

PUBLIC LAW BOARD NO 5850

**Award No.
Case No. 112**

PARTIES TO DISPUTE:
**(Brotherhood of Maintenance of Way Employees
(The Burlington Northern Santa Fe Railroad**

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when on September 29, 1998, the Carrier issued a Dismissal to Mr. Eugene Henderson for the alleged violation of Rules S-28.1.3, S-28.2.5-A, S-28.2.7, and S-28.6 of the Safety Rules and General Responsibilities for All Employees, effective March 1, 1997, in connection with his alleged late reporting of an alleged on-duty injury occurring during the first week of February 1998.
2. As a consequence of the Carrier's violation referred to above, Claimant shall be reinstated to his former position with seniority restored, he shall be paid for all wages lost and discipline shall be removed from his record.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

From the outset, the Organization, in its appeal of the claim, complained about the quality of the transcript. The word "inaudible" appears too many times. Although the Board cannot agree that the investigation should be voided or dismissed because of the "inaudibles," it is a close call. When using the recording device, the hearing officer must insist that all speak clearly and into the microphone. Another factor is the use of first names. Everyone at the investigation is probably well aware of who the first name applies to, but no one else.

Regarding the investigation, Claimant was charged with a failure to promptly report an injury. On August 3, 1998, the Carrier became aware that Claimant was facing a knee

operation on August 28, 1998.

When the Roadmaster discussed the pending operation with Claimant, he first asked if this condition was simply due to wear and tear over the years, and Claimant responded in the affirmative. Then the Roadmaster asked Claimant if he had ever hurt his knee and he again responded in the affirmative. When asked when it happened, Claimant stated it was the first week in February, 1998.

The Carrier then found where Claimant was working in the first week of February, and did then determine who his Foreman was at the time and who the Roadmaster was.

An inquiry by the Carrier of both the Foreman and Roadmaster revealed neither was aware of the "injury." Claimant stated what he was doing at the time of the injury, and he further stated that two of his peers prevented further injury, when one caught the claw bar and the other caught Claimant. It appears the spike broke off just below the head. It was described as a "cut throat" spike.

The Organization argues that Claimant had been turning in doctor reports concerning his knee, but through testimony, Claimant had been seeking medical help for his knee prior to the claw bar incident as well as subsequent thereto. Although Claimant testifies to the contrary, no Supervisor who Claimant was working for in the first week in February could recall Claimant reporting the claw bar incident.

When Carrier discovered the names of the two employees who caught Claimant when he fell or started to fall, and found neither responded to an e-mail request to be present at the meeting, the investigation was postponed until the testimony of Claimant's fellow workers could be presented.

On September 9, 1998, the investigation resumed. Both of the witnesses requested by

the Claimant furnished statements professing they had no recall of the incident that occurred in February, but when testifying, one of the witnesses recanted his written statement and recalled the incident Claimant contends aggravated his knee condition.

When queried further, the witness had no knowledge of whether the Foreman was advised or not.

It is this Board's view that sufficient evidence has been adduced to establish Claimant's culpability for the charges assessed.

He did have a deteriorating knee condition for which he was doctoring prior to February, 1998. When he was off to see a doctor or for treatment, to legitimize his absence he furnished statements. When he allegedly slipped in the first week of February, there is no evidence that he told his Foreman or the Roadmaster or even requested medical assistance. Furthermore, his record reveals two prior injuries, and apparently in those cases he reported them properly and filled out an injury report in each case. So, the Board's view is that he knew the procedure when sustaining an injury. Claimant has an obligation to report his injury to a Supervisor promptly so that the Carrier can then gather all the facts that are fresh in the minds of any possible witness and correct any problem necessary to preclude others from being injured.

Claimant did not report the injury that allegedly occurred during the first week in February to anyone in authority. He continued to be doctored after the February incident just as he had done prior to the February incident. It wasn't until August 3, 1998, when Claimant advised his Supervisor of the time he needed to be off for the knee operation that it came to light that Claimant's contention that the knee condition had been aggravated in the February incident.

Under the circumstances prevalent in this case, Claimant clearly did not timely report the injury that allegedly aggravated his deteriorating knee condition to the extent that surgical repair was the only alternative for Claimant.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.


Robert L. Hicks, Chairman & Neutral Member


Rick B. Wehrli, Labor Member


Thomas M. Rohling, Carrier Member

Dated: 6/29/99