

**PUBLIC LAW BOARD NO. 5850**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY**

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Case No. 421 – Award No. 421 – Claimant: Cook  
Carrier File No. 14-12-0009  
Organization File No. 240-13I1-112.CLM

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing November 18, 2011, when Claimant, Delbert Cook (1159565), was issued a Level S 30-day Record Suspension with a 3 year review period, concerning his failure to comply with instructions issued by his Supervisor on September 23, 2011 and his indifference to duty when he failed to contact a Supervisor prior to seeking medical treatment when his medical condition changed on September 26, 2011. The BNSF had first knowledge on September 28, 2011. The Carrier alleged violation of MOWOR 1.13 Reporting and Complying with Instructions, MOWOR 1.2.5 Reporting, and MOWOR 1.2.7 Furnishing Information.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be compensated for his lost time and expense and otherwise made whole.

**FINDINGS:**

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Delbert Cook, has been employed by the Carrier since 1997. On September 30, 2011, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged failure to comply with instructions issued by Supervisor Gary Marcellus on Friday, September 23,

2011, and his alleged indifference to duty when he failed to contact a supervisor prior to seeking medical treatment when his medical condition changed on September 26, 2011. Following the investigation, the Carrier determined that Claimant had committed the misconduct alleged, in violation of MOWOR 1.2.5 Reporting, MOWOR 1.2.7 Furnishing Information and MOWOR 1.13 Reporting and Complying with Instructions. Taking into consideration Claimant's personal record, the Carrier assessed him a Level S 30-day record suspension with a three-year review period.

The applicable Maintenance of Way Rules provide, in relevant part:

#### **1.2.5 Reporting**

All cases of personal injury, while on duty or on company property, must be immediately reported to the proper manager and the prescribed form completed.

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If an employee receives a medical diagnosis of occupational illness, the employee must report it immediately to the proper manager.

#### **1.2.7 Furnishing Information**

Employees must not withhold information, or fail to give all the facts to those authorized to receive information regarding unusual events, accidents, personal injuries, or rule violations.

#### **1.13 Reporting and Complying with Instructions**

Employees with report to and comply with instructions from supervisors who have the proper jurisdiction. Employees with comply with instructions issued by managers of various departments when the instructions apply to their duties.

Carrier Production Roadmaster Gary Marcellus testified at the investigation that on Thursday, September 22, 2011, Claimant was working as a trackman on Gang RP 17 when he contended that he had injured his back while running a rail manipulator. Mr. Marcellus stated that he called the Carrier's medical nurse to determine the location of the nearest medical facility, and learned that it was in Albuquerque, New Mexico, the location to which the gang was working its way. He added that Claimant also spoke to the nurse and told her that he did not want to go to Albuquerque and just wanted to go back to their hotel in Moriarty and see how he felt in the morning.

Mr. Marcellus stated that he dropped Claimant at his hotel and later than evening had him fill out the required personal injury form. He added that he asked Claimant again if he wanted medical attention and he said no. Mr. Marcellus continued that Claimant called a few hours later, asking to take the next day, Friday, off. He stated that

he did not specify whether he wanted a vacation or floating day. He stated that he contacted his supervisor, ADMP Southwest Division Ray Chavez and they decided that they could accommodate having Claimant just show up and spend time with him, and they wanted to do a reenactment to see if they could determine how the incident had happened.

Mr. Marcellus acknowledged that they refused to give Claimant the day off, and stated that Mr. Chavez made that decision. He explained that since Claimant did not want to seek medical help, they wanted to evaluate him again in the morning and see what was going on. He said he explained this to Claimant, and that Claimant did not challenge it or request medical attention.

Mr. Marcellus stated that Claimant reported for work the next morning and still did not request medical attention. He stated that he and Mr. Chavez, along with Claimant, did a reenactment, looked at the tool, and found nothing wrong. He explained that a reenactment is a regular part of the investigation process for an injury. Afterwards, he added, both he and Mr. Chavez asked Claimant again if he wanted medical attention and he said no. Mr. Marcellus stated that he and Mr. Chavez told Claimant that if anything changed over the weekend and he wanted to see a doctor he needed to inform them before doing so. He explained at the hearing that this is an FRA requirement.

