

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYEES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated March 15, 2008, the Manager System Production Teams instructed Gregory L. Siefer, the Claimant herein, to attend a formal Investigation in Louisville, Kentucky, on March 26, 2008, "to determine the facts and place your responsibility, if any, in connection with information that I received on Monday, February 25, 2008, in connection with an alleged personal injury that you assert occurred while you were working on the T8 System Production Gang in or around Louisville, Kentucky, sometime during 2005 or before." The letter continued, "In connection with the above matter, you are charged with failure to properly perform the responsibilities of your position, late reporting of an alleged injury, as well as, possible violations of, but not necessarily limited to, applicable CSX Transportation Operating Rules and Regulations; CSX Safe Way Safety Rules; Engineering Department Rules and Instructions; as well as System Production Teams SPT Policies."

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds that:

The carrier or carriers 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.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On February 28, 2007, a complaint in the name of Gregory L. Siefer was filed in the Common Pleas Court of Lucas County, Ohio, against CSX Transportation, Inc. pursuant to the Federal Employers' Liability Act seeking damages in the amount of one million dollars. The complaint was not sworn to and was signed by the Plaintiff's (Mr. Siefer's) attorney as attorney for the Plaintiff. It alleged that from 1975 through 2007, while employed as a Trackman by the Carrier, the Claimant "was subjected to numerous repetitive traumas while repairing Defendant's railroad tracks and was caused to be severely and permanently injured, in whole or in part, due to the carelessness and negligence of Defendant. . . ." Specifically, according to the complaint, the Claimant "sustained severe permanent injuries to his back, spine and body resulting in disability. . . ."

As part of the record in the Investigation, the Carrier introduced into evidence a deposition given by the Claimant in his lawsuit in which he testified that he underwent surgery twice for a herniated disk, once in 1998 by a Dr. Duggan; and a second time in January, 2006, by a Dr. Kim. After both surgeries he returned to work with medical releases permitting him to work without any restrictions. He made no claim in connection with either surgery that his back condition was work-related. At no time did he report a back injury or fill out an injury report. At the Investigation the Claimant expressed the opinion that the Carrier removed him from service prior to the hearing as retaliation for the lawsuit he filed against the Carrier.

According to Carrier testimony, the Claimant was in violation of the following rules:

General Safety Rules:

Rights and Responsibilities

1. We have the right and the responsibility to make decisions based on experience, personal judgment, and training. We must make certain that:

...

- i. oral and written report of accidents and injuries are made as soon as possible to the supervisor or employee in charge.

...

GS-5. Reporting Injuries or Incidents

A. On Duty Injuries

Any employee experiencing an on-duty injury must report the injury to a supervisor at the time of the occurrence prior to leaving the property on the day of the occurrence so that prompt medical treatment may be provided. A form PI-1A must be completed by the employee reporting the injury. . . .The Claimant is charged with late reporting of an injury. In fact the alleged injury, identified by the Claimant in his deposition at page 21 as a herniated disk, was never reported by the Claimant as an injury. The record shows that the Claimant underwent surgery for a herniated disk on two occasions: in 1998 and, again, in January, 2006, and missed several weeks of work on each occasion. It is not disputed, however, that at no time did the Claimant notify his supervisor or manager either with regard to the 1998 surgery or the 2006 surgery that his back condition was caused by an injury at work. On each occasion the Claimant was released by his doctor to return to work without restriction.

It is not clear in the record when the Claimant decided that his injury was work-related. Neither in his deposition or in his testimony at the Investigation did the Claimant attribute his herniated disk to any particular accident or other incident that occurred on the job. Rather the Claimant testified that it was walking on the ballast and assisting with the manual handling of tie plates when the gang was shorthanded that, over a period of time, caused his back condition. The Claimant further stated that no one really told him that the walking and handling of the plates caused his back condition, that neither Dr. Kim, the surgeon, or Dr. Sandy, who referred him to Dr. Kim, said that that was what caused his back condition.

The Claimant's testimony regarding his alleged injury is consistent with the FELA complaint filed by his attorney so far as the cause of the injury is concerned. The complaint does not allege that Mr. Siefer was injured in a particular incident or on a specific day. Rather it claims that he "was subjected to numerous repetitive traumas while repairing Defendant's railroad tracks and was caused to be severely and permanently injured . . . due to the carelessness and negligence of Defendant. . . ."

The fact nevertheless remains that both in his lawsuit and his testimony at the Investigation Mr. Siefer is claiming that he was injured. As such the Carrier's rules are clear. General Safety Rule 1 i and Rule GS-5 both require that injuries be reported as soon as possible, and GS-5 in addition requires that a Form P I-1A be completed. At some point, whether it was in 2005 or 2007, the Claimant came to the conclusion that he had an on-duty injury. At that point he should have reported the injury to his supervisor and completed a form PI-1A. His failure to do so was a disciplinable offense.

