

**PUBLIC LAW BOARD NO. 5850**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY**

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Case No. 428 – Award No. 428 – Claimant: Pegelow  
Carrier File No. 14-12-0099  
Organization File No. 20-1313-121.CLM

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing January 26, 2012, when Claimant, Darrell W. Pegelow (1745405), was disciplined with a Level S 30-day Record Suspension with a 3 year review period for his alleged failure to properly report a personal injury that allegedly occurred August 2011 which was report (sic) to his supervisor on January 5, 2012. The Carrier alleged violation of MOWOR 1.1.3 Accidents, Injuries and Defect, 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 reinstated, if applicable, of seniority, with all rights unimpaired; the reinstatement of lost vacation time; and for the payment of all wage and expense loss, commencing January 26, 2012, continuing forward and/or 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, Darrell W. Pegelow, has been employed by the Carrier since 2007. On January 5, 2012, the Carrier notified Claimant that an investigation had been scheduled "for the purpose of ascertaining the facts and determining (his) responsibility, if any, in

connection with (his) alleged failure to properly report a personal injury that you claim happened in Iowa sometime in August 2011, which was reported to your supervisor on January 5<sup>th</sup>, 2012. Following the investigation, the Carrier found that Claimant had committed the misconduct alleged, in violation of Maintenance of Way Operating Rules 1.1.3 Accidents, Injuries and Defects; 1.2.5 Reporting; and 1.2.7 Furnishing Information, and assessed him a Level S 30-day Record Suspension with a three-year review period. In its response to the claim, the Carrier reduced the review period to one year.

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

**1.0 General Responsibilities**

**1.1 Safety**

**1.1.3 Accidents, Injuries, and Defects**

Report by the first means of communication any accidents, personal injuries . . .

**1.2 Personal Injuries and Accidents**

**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.

The essential facts of this case are not in dispute. Carrier Golden, Illinois Roadmaster Timothy Dearwester testified at the investigation that Claimant reported to him at the relevant times. He stated that on or about January 3, 2012, Claimant informed him that needed to fill out an Accumulated Trauma Report, as he had a bulging disc in his back. Mr. Dearwester explained that he asked Claimant if this was a railroad-related issue and Claimant responded that he could not say for sure. Claimant told him that it had been bothering him for six to eight months, but added that his back had been a problem for years. Mr. Dearwester added that Claimant informed him that he had been

going to a chiropractor for approximately six months, and his regular doctor for about one month. Claimant also told him that the previous Friday he had an MRI performed, the doctor discussed the bulging disc, and he called his Organization representative and told him that he needed to fill out an injury form to cover himself.

Mr. Dearwester continued that he met with Claimant the next morning, and asked him if he could say for certain whether his injury was railroad-related, and Claimant replied that it was. Mr. Dearwester added that Claimant told him it had been going on only for the last six months. Claimant had reported it to a mechanic, although Claimant could not recall his name. He provided a physical description of the mechanic. Later that day, the two met again and at Section Headquarters, and Claimant provided Mr. Dearwester an Employee Personal Injury/Occupational Illness Report he had already filled out.

The report, which was entered into the investigation record, indicated that the injury had occurred in early September 2011, about the time Claimant began working on the Jackson Tamper #242, which had a hard seat. It stated that Claimant experienced back pain, which got worse and worse, and then pain in his leg, and that he was diagnosed with a bulging disc on December 30, 2011. In response to a question about whether there was defective equipment, Claimant wrote that a mechanic informed him that the machine had the wrong seat. He could not identify the mechanic, although he provided Mr. Dearwester a physical description. Mr. Dearwester stated that the incident had been investigated and the machine was equipped with the proper seat, and there were no reports of a defective seat during the time period at issue. He added that as of the date of the investigation, Claimant had still not provided an authorization for the use and disclosure of medical information.

Claimant testified that during his telephone conversation with Mr. Dearwester on or about January he could not say whether his injury was railroad-related, because "he did not know the process." He stated that when Mr. Dearwester asked how long the situation had been going on he replied that it was six to eight months, and did not recall stating that it had been years. He denied, at the investigation, that his back had been bothering him for years. He added that he told Mr. Dearwester that he had been seeing a chiropractor for six months, due to the back pain, and his regular doctor for one month. He also confirmed that he told Mr. Dearwester about the MRI and the diagnosis of bulging disc, and that he contacted his Organization representative and informed him that he needed to fill out an injury report to cover himself. He stated that he filled out an Employee Personal Injury/Occupational Illness Report that day and provided it to Mr. Dearwester the next.

Claimant stated that the pain began shortly after he began working on the tamper, but he acknowledged that he had not, in September 2011, informed any supervisor of that fact. He also testified that he had begun to experience pain in about April to June 2011. Although Claimant maintained that he informed a mechanic, one time, of the problem, he acknowledged that the seat was never changed and he continued to work, aggravating his back. Claimant stated that the pain only became sufficiently manifest to him that he

needed to seek medical treatment on December 29, 2011. He added that it was during his discussions with medical personnel that he learned that the injury could have been caused by the operation of the tamper.

