

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 10-13-0663
Organization File No. C-13-D040-39

Claimant — Nancy Bell

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on October 4, 2013, when it issued a Level S 30-Day Record Suspension to Claimant, Nancy Bell, for violation of MOWOR 1.2.5 Reporting and MWOR 1.13 Reporting and Complying with Instructions, in connection with Claimant's failure to notify BNSF that you sought medical treatment following an alleged on-property incident on February 5, 2013, at/or near MP 495.49 on the Blackhills Sub, while assigned as a Section Laborer on Newcastle Section, headquartered in Newcastle, WY.
2. As a consequence of the violation referred to in part (1), Claimant's record should be cleared of the discipline and any mention of the investigation and shall be made whole for any losses.

BACKGROUND:

The Claimant entered service with the Carrier on September 18, 1980. At the time of the incident that resulted in her discipline, she was working as a Section Laborer in Wyoming.

On February 5, 2013, the Claimant was involved in an incident at work where a hose being moved by a co-worker caught her feet from behind and knocked her to the ground. Claimant's Supervisor, Roadmaster Charles Oleson, was aware of the accident: the record includes a "BH Sub Report of Injury/Incident" that he completed over the course of several days, beginning the date of the incident, February 5, 2013. Oleson asked the Claimant each day how she felt. The first day she told him she "wasn't hurt and she didn't want to go to the doctor, but just wanted me to know because she didn't know she feel (sic) in a few days. That night I asked how she felt she said OK." It was not until the evening of February 7 that Ms. Bell told Oleson that she "felt worse" and they decided to fill out the paperwork next morning. Ms. Bell completed an Employee Personal Injury report on February 8, 2013. Under "Describe Injuries," Claimant wrote "sore & bruised." Her description of how the injury happened ended "landed on back and whiplashed." The injury report form includes a box toward the bottom that states (in small print):

NOTE — If you do not receive medical treatment as a result of this injury or occupational illness, you must promptly notify your supervisor:

- if you experience any complications resulting from your injury/illness.
- if you are unable to perform your normal duties or absent yourself from your regular assignment because of this injury/illness.
- before visiting a health care professional for subsequent treatment or observation due to your injury.

The Carrier did an investigation but closed the case March 4, 2013, since it appeared that Ms. Bell was not seeking or undergoing medical treatment.

The Claimant continued to work full time for several months afterward. Sometime around August 22 or 23, she sought dental treatment for a toothache. According to Supervisor Oleson, the next day she came to him to report that she needed to have the tooth removed. She then told him that she thought the tooth might have been traumatized because of the fall back in February. She did not mention to him that she had been taking any medication. A few days before, on August 14, 2013, the Carrier's medical department received a request from an orthopedist's office regarding billing for an evaluation "for neck and back issue" that was scheduled for August 15. The office contacted the medical department because "the employee is reporting that it is a result of her incident 2/5 and is being referred there by a Dr. Carpenter." The record includes an e-mail string that starts with the August 14 message from the Medical Care Manager who was contacted by the orthopedist's office and ends with a message dated August 22, 2013, from Dan Best, Field Manager, Medical & Environmental Health, to several individuals. In the e-mail, Best

represents that his office had gotten information from the orthopedist's office that indicated that the Claimant had been undergoing treatment for the February injury for some months:

Last night we received the clinical note from this visit (8/15/13). This doctor states that Ms. Bell has actually been receiving medical treatment and evaluation since the time of the incident, including diagnostic testing, prescription medication, and a prescription for physical therapy (she never pursued the PT apparently). She apparently did fill the prescription for pain medication, which she reportedly continued through July 2013. She indicated to the doctor that she has been experiencing pain in her neck, low back/hip, and headaches since the incident. She is to be scheduled for an MRI, and we will continue to follow her treatment from here.

This employee has continued to work full duty, and does not have any current work restrictions. It appears she remains able to work at full duty at this time.

However, this the first knowledge that we have had regarding potentially reportable medical treatment, and regarding the fact that she is telling her doctor that she has been seeking and receiving medical care since the February incident.

