PUBLIC LAW BOARD NO. 4244

Award No. 343
Case No. 349

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
and
BNSF Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on September 24, 2004, when it issued the Claimant, T. J. Mooney, a Level-S 30-day record suspension with a 3-year probation for failing to be alert and attentive and taking corrective action to repair a broken latch on a tool box causing a laceration to his finger; in violation of Rule S-1.5.2 of the Maintenance of Way Safety Rules, and 1.1, 1.1.1, 1.1.2, and 1.6 of the Maintenance of Way Operating Rules.

2. As a consequence of the violation referred to in part (1), the Carrier shall immediately remove any mention of this incident from Claimant's personal record, and make him whole for all time lost account of this incident. [Carrier File No. 14-04-0165. Organization File No. 100-13I3-044.CLM].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Trenton J. Mooney, entered the Carrier's service in its Maintenance of Way Department on April 14, 2003. He suffered an on-duty injury on September 10, 2004, which he described in a personal injury report as "Smashed fingers, index and middle fingers." On September 16, 2004, he was sent a notice of investigation by UPS Next Day Air, for which he gave a receipt on September 20, 2004. The notice read, in part:

> Please arrange to attend investigation . . . at 1000 hours, Friday, September 24, 2004, to ascertain the facts and determine your responsibility, if any, in connection with your alleged failure to remain alert and attentive and to properly inspect and take corrective action to prevent injury to yourself on September 10, 2004 . . .

When the investigation was convened at the appointed date and time, the Claimant was not present. A 20-minute recess was afforded the Organization's representative, in which he attempted to locate the Claimant by telephone or in person, but he could not be found nor contacted. The investigation proceeded in his absence.

Roadmaster Marion L. Gaunt was the sole witness. He testified that he was notified of the Claimant's injury to his fingers, which required seven sutures to his right index finger and four sutures to his right middle finger. He offered the following testimony with respect to how the injury occurred:

11. Q. And, Mr. Gaunt, when you talked personally with Mr. Mooney did he explain to you how the incident occurred as you previously stated?
A. Yes.

12. Q. Mr. Gaunt, did Mr. Mooney explain to you why he had his hand in pinch point area?
A. He said he was trying to hold a toolbox door up and was using the lift gate to hold the door close. Once the lift gate made contact with the toolbox door, the toolbox door was missing a latch which would otherwise have held it close.

13. Q. Mr. Gaunt, did Mr., did you ask Mr. Mooney approximately how long this latch had been missing off the toolbox?
A. Yes, I did. He said approximately three weeks.

14. Q. Mr. Gaunt, during this approximate three week period did Mr. Mooney inform you of this defect?
A. No.

Mr. Gaunt also offered in evidence the personal injury report which had been filled out by the Claimant on the day of the injury. The Claimant described how the injury occurred in these words:

> I was closing a tool door and lifting the lift gate up that holds the doors shut and had my hand in the way of the lift gate and the tool door.

In the part of the report asking, "Could you, by more care on your part, have prevented your injury?" the Claimant checked "Yes" and explained, "By getting the truck fixed." He also attributed the injury to "No door latch."

On October 12, 2004, the Carrier's Division Engineer issued his decision on the investigation:

> Based on evidence and information provided in the investigation, you are issued a ***Level S 30-day Record Suspension*** with a three year review period for violation of MOW Safety Rules S.1.5.2 and MOW Operating Rules 1.1, 1.1.1, 1.1.2 and 1.6.

In summary, Maintenance of Way Safety Rule ("MWSR") S-1.5.2 requires employees to inspect their vehicles for conditions which might cause injury, to protect themselves by necessary action, and to report such conditions to a supervisor. Maintenance of Way Operating Rule ("MWOR") 1.1 states safety is of first importance in performing duties. MWOR 1.1.1 says one must take the safe course in case of doubt or uncertainty. MWOR 1.1.2 requires employees to be alert and attentive to prevent injury. MWOR 1.6 prohibits employees from being careless of the safety of themselves or others.

The Organization promptly appealed the Carrier's disciplinary decision. It argues that the notice of investigation was vague and ambiguous. It further argues that there is no evidence that the notice was ever delivered to the Claimant, nor that the Claimant filed the personal injury report. It states that the evidence offered by the sole witness was altogether hearsay in nature. The Organization also argues, "If the Notice was delivered, why wasn't the Claimant ever notified to be at the Hearing? Does the Carrier truly believe that the Principal would not come to defend himself, nor explain at his own Hearing?" The Organization states the record does not support the Carrier's disciplinary decision, and asks that its claim be sustained.

The Carrier rejoins that the notice was clear and concise enough that the Claimant and his representative could prepare an adequate defense. It states that it developed substantial evidence, including the Claimant's own personal injury report, to show that he knew what he did was not safe. He was aware the toolbox latch had been broken for three weeks, and instead of reporting the unsafe condition, he "jerry-rigged" a system to hold the door closed and that was the direct cause of his injury. The Carrier also argues that the Claimant's absence from the investigation was at his own peril

The Board has carefully examined the transcript of evidence and testimony, and considered the arguments of the Parties. Addressing first the Claimant's absence from the investigation, the Board is persuaded that he had adequate and proper notice. The Agreement does not require hand-delivery. UPS, which can provide a tracking record of its mail handling, is a recognized method of delivery, akin to certified or registered mail, all of which is intended to provide evidence of mailing and/or receipt. Mr. Gaunt testified that the signature of receipt on the notice of investigation matches the Claimant's signature on file with the Carrier. The Board also takes notice that the handwriting on the personal injury report and the Claimant's signature thereon also

matches the signature and date given in receipt of the investigation notice. The Board is persuaded that the Claimant was properly notified of the investigation, and his absence therefrom was at his own peril. The Board is not persuaded that the Claimant's absence somehow proves that he did not receive the notice; his absence is inexplicable, and the Organization has not offered any post-hearing evidence that he was providentially deterred from attending.

The sole witness's testimony was, to a degree, hearsay. However, in the absence of contrary evidence from any other source, and in view of the fact that his hearsay evidence lends support to the substantive evidence in the record, i.e., the personal injury report, the Board finds no procedural error. Even if the Board disregarded all of the witness's hearsay testimony, the personal injury report itself is sufficient evidence that an unsafe condition existed in the missing latch. The witness's testimony that he was told the defect had existed for three weeks and that he had not been provided a report of the unsafe condition is not hearsay evidence.

The notice of charges is not a model of precision, but it alludes to a self-reported injury at a specific date, time, and place — clearly the notice is based upon the Claimant's own personal injury report — and in light of his own knowledge of the injury, is sufficient to permit preparation of a defense. Substantial evidence was developed to support the charge, and the assessed discipline is not unreasonable. The claim will be denied.

AWARD

The claim is denied.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

William L. Yeck, Carrier Member

May 2 2005
Date