

N. BEGAY 585-62-6315

PUBLIC LAW BOARD NO. 3241

In the Matter of:	)	National Mediation Board
	)	Administrator
BROTHERHOOD OF MAINTENANCE OF	)	
WAY EMPLOYEES,	)	
	)	
Organization,	)	
and	)	
	)	
UNION PACIFIC RAILROAD COMPANY	)	Case No. 74
(former Western Pacific Railroad),	)	Award No. 74
	)	
Carrier.	)	

Hearing Date: November 18, 1997  
Hearing Location: Sacramento, California  
Date of Award: June 4, 1998

MEMBERS OF THE BOARD

Employees' Member: R. S. Wehrli  
Carrier Member: D. A. Ring  
Neutral Member: John B. LaRocco

ORGANIZATION'S STATEMENT OF THE CLAIM

1. That the Carrier violated the provisions of the current Agreement when it assessed a Level 2 (up to one day alternative assignment with pay to develop a Corrective Action Plan) against Tamper Operator Mr. N. Begay. Said action being excessive, unduly harsh and in abuse of discretion.
2. That the Carrier now reinstate Claimant to his former position with seniority and all other rights restored unimpaired, with pay for all loss suffered and his record cleared of all charges.

### **OPINION OF THE BOARD**

This Board, after hearing upon the whole record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted by an Agreement dated July 23, 1982; and that all parties were given due notice of the hearing held on this matter.

Pursuant to proper notice dated April 10, 1996, the Carrier charged Claimant, a Track Machine Operator on Surfacing Gang No. 9084, with three separate offenses. First, the Carrier alleged that Claimant submitted a late on-duty personal injury report. Second, the Carrier charged that Claimant falsified an on-duty personal injury. Third, the Carrier alleged that Claimant had not fully completed a Carrier sponsored Back Hardening Program through the Cottonwood Hospital.

Following a lengthy investigation on May 1, 1996, the Carrier assessed Claimant a Level 2 on the Carrier's Upgrade Disciplinary Process. The May 20, 1996 disciplinary letter clearly states that the discipline was for Claimant's purported failure to promptly report and to timely file a personal injury report. Since the disciplinary letter does not allude to the other two charged offenses, the Carrier apparently either exonerated Claimant of those charges or recognized that the hearing did not accumulate substantial evidence to sustain the remaining two charges. Therefore, this Opinion will merely address the charge of alleged failure to promptly submit a report of an on-duty personal injury.

Claimant has worked for the Carrier since 1977. In 1985, he suffered an on-duty injury to his lower back. Thereafter, Claimant experienced periodic back pain.<sup>1</sup> The Track Supervisor of Gang No. 9084 testified that Claimant started constantly complaining about back pain in the early summer of 1995. The Track Supervisor informed Claimant that the Carrier would attempt to enroll

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<sup>1</sup> The record does not reveal if Claimant completely healed from the 1985 injury.

him in a Back Hardening Program. The Director of Track Programs was ultimately successful in getting Claimant admitted to the Back Hardening Program at the Intermountain Spine Institute at Cottonwood Hospital. Claimant commenced the Back Hardening Program on February 26, 1996 and concluded the program on March 22, 1996.

Near the end of Claimant's participation in the Back Hardening Program, the Track Supervisor and the Director of Track Programs learned that Claimant intended to file a personal injury report attesting that he had suffered an on-duty personal injury on January 21, 1996, while he was working with the gang near Tracy and Stockton, California.

The Director of Track Programs testified that Claimant first raised the allegation that he had been injured while on duty only after a Carrier Claims Agent informed Claimant that he could no longer file a claim based on the 1985 injury. The Director of Track Programs emphasized that, while Claimant stated that he experienced ongoing back problems, Claimant did not mention a specific accident, incident or injury to him during the time the Director was trying to gain Claimant's admittance to the Back Hardening Program. Similarly, the Manager of Track Programs testified that although the gang reviewed safety rules, including the rules pertaining to injuries, at a February 20, 1996 start up meeting, Claimant never told the Manager that he had allegedly suffered an on-duty injury. Claimant's immediate Supervisor was not aware that Claimant had ostensibly incurred any injury until mid-March, 1996. The Supervisor denied threatening Claimant to deter him from filing a personal injury report. However, the Supervisor warned Claimant that if he filed a personal injury report he would probably be disciplined for filing a late report.

On April 3, 1996, Claimant completed and submitted a personal injury report alleging that, on January 21, 1996, he injured his lower back while helping a fellow employee lift a derailed buggy.

The fellow worker vaguely remembered an incident where a buggy wheel had come off the track. He and Claimant managed to rerail the buggy.<sup>2</sup> However, the other employee was certain that the incident did not occur on January 21, 1996, but he could not pinpoint the exact time of the incident.

The Manager of Track Programs researched Carrier records and discovered that the tamping machine was not in use during the period around January 21, 1996 and, on that date, Claimant and other workers were servicing and washing machines at Stockton. The Manager also asserted that it would be impossible for two people to lift the heavy buggy.

The Carrier presented substantial evidence that Claimant failed to promptly file a personal injury report and his inaction (for many weeks) warranted the assessed level of discipline.

The record is unclear as to exactly when Claimant and his fellow worker purportedly rerailed the buggy. In all likelihood, the alleged incident occurred weeks before January 21, 1996. Therefore, when Claimant filed the personal injury report on April 3, 1996, the report was at least two and a half months late and potentially three to four months late. The late report, coupled with the vagueness concerning the date of the incident, raised the Carrier's suspicion that the injury might not have occurred.<sup>3</sup> However, this Board need not consider whether Claimant actually suffered a back injury as he rerailed a buggy because, as we discussed at the onset of the Opinion, the Carrier did not discipline him for feigning an on-duty personal injury.

Prompt reporting of personal injuries is an essential safety rule that the Carrier must vigorously enforce. Employees are required to report a personal injury when it occurs or as soon as

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<sup>2</sup> The record does not disclose if Claimant and his fellow worker actually lifted the buggy or if they used some leverage to rerail the buggy.

<sup>3</sup> The Carrier's suspicions were heightened by the Director of Track Programs assertion that Claimant spoke about the alleged injury only after Claimant learned that the statute of limitations had expired on his 1985 injury.

practical thereafter for several reasons. The rule insures that the employee will receive immediate, necessary medical treatment, permits the Carrier to correct any hazardous condition and allows the Carrier to investigate the incident while the facts are fresh.

In this case, if Claimant truly injured his back sometime in December 1995 or January 1996, he may very well have aggravated the condition by continuing to work. By failing to report the alleged injury, the Carrier was deprived of any opportunity to make certain that Claimant received necessary medical treatment. Also, in this case, it now may be impossible for the Carrier to determine whether or not the injury occurred because, as a consequence of Claimant's late report, most of the facts surrounding the alleged injury are stale. Witnesses' recollections, like the memory of Claimant's fellow gang member, deteriorate over time.

In sum, the Carrier submitted substantial evidence proving that Claimant was late in reporting an alleged personal injury. The Level 2 on Upgrade was a penalty commensurate with the seriousness of Claimant's offense.

**AWARD AND ORDER**

Claim denied.

Dated: June 4, 1998

  
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R. B. Wehrli  
Employees' Member

  
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D. A. Ring  
Carrier Member

  
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John B. LaRocco  
Neutral Member