

PUBLIC LAW BOARD NO. 5696
AWARD NO. 26
CASE NO. 26

BURLINGTON NORTHERN RAILROAD

PARTIES
TO DISPUTE:

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the current Agreement when suspending Mr. B. M. Phillips for thirty days for allegedly failing to promptly report a personal injury received on march 10, 1995, but not reported until March 31, 1995.
- (2) As a consequence of the Carrier's violation referred to above, Claimant's seniority shall be compensated for all wages lost and discipline shall be removed from his record.

FINDINGS:

Upon the whole record, after hearing, this 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.

Claimant is a 25 year service employee, who was working as a trackman at the Rail Complex in Springfield, Missouri at the time of the

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incident in question. By letter dated March 31, 1995 he was removed from service for "not working safe and late reporting of personal injury report." As the result of an investigation conducted on April 18, 1995, the Hearing Officer recommended that Claimant be suspended for 30 days for failure to properly and promptly report a personal injury occurring on March 10, 1995 in violation of Operating Rules 1.1.3 and 1.2.5. The Organization appealed by letter dated June 12, 1995.

A review of the investigation reveals that Claimant began experiencing pain in his left elbow around March 10, 1995 but did not report it to anyone since he assumed it was arthritis which he experiences due to advanced age. During this period of time Claimant was assigned to driving on anchors with a sledgehammer and maul. The pain increased during the week and by the afternoon of March 16, 1995, Claimant informed his crew that he was unable to use the maul any further that day.

Claimant phoned his foreman, Jerry Lee, early on the morning of March 17, 1995 and told him that he had hurt himself and was going to the emergency room to get medical treatment of his elbow. Lee recalled Claimant stating that he wasn't sure exactly what happened but that he needed to find out what was wrong. Claimant saw a doctor at Cox Hospital on March 17, 1995 and was diagnosed as having left medial epicondylitis, or "tennis elbow" which could be caused by repeated swinging or overuse of the tendon. Claimant received a medical treatment form indicating that he was to avoid swinging a maul or heavy lifting for 3-4 days, which he brought back to work with him that morning.

When Claimant arrived at work, he and foreman Lee went to see Cliff

Heiney, Manager of the Rail Complex, and Claimant gave him the medical form, explaining his diagnosis and restrictions. Claimant asked if Heiney wanted him to fill out an accident or first aid report, and recalled Heiney saying no, that he should wait and see what developed. Lee testified that when Claimant informed Heiney of his diagnosis, Heiney said that he was not going to require Claimant to fill out an F-27 or injury report since it was just arthritis or an inflammatory injury. Heiney testified that Claimant did not approach him prior to March 31, 1995 offering to fill out an injury report, and that he found out that something was wrong when Lee told him on March 20, 1995 that Claimant was going to the emergency room. Heiney did state that Claimant came to him around March 22, 1995 and he was sent to see the company doctor.

Claimant was permitted to work under restricted duties, not using his left hand, between March 17 and 31, 1995, and to get various therapies to which he was referred. Claimant recalls being sent to see a company doctor on March 28, 1995 after he complained that his elbow as not getting any better, and having the diagnosis confirmed. Claimant recalled Heiney telling him to submit his bills to Travellers Insurance rather than directly to the company. Claimant testified that his right arm started to hurt from overuse during this time and he became concerned about possible damage occurring from working in that fashion, so he went to Heiney on March 31, 1995 and requested that he be permitted to fill out a personal injury report. Heiney testified that he told Claimant that he would try to keep him on a Wage Continuation Program so he could get paid during this period, and that he intended to continue to keep Claimant working, until Claimant insisted on filling out the injury report. Claimant filled out the report on March 31, 1995 indicating that it was an on-the-job injury

occurring on March 10, 1995. Heiney explained that he called Fort Worth and was told to dismiss Claimant for not properly reporting his injury and working unsafely, which he did.