Oleson testified that he received notice of a "discussion call" regarding Claimant's possible medical treatment, which he thought took place on or near August 26, 2013. He asked her about her medical treatment sometime around September 2, 2013. She told him that she had gotten a prescription for pain medication (hydrocodone) in December 2012, prior to the February incident, but had not filled it until sometime in April 2013. She had not told him that she was taking medication at any time. Shortly before that, she had missed work and reported to Oleson the next day that she had had an MRI. She did not relate it to the February accident, stating only that "it showed she had some signs of aging and that was it"; Oleson seemed to think that the issue was "woman-related" but did not know specifically what it was. Division Engineer Samuel Turnbull testified that he hand-delivered the Notice of Investigation to the Claimant and had a discussion with her about the notice issue. She told him that she had told her supervisor, Oleson, whenever she went to the doctor. She reported having an MRI the day after it was taken, but the record is not entirely clear on whether it was related to the February accident or for a "cyst in her backside."

The Carrier sent Claimant a Notice of Investigation dated August 30, 2013, indicating that an investigation would be held "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with" here alleged failure timely to report her injuries in connection with the February accident. The hearing took place September 6, 2013. Roadmaster Oleson testified that when the Claimant and he filled out the injury report form she told him that she was not then seeking medical help but if things

changed, she would let him know. He stated that he told her that if she received medical attention, she needed to let him know. Claimant testified that she did let Mr. Oleson know in advance when she was first going to seek medical attention for injuries sustained in the February 5 incident. She stated that she had an appointment on July 11, 2013, with a Dr. Carpenter and that she told Oleson a few days before then that she was going to a doctor "to find out if there was any injury, anything happening to the back of my head from the fall." Dr. Carpenter ordered x-rays and an MRI. She testified that July 11 was the first time she sought medical attention in relation to the injuries she sustained on February 5. She also informed Mr. Oleson when she got a prescription on August 15, 2013. Mr. Oleson's memory on what the Claimant told him and when was fuzzy.

By letter dated October 4, 2013, Claimant was notified that she had been found in violation of MWOR 1.2.5 Reporting and MWOR 1.13 Reporting and Complying with Instructions. The discipline assessed was a Level S 30 Day Record Suspension and a one-year review period.

FINDINGS AND OPINION:

Public Law Board 7602, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Board has jurisdiction over the dispute involved herein.

The Carrier found the Claimant in violation of MOWOR 1.13, Reporting and Complying with Instructions, and MOWOR 1.2.5, Reporting. MOWOR 1.13 states:

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

MOWOR 1.2.4, Reporting, provides:

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. . . .

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

The Carrier reached its conclusion based on its determination that the Claimant had sought medical treatment related to the February accident without advising management in advance

that she was seeking treatment, as required. The Employee Injury Report form states that an employee must notify her supervisor “before visiting a health care professional for subsequent treatment or observation” for an on-the-job injury. The Carrier’s determination that Claimant had sought treatment without notifying her supervisor in advance appears to be based on the testimony of the supervisor, Charles Oleson, and the August 14-22, 2013, e-mail string that started with the e-mail to the Carrier’s medical department from the orthopedist’s office about billing for an evaluation for neck and back issues that the employee was reporting were “a result of her incident 2/5.”