Mr. Marcellus testified that the next time he heard from Claimant was the following Wednesday, September 28, 2011, when Claimant told him that he had gone to his doctor on Monday, September 26, and would be off work for "a bit."

Mr. Marcellus further testified that during his conversation with Claimant on September 28 Claimant contended that the Carrier officers had refused him medical treatment the previous Friday. Mr. Marcellus stressed that he had asked Claimant twice on that Friday whether he wanted medical attention and both times he said no.

Mr. Marcellus denied hearing from Claimant the morning of September 27, and also denied having received a voicemail. A telephone record was entered into evidence, which showed a call placed from Claimant's phone number to Mr. Marcellus' phone at 7:07 a.m. The record does not show the duration of the call.

Raymond J. Chavez testified at the investigation that he first spoke to Claimant concerning the incident the day after it occurred. He stated that Claimant told him that he still had a little bit of pain but did not wish to seek medical attention. He confirmed that he and Mr. Marcellus and Claimant performed a reenactment of the injury that day. He also maintained that he asked Claimant about seeking medical attention several times, and Claimant refused. He stated that when he left the jobsite he gave Claimant his cell phone number and told him to notify him or Gary Marcellus if there was any change over the weekend.

Mr. Chavez stated that he decided to have Claimant come in to work the day after the incident so that they could monitor his condition for any changes and they could find

light duty for him to perform that day. He explained that as Claimant had reported back pain but did not want to seek medical attention, they also wanted to give him another opportunity to seek medical attention. He explained that although he and Mr. Marcellus were worried about Claimant it is the individual's decision to decide whether to seek treatment.

Mr. Chavez added that he spoke with Claimant again that evening, and again Claimant did not request medical attention. He also stated that Claimant never told him he wanted to see his own physician.

Mr. Chavez testified that Claimant called him on Wednesday, September 28, and told him he had visited a chiropractor the previous Monday and had another appointment on Friday. He added that he told Claimant to contact Kevin Vaudt, the Carrier's Medical Care Manager. He stated that he had not received any voicemails from Claimant between September 23 and September 28. He added that Claimant told him he had tried to call Mr. Marcellus on Wednesday.

Kevin Vaudt, Carrier Medical Field Manager for the Southwest Division, testified at the investigation that there are federal requirements that the Carrier report work injuries, and safety requirements also make that information necessary. He explained that the Carrier also needs that information to help their employees obtain the necessary treatment. He stated that on or about October 13, 2011 Claimant provided him with a doctor's excuse relieving him from duty.

Claimant maintained at the investigation that when he first injured his back he told his supervisor, whose name was Todd. Todd asked him if he had contacted Mr. Marcellus, but said nothing more and then walked away. At the end of the day, he called Todd again and told him he needed to go to the hospital, and Todd contacted Mr. Marcellus who came to the jobsite and picked him up. Claimant stated that as soon as he got into Mr. Marcellus' truck Mr. Marcellus asked Claimant if he wanted an Ibuprofen to relax himself at the hotel, and had him start driving towards Moriarty. According to Claimant, Mr. Marcellus urged him four times during the trip to get to Moriarty.

Claimant testified that there was a chiropractor in Moriarty and he asked to be taken there, and Mr. Marcellus did not respond. He added that they spoke to a woman named Ann and she told him to just take Ibuprofen and relax and put ice on his back at the hotel. He repeated that this was also Mr. Marcellus' response to his request to be taken to a doctor. He stated that he was in deep pain.

He explained that his brother was present at the motel, and they went to the Best Western, where Mr. Marcellus was staying, to fill out an injury report. He stated that after he did so, he asked Mr. Marcellus three times for a doctor and told him he wanted to see his own doctor. He stated that he also asked three times for a day off and Mr. Marcellus refused and was hostile towards him. He stated that Mr. Marcellus did not call anyone and just told him no straight out. He stated that as they left the hotel he asked Mr.