Claimant explained that he was not sure that the injury was job-related until he saw the doctor on March 17, 1995 and was told that he had tennis elbow and how it is caused. Claimant explained that he does not play golf or tennis or any sports, and that he was certain that his elbow condition was caused by repeatedly driving the anchors with a maul. Lee recalled Claimant indicating that he couldn't imagine hurting his elbow anywhere but work after he found out the nature of the injury. Heiney testified that he was never informed that Claimant suffered an on-the-job injury until he insisted on filling out the injury report on March 31, 1995.

Claimant noted that his condition is similar to carpal tunnel syndrome suffered by some other workers in that it is discovered only after experiencing a period of pain requiring seeking medical attention. Heiney testified that other employees with carpal tunnel syndrome filled out accident reports only after the condition was diagnosed by a doctor, and were not disciplined for late filing of the report. Heiney stated that an employee's obligation is to fill out a personal injury report as soon as practical after the injury occurs.

Carrier argues that the investigation supports its conclusion that the Claimant did not promptly fill out the required personal injury report in violation of Operating Rules 1.1.3 and 1.2.5 despite being aware of such requirement. It notes that the Investigating Officer modified the original penalty of dismissal by reducing it to a 30 day suspension which it contends is reasonable.

The Organization argues that Claimant did nothing wrong meriting any discipline. It contends that Claimant did not know for certain that he had sustained an on-the-job injury until he visited the doctor on March 17, 1995 and his injury was diagnosed and its cause clarified. The Organization asserts that Claimant attempted to fill out an accident report as soon as he discovered the nature of his injury, but was told by his manager that he did not have to. The Organization contends that Carrier acted unreasonably by disciplining Claimant for actually filling out such report on March 31, 1995, since it had no intention of removing him from work until he insisted on documenting his injury at that time.

A review of the entire record convinces us that Carrier has failed to sustain its burden of proving by substantial evidence that Claimant did not attempt to comply with Operating Rules 1.1.3 and 1.2.5 on March 17, 1995 when he first discovered that his elbow pain was associated with a tendon injury caused by repeated use of the maul at work. Claimant's evidence that he brought his medical form to work after seeing the doctor on March 17, 1995, went with Foreman Lee to see Heiney on that date, asked about filling out forms regarding his injury, and was told by Heiney that they were not required, was corroborated fully by the testimony of Lee. In light of such evidence, we are unable to accept Heiney's denial of speaking with Claimant on that date or his assertion that Claimant never asked to fill out a form prior to March 31, 1997.

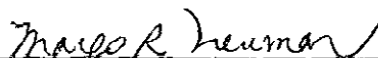
Although Carrier dropped its charge of unsafe work after the investigation and based the issuance of the 30 day suspension solely on Claimant's failure to properly and promptly report his injury, the record clearly reveals that it was Claimant's insistence upon filing a personal injury report concerning an on-the-job injury on March 31, 1995 that was

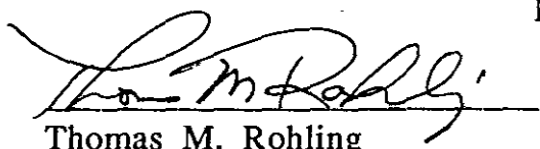
the driving force behind his removal from service. Heiney testified that he intended to keep Claimant on the payroll despite his work restrictions, but was informed by the head office in Fort Worth to dismiss him after he insisted on filing the injury report. Claimant's explanation that he listed March 10, 1995 as the date of injury on the report because that is when he began to work driving anchors with the maul and felt pain, as well as his testimony that he did not immediately report it because he assumed the pain was normal arthritis that would go away appears to be reasonable in light of his admitted aches and pains due to age and the nature of the injury in question.

While Carrier has every right to expect full compliance with its injury reporting procedures, under the circumstances of this case the Board finds that Carrier failed to sustain its burden of proving that Claimant failed to do so. Accordingly, we shall direct Carrier to remove the 30 day suspension from Claimant's record and to compensate him for any losses associated therewith.

AWARD:

The claim is sustained.


Margo R. Newman
Neutral Chairperson


Thomas M. Rohling
Carrier Member


E. R. Spears
Employee Member

Fort Worth, Texas
October 30, 1997