A thorough review of the record leads the Board to the conclusion that the Carrier has not met its burden of proof in this case. There are two time frames that have to be evaluated. The Claimant testified that she first sought treatment from Dr. Carpenter for physical problems possibly related to the February 5, 2013, incident on or about July 15, 2013. Under the reporting requirement, she clearly had an obligation to notify Supervisor Oleson of that visit in advance. So the first time frame to look at is between February 5 and July 15. Is there evidence that the Claimant sought treatment for her on-the-job injuries during that period? If there is, she should have reported it at the time. There is a representation by Dan Best in his August 22, 2013, e-mail that the orthopedist “states that Ms. Bell has actually been receiving medical treatment and evaluation since the time of the incident, including diagnostic testing, prescription medication, and a prescription for physical therapy.” The record establishes that the Claimant has medical problems unrelated to the February incident for which she sought and received treatment both before February 5, 2013, and during the entire period between February 5 and mid-August 2013. Without any documentation, it is impossible to determine if the “medical treatment and evaluation” referred to by the orthopedist was related to those problems or to the injuries she sustained on-duty in February. The same is true of the references to prescription medications. The Claimant continued to work full-time throughout. It may be that the Claimant herself thought her aches and pains arose from her other medical issues and did not think to attribute them to the February accident until mid-summer. The bottom line is that there is simply not enough evidence in the record to conclude that the Claimant sought treatment for injuries related to the February 5, 2013, incident between that date and July 15, 2013. And if she did not seek treatment, she had no obligation to report anything to the Carrier.

Claimant testified that she first sought treatment for the injuries from Dr. Carpenter on July 15, 2013. That, then, is the date by which she should have notified the Carrier, through her supervisor, Roadmaster Oleson, that she was seeking treatment. Claimant testified clearly that she told Oleson about her upcoming appointment a few days ahead of time. In contrast, Mr. Oleson’s testimony on the point was confused and internally inconsistent, which makes it hard to credit. At various times he testified that she did tell him

beforehand, that she told him immediately afterward, and that she said nothing to him until August. He remembered her talking to him about at least one and perhaps two MRIs sometime in the summer but his testimony about when those conversations took place varied. Oleson testified that he keeps notes on employee IOD injuries and conversations with employees about them. But there are no notes that would establish when any of their various conversations occurred, including ones that are not in dispute. It was clear in the transcript that Mr. Oleson was testifying honestly and to the best of his ability—but his memory of what events happened and when they happened was very poor.

Moreover, it appears that there may have been some miscommunication between Oleson and the Claimant regarding when she needed to report medical treatment to him. Oleson stated that at one point that he told Ms. Bell that she needed to advise him *prior* to seeing a doctor, then he added that he would have said to her, out of politeness, “please let me know *if* you see a doctor,”¹ a statement that lacks any time element. Absent a clear and consistent directive from Oleson, Claimant may reasonably have thought that notice immediately after a medical visit would suffice.

The standard for the Carrier to meet its burden of proof is not a criminal one. But there must be sufficient credible evidence from which to conclude that the conduct the Claimant is charged is likely to have happened. There are no medical records that tie any medical treatment before July 15, 2013, to the injuries suffered by the Claimant on February 5, 2013, or distinguish between treatments for her other physical conditions and treatment for the IOD, which makes it impossible to conclude that she failed to notify her supervisor as required by MOWOR 1.2.5 or failed to follow instructions (to notify him) as required by MOWOR 1.13. As for whether Claimant provided the required notice on or shortly before July 15, 2013, and thereafter, the Carrier’s evidence is too confusing and contradictory for the Board to have confidence in relying on it. As a result, the Board finds that the Carrier has not met its burden of proof, and the Claim is sustained.² The discipline and all references to it shall be removed from Claimant’s record. She did not lose any time from work so there is no need for a monetary remedy.

AWARD

¹ See, transcript of hearing, p. 63, lines 22-25. “Roy Miller: ... several times you testified that you told her please let me know.” “Charles E Oleson: Yes, that is exactly my wording. That’s the way I would have stated it. Please let me know.”

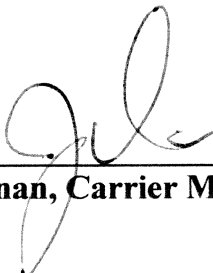
² The Organization raised a serious procedural issue regarding timeliness of the notice of investigation that was issued on August 22, 2013. Because of the holding on the merits of the Claim, it is unnecessary for the Board to address that issue.


Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.


Andria S. Knapp, Neutral Member


Joseph Heenan, Carrier Member


Zachary Voegel, Organization Member

5/25/2016
Date