.

The Organization provided the Claimant with a very able defense and made a clever argument quoting from the Carrier's former CEO's letter of November 16, 1998. Careful review of that letter reveals that the CEO was discussing the employee who had a minor injury and their responsibility which in this instance would of have been Mr. Samuels. That letter did not address an injured employee's Supervisor's responsibilities in reporting injuries or in this case the Claimant's responsibilities. The Board also notes that the updated Rules Claimant was charged with violating postdate the former CEO's letter by approximately six years. Rule 1.1.3 Accidents, Injuries and Defect states in pertinent part the following:

"Report by the first means of communication any accidents, personal injuries,

...The employee on whom the responsibility most naturally falls must assume authority until the proper manager arrives." *(Underlining Board's emphasis)*

Rule 1.2.5 - Reporting also specifically 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."
(Underlining Board's emphasis)

On page 33 of the Transcript the Claimant testified that Mr. Samuels showed him the injury he incurred on his leg on November 13th. Claimant should have reported that injury in accordance with the aforementioned Rules even though at that time it appeared to be minor and Samuels did not want to report it to anyone else. Therefore, substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant violated Rules 1.1.3 and 1.2.5, however, there is no proof that he violated Rule 1.6 - Conduct, nor is there any proof that he was dishonest in not reporting the incident in a more timely fashion. Proof of dishonesty requires showing a willful perversion of truth in order to deceive, cheat or defraud, none of which was evident in this dispute.

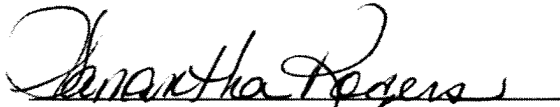
The only issue remaining is whether the discipline was appropriate. If this had been the Claimant's first 30 day record suspension the Board would have been inclined to reduce the discipline, however, the record reveals that this was the Claimant's third 30 day record suspension within less than three years. Thus, the discipline in this instance was rehabilitative in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The Board finds and holds that the discipline will not be set aside because it was not arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

Award Date: 12/6/10