The Carrier first states that it mailed the investigation transcript to Claimant and the Organization in a timely manner, and satisfied the requirements of Rule 13(e) of the parties' agreement, notwithstanding the Organization's contention that it did not receive the transcript until 38 days after the investigation. The Carrier also states that the fact that it cited no specific Rules violations in the investigation notice did not constitute error, as the notice included sufficient information for Claimant and the Organization to prepare a defense. The Carrier asserts that Claimant received a fair and impartial investigation as required.

On the merits, the Carrier points out that employees are expected to immediately report cases of personal injury to the proper manager and complete the prescribed form. Claimant, the Carrier stresses, alleges he sustained an on-duty injury in August 2011, but admitted he did not tell anyone in Carrier management about it at the time. Further, the Carrier points out, Claimant did not fill out a Personal Injury Form, or even mention his alleged injury, until January 2012, five months later.

Claimant, the Carrier contends, clearly violated the requirement that he immediately report an injury and the cause thereof. That was especially important in this case, the Carrier adds, because Claimant contended a seat caused his injury and the Carrier should have looked into the situation at the time. Claimant's failure denied the Carrier the opportunity to investigate a potentially dangerous situation. Claimant's testimony shows that he neither timely reported the injury nor filled out the required paperwork, and, the Carrier concludes, it has met its burden of proving Claimant's guilt by substantial evidence. The Carrier points out that it reduced the probationary period assessed Claimant, and there is no reason to disturb the remainder of the penalty.

The Organization asserts that the Carrier has issued harsh and arbitrary discipline, based on a loose interpretation of its safety rule, to an employee who was simply trying to do "right thing," by seeking to avoid monetary harm to the Carrier. However, the Organization contends, the Claimant followed Carrier's rule precisely, and should not have been subjected to any discipline.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. First, the Organization objects to the fact that no specific Rules Claimant allegedly violated were listed in the investigation notice. The Carrier's failure, the Organization asserts, deprived it of the opportunity to prepare a defense and denied Claimant his right to a fair and impartial investigation. The Organization also contends that it did not receive the investigation transcript until 38 days after the hearing, which violated the requirement that it be provided within 30 days and disadvantaged the Organization's effort to prepare Claimant's appeal.

On the merits, the Organization asserts that Claimant followed all Carrier instructions to the best of his ability, and reported his injury when he received a clinical diagnosis from a medical professional. The Carrier, the Organization maintains, provided no evidence that Claimant violated any of the Rules listed in the discipline letter. The Organization concludes that the discipline is extreme, unwarranted, unsubstantiated and unjustified, and urges that the claim be sustained.

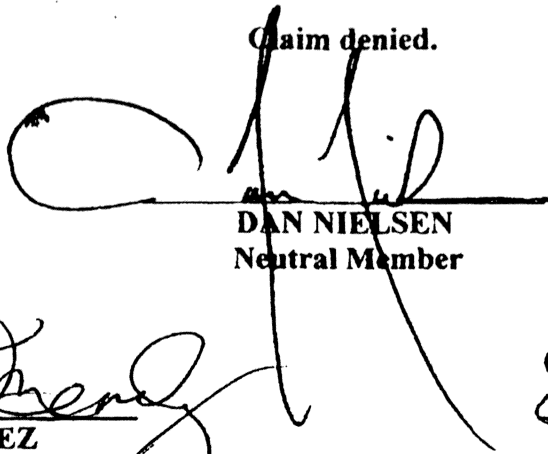
The Board has carefully reviewed the record in its entirety. First, we find that there was no procedural irregularity which denied Claimant his right to a fair and impartial investigation. Claimant and the Organization had sufficient notice of the basis for the investigation. There is no tangible prejudice from the delay in receiving the transcript, and had it somehow affected the Organization's ability to appeal, the Carrier had agreed to an extension of time to address the delay.

On the merits, we find that the Carrier has met its burden of proving Claimant's guilt by substantial evidence. The Carrier's Rules clearly required Claimant to notify management, and provide all appropriate information, at the first sign of a duty-related injury. The record is clear, as Claimant acknowledged, that Claimant experienced pain, attributed it to the seat on his vehicle, and sought medical treatment from a chiropractor, months before he reported the situation to the Carrier. His assertion that he reported the situation to an unnamed mechanic, even if true, falls well short of what is required. There is simply no justification for his failure to address the situation until he had a specific medical diagnosis.

Nothing in the Carrier's Rules gives an employee the discretion to determine when an injury should be reported; they require immediate reporting. As has been repeatedly recognized, the Carrier's rules requiring prompt reporting of workplace injuries are in place to allow the Carrier to quickly investigate the situation, correct any unsafe condition, and assist an injured employee in obtaining proper medical care so that an injury is not aggravated. The record establishes that Claimant is guilty of violating Carrier's rules. We find no reason to overturn the discipline deemed appropriate by the Carrier.

AWARD

Claim denied.

A large, stylized handwritten signature in black ink, appearing to read 'Dan Nielsen', is written over the printed name and title.

DAN NIELSEN  
Neutral Member

A large, stylized handwritten signature in black ink, appearing to read 'Joy Mendez', is written over the printed name and title.

JOY MENDEZ  
Carrier Member

A large, stylized handwritten signature in black ink, appearing to read 'David Tanner', is written over the printed name and title.

DAVID TANNER  
Organization Member

Dated this 15<sup>th</sup> day of October, 2013.