PUBLIC LAW BOARD NO. 3460

Award No. 61
Case No. 61

PARTIES TO DISPUTE

Brotherhood of Maintenance of Way Employes
and
Burlington Northern Railway Company

STATEMENT OF CLAIM

"1. The dismissal of section foreman John G. McMullen, Sr., for alleged "violation of rule 700 (A)....late reporting to proper authority of alleged personal injury...." was excessive, unwarranted and without just and sufficient cause and in violation of the agreement.

2. The claimant shall be reinstated to service with seniority and all other rights unimpaired and his record cleared of the charge leveled against him and he shall be compensated for all wage loss suffered."

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

The record indicates that prior to his dismissal the claimant had been employed as a section forearm in West Duluth, Minnesota. He had been employed by Carrier for some twelve years, eight of those years as a foreman. He had no discipline on his record as of the date of the incident involved herein.

The essential elements of this dispute are that on April 29, 1981, claimant McMullen injured his back while lifting a rail with his crew. He continued to work and went to his chiropractor on May 1, 1981. While certain facts are in dispute it is clear that he reported to his supervisor by telephone on May 17, 1981 that he would be unable to work the following Monday and possibly for the whole week due to the injury he had suffered on April 29th. The Carrier received a copy of an undated personal injury report on May 19, 1981, completed by claimant with respect of the April 29th injury.

It should be noted that rule 700 (A) of the Rules of the Maintenance of Way Department (and also as part of rule 2 of the Safety Rules herein) provides:

> " An employe having any knowledge or information concerning an accident or injury before the tour of duty ends must complete form 21504, Report of Personal Injury."

Claimant was subsequently charged with failure to properly and timely report the alleged personal injury which occurred on April 29, 1981 and following an investigation was found guilty of the charges and dismissed.

Several other factual matters are either in dispute, or are obscured by some controversy. First, claimant indicated and this had been verified by the physician involved, that his

chiropractor, upon examining him on May 1, called Carrier Claims Agent, a Mr. Hansen, with respect to the alleged injury of April 29th. Hansen apparently, according to the physician, reassured him that there was no intent to harrass or dismiss Mr. McMullen and therefore he should not worry and nothing could be done until a report of the accident was filed. McMullen testified further that he did not believe it was necessary to file such a report as long as he could continue to work, and McMullen worked from May 3rd onward until May 17, when he no longer felt he could work due to the pain he was suffering. McMullen also indicates that he reported that he had suffered this injury to his supervisor, Roadmaster Vadnais on May 4, 1981. However, Vadnais does not recall that conversation. One other important aspect of this matter is that Mc Mullen testified that while involved in some minor accidents with respect to employees working under his supervision, his supervisor Mr. Vadnais had told him not to bother to report minor injuries. This conversation allegedly occurred in mid April of 1981. Vadnais in his testimony confirmed this conversation without his recalling the specific date.

Petitioner raises certain questions concerning the timeliness of the investigative hearing in the light of when Carrier first became aware of the injury. This issue as the Board views it is not determinative of this dispute and the Organization

has not established sufficient proof to overturn the investigation and discipline on this basis.

The Organization's position on the merits deals with a number of items. First, it is alleged that claimant's injury in his belief was not of a serious enough nature to warrant notifying a supervisor at the time that it occurred. This was consistent according to the Organization with claimant's understanding of the roadmasters instructions for reporting minor injuries. However, as soon as the injury clearly manifested itself, Carrier was promptly notified by the doctor's telephone call to the Claims Agent on May 1, 1981 and further confirmed by claimant informing his supervisor, Roadmaster Vadnais, on May 4th. That date was claimant's first opportunity to do so following his consultation and visit to his doctor. The Petitioner notes further that it seems an incredible miscarriage of justice to terminate claimant under the circumstances of this matter. He did indeed come to work and ignore what he considered to be a minor injury until it was not longer possible for him to work because of the severity of the pain. Carrier was put on notice as its instructions had indicated by the call of the doctor to the Claims Agent and by his own conversation with his supervisor and finally by the filing of the accident report which Carrier received on May 19th. The Petitioner urges

that even if the claimant was guilty of some misconduct, the dismissal was clearly excessive and unwarranted in view of the twelve year unblemished record of claimant and the particular circumstances involved.

The Carrier argues that claimant simply failed to abide by the rules, which were clear and unequivocal and of which he was aware. The oral notification to the Claims Agent by the doctor and claimant's conversation with the Roadmaster did not take the place of the filling out of the accident report which is mandatory. Further, Carrier disagrees with claimant's testimony with respect to his supervisor having told him that injury reports were not to be filled out in minor cases. Carrier argues that the extreme necessity of filling out accident report in circumstances such as that involved herein is too well known to bear repeating. Clearly a Carrier has a right to dismiss employees who fail to promptly report accidents. This has been supported by numerous Board awards. For example, in Third Division Award 19198, the Board held among other arguments, that the prompt reporting of injuries is necessary and extremely important. The Board found that it was of the greatest importance for the employer to know of any injuries whether real, suspected or imaginary that have happened to any of its employees while on duty. The Board found in that case that the claimant was

dilatory in reporting the injury and the penalty of dismissal was not arbitrary or capricious. Similar awards have been rendered on other properties as well as this property as well.

The Board recognizes that the basic fact of claimant's late reporting of the injury in proper fashion is clear and unquestioned. Further claimant had been aware of the process and necessity for reporting such injuries since he had reported physical personal injuries on at least two prior occasions. Additionally being a foreman it was his responsibility to be aware of such procedures in order to instruct employees under his supervision who were injured and must fill out the form as well, which he had done on prior occasions also. That claimant bears some culpability for the infraction is clear. On the other hand the Board is also aware that the testimony and transcript bears out the corroborated fact that claimant's Roadmaster had informed claimant that it was not necessary to report minor injuries as long as a verbal report was made and the supervisor was made aware of the problem.

Based on the above indications, it is apparent that this case has some special attributes. This dispute involves a foreman who attempted to work in spite of being injured in good faith,

reported the injury when it was necessary because he was physically unable to continue, and in spite of a long and faithful record of service, was arbitrarily terminated. This too in the face of an instruction from his immediate supervisor that minor injuries need not be reported in writing with the filling out of the form. It is the Board's view that the ultimate penalty of dismissal in this case was harsh, arbitrary and discriminatory and must be corrected. For that reason the Board finds that Mr. McMullen shall be reinstated to his former position with all rights unimpaired, subject of course to a return-to-work physical examination. He is at least culpable, however, in part, for the late reporting of the injury. For that reason a one-year penalty is adequate for the seriousness of this particular infarction. However, effective July 1st, 1982 he will be made whole for all losses sustained until the day of reinstatement, less earnings from other activities or jobs and less unemployment compensation received if any.

AWARD

Claim sustained in part; claimant shall be reinstated to his former position with all rights unimpaired subject to passing a return-to-work physical examination. Effective July 1, 1982, he shall be made whole for all losses sustained until the date of reinstatement less earnings as indicated above.