Marcellus again to give him the next day off, as an AWOL or floating day, and Mr. Marcellus told him no, to just report the next morning.

He stated that he reported that day, and no one asked him if he needed to see a doctor. He added that after he got off work he called Mr. Chavez and told him that he was in pain, had been hurting all day and wanted to see his doctor. He maintained that Mr. Chavez hung up on him. Claimant denied that either Mr. Marcellus or Mr. Chavez asked him to contact them if he was going to see a doctor. He stated that he provided documents concerning his injury to the Organization, but did not recall the date.

Claimant continued that he went to see his doctor first thing Monday morning, September 26. Claimant also maintained that he attempted to contact Mr. Marcellus on September 26 but the call did not go through. Claimant added that he tried to call Mr. Chavez and Mr. Marcellus on Tuesday and left a voice message for Mr. Marcellus, and on Wednesday he spoke to Mr. Marcellus, who raised his voice to him. He stated that he asked Mr. Marcellus to fax an injury report to his doctor, and Mr. Marcellus refused. He added that he next called Mr. Chavez, who got mad at him and said he would call him back, which he later did. He stated that Mr. Chavez asked how he was feeling, and he told him that the doctor had pulled him out of service.

The Carrier's Policy for Employee Performance Accountability (PEPA), provides that an employee involved in a serious incident, as enumerated in the policy's Appendix B, will receive a 30-day record suspension and may be offered training to correct the underlying behavior. Appendix B lists as serious violations numerous safety infractions as well as "other serious violations" of Carrier rules. The General Information section of the policy provides, in relevant part:

d. Employees will not be disciplined for "late reporting" of muscular-skeletal injuries, as long as the injury is reported within 72 hours of the probable triggering event, the employee notifies the supervisor before seeking medical attention and the medical attention verifies that the injury was most likely lined to the event specified.

Claimant's personal record shows no previous discipline.

The Carrier states that Claimant's guilt of the charges has been proven and the discipline assessed was warranted. The Carrier asserts that employees are expected to immediately report personal injuries to the proper manager and to complete the required form. The Carrier notes that Claimant alleges he sustained an on-duty injury on September 22, 2100 and filled out an injury report but stated he did not need medical attention. Both Carrier witnesses testified, the Carrier notes, that they instructed Claimant to call them if his medical condition changed. The Carrier further notes that it was discovered on September 28, 2011 that Claimant had received medical attention two days earlier but did not notify his supervisors notwithstanding their clear instructions. Therefore, the Carrier states, it has proven that Claimant failed to follow instructions.

The Carrier points out that Claimant admitted he was injured on September 22, 2011, went to the doctor on September 26 and did not talk to either supervisor until September 28. Claimant made various excuses for not having informed them, including that he was not told to do so, that he tried to call, and that he told Mr. Chavez on September 23 he would be going to the doctor. The Carrier states that it is well established that where, like here, the record includes conflicting testimony, it is the province of the Hearing Officer, not this Board, to resolve such conflicts and the Hearing Officer's decision to credit the testimony of the Carrier officers over Claimant's should not be disturbed by this Board. The Carrier concludes that the Organization's various excuses for Claimant's conduct should not be accepted, and the Board should uphold the Carrier's determination that Claimant violated Carrier rules as alleged. The Carrier states that the discipline was appropriate given the seriousness of the violation.

The Organization asserts that on September 22, 2011 Claimant notified Mr. Marcellus that he had injured his back and needed medical attention. The Organization notes Mr. Marcellus' testimony that he contacted the Carrier's Medical Nurse to locate the closest medical facility to the jobsite, which Mr. Marcellus maintained was in Albuquerque, New Mexico, approximately 69 miles from Willard, New Mexico, where they were working. The Organization questions why they were going to travel all the way to Albuquerque because Mountainair Family Health Center was located only 14 miles away.

The Organization maintains that the crux of this case is that Claimant was refused medical treatment. The Organization states that he was required to go to Mr. Marcellus' hotel room to fill out an injury report and was never asked to submit to a urinalysis or breathalyzer test as required by Carrier protocols. Moreover, the Organization points out, Claimant was denied the next day off, presumably to keep him from visiting his personal physician. The Organization states that the Carrier maintained the supervisors wished to monitor Claimant's condition, but neither has any medical training that would qualify him to do so. Moreover, the Organization states, when Claimant contacted Mr. Chavez on his way home from work on September 23, 2100 and told him that he was going to see his doctor, that was sufficient notification of his change in status. The Organization maintains that the supervisors were attempting to keep the injury unreported and had no intention of pursuing the matter until September 28, 2011, when they were made aware that Claimant had seen his personal doctor.

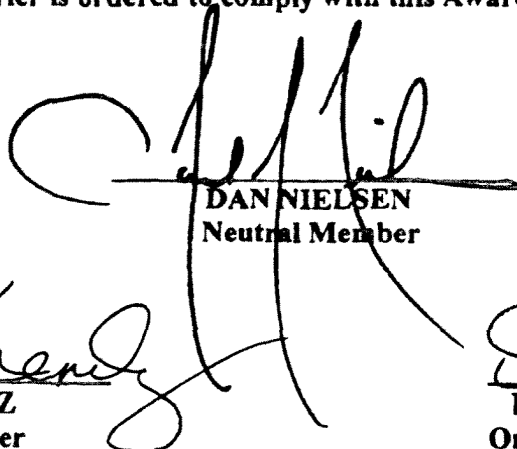
The Organization adds that the Carrier requires employees to report muscular skeletal injuries within 72 hours thereof, and asserts that Claimant met this requirement. Claimant, the Organization notes, claimed he contacted the Carrier officers the same day as his appointment, September 26, and provided evidence that he attempted that again the next day. Also, the Organization points out, Mr. Vaudt testified that Claimant had produced all information needed by the Carrier to support his time off work. The Organization concludes that Claimant committed none of the Rules violations alleged. Even if the charges had been proven, the Organization urges, the discipline issued is excessive in proportion to the charges and the claim should be sustained.

We have carefully reviewed the record in its entirety, and find that the Carrier has met its burden of proving the charges against Claimant by substantial evidence. The outcome of this case depends largely upon the resolution of conflicting versions of events. It is well settled that such resolutions are the province of the Hearing Officer, not this Board. The credited testimony of the two Carrier witnesses establishes that they repeatedly asked Claimant if he wanted medical attention and that he declined. That testimony also establishes that they asked him to contact them over the weekend following the injury if anything changed and before he sought medical treatment, and he did not do so. Claimant's only evidence is a phone record that shows he made a call to Mr. Marcellus' cell phone the day after he saw his physician; even the portion of the PEPA cited by the Organization, which does not readily apply to the instant situation, requires the employee to notify supervision before seeking medical attention. The Carrier has proven that Claimant failed to follow instructions, that he failed to provide his supervisors with necessary information concerning his condition, and failed to immediately report the outcome of his medical visit.

We cannot say that the penalty of a 30-day record suspension assessed in this case represents an unfair, arbitrary or discriminatory exercise of the Carrier's discretion to determine penalties. We do find, however, that the imposition of a 3 year review period is inconsistent with the prior record of Claimant and the disciplinary norms of the Carrier. We therefore direct that the penalty be modified to a Level S 30-day Record Suspension with a 1 year review period.

#### AWARD

**Claim partially sustained in accordance with the Findings.  
The Carrier is ordered to comply with this Award within 45 days.**

  
**DAN NIELSEN**  
Neutral Member

  
**JOY MENDEZ**  
Carrier Member

  
**DAVID TANNER**  
Organization Member

Dated this 21<sup>st</sup> day of MAY, 2013.