With regard to taking the Claimant out of service, the Carrier's Individual Development and Personal Accountability Policy expressly provides that late report of an

on-duty personal injury is a major offense warranting removal from service prior to hearing. The Carrier properly removed the Claimant from service when it learned that he was claiming an on-duty injury which was not reported to a supervisor.

The Board believes, however, that under all of the circumstances dismissal from service was an excessive penalty. For one thing, according to the evidence there was no single incident wherein the Claimant was injured. Based on his testimony and the complaint, he claims that over a period of time the cumulative effects of walking on ballast and assisting in lifting tie plates resulted in trauma to his back and a herniated disk. The absence of a single event resulting in an injury could have caused him to reach the erroneous conclusion that the rules of reporting an injury did not apply to him.

In addition, there is no substantial evidence of a fraudulent claim on the part of the Claimant. For example, he has had two surgeries for a herniated disk, so one cannot say that the alleged injury was fabricated. Whether the injury is work-related is another question on which this Board expresses no opinion. In the absence of fraud and in light of the Claimant's more than 30 years of service, the Board believes that dismissal was an excessive penalty in this case. See Third Division Awards Nos. 30989 and 36576. The fact, however, that the Claimant waited almost two years to claim that his herniated disk was work-related seriously prejudiced the Carrier's ability to investigate the cause and circumstances of his injury. It is a proper basis for denying any back pay to the Claimant.

The lawsuit, however, raises another problem that must be addressed. In the Board's opinion there is a basic inconsistency between the Claimant's suit and the unconditional release he provided the Company when he offered to return to work in April, 2006, following his back surgery in January of that year. Based on the medical release without restrictions that the Claimant presented, the Carrier was entitled to believe

that there was no medical risk to it in permitting the Claimant to return to work in his previous job.

However, the complaint alleges that from 1975 through 2007 the Claimant, in his work as a trackman, “was subjected to numerous repetitive traumas while repairing Defendant’s railroad tracks and was caused to be severely and permanently injured, in whole or in part, due to the carelessness and negligence of Defendant as hereinafter alleged.” This includes the period of time after the Claimant’s return to work following his second back surgery. There is no evidence that the Claimant’s working conditions changed after he returned to work from his second surgery. The complaint is thus alleging that the Claimant’s normal duties and work conditions are continuing to cause him severe and permanent injuries.

The final paragraph of the complaint alleges that the injuries sustained by the Claimant have “caused and will cause him in the future to suffer great pain and mental anguish; and he has lost and will in the future lose earnings he otherwise would have earned but for his injury; and he has been and will in the future be compelled to obligate himself for medical aid and attention; and his future earning capacity has been seriously diminished thereby. . . .”

In his deposition the Claimant testified that since his surgery in 2006 he has not missed any work because of his back. He also stated that he has not seen a doctor about his back since he was released to return to work without any restrictions in April, 2006. He testified that he is able to do the same job duties as prior to his surgery, that his back feels okay. He takes no medication for his back, including no pain medication.

From the Claimant’s testimony in the Investigation and in his deposition it is clear that the allegations in the complaint that he will in the future suffer great pain and mental

anguish and will be compelled to obligate himself for medical aid and attention have not yet come to pass. If we are to believe the complaint's allegations, however, they can come to pass at any time as a result of the performance by the Claimant of his normal job duties. Such a state of affairs appears to this Board as contrary to the release to return to work without any restrictions given to the Claimant in 2006 by his physician or surgeon.

Given the contradiction between the allegations in the complaint and the medical release without restrictions that the Claimant presented to the Carrier in April, 2006, permitting him to return to work, this Board will require another medical release, in writing, from his physician or surgeon before permitting the Claimant to return to work. Such release must be based on an actual contemporaneous physical examination of the Claimant, including x-rays if necessary, and must include a statement that the Claimant has provided a detailed description of his job duties and working conditions, including walking on large-sized ballast and lifting, from time to time, of tie plates.

The release should make clear whether the Claimant can safely perform his job duties given the condition of his back. The Claimant must cooperate by providing a complete and detailed description of his job duties and working conditions to the examining physician or surgeon. Preferably the examination of the Claimant should be performed by Dr. Kim or some other surgeon or physician familiar with his medical history. Should the Claimant provide the Carrier with a medical release without restrictions of the kind described herein, then the Carrier shall be required to permit him to return to work to his former job. The Carrier may also require the Claimant to fill out an injury report as provided in Rule GS-5. If the Claimant is unable to provide a release without restrictions, then his case shall be handled by the Carrier as that of any other employee in good standing with a similar medical condition.

If the Claimant believes that his job duties pose a danger to his back or his health in general, he shall be permitted to retire voluntarily based on his years of service. Such retirement should be on the same basis as anyone else with his years of service and medical condition would be entitled to retire. This Board expresses no opinion on the question of whether the Claimant is entitled to retirement benefits at this time. The terms of any applicable retirement plan or statute will determine the Claimant's right to any monetary or other benefits.

A W A R D

Claim sustained in accordance with findings .

O R D E R

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.



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
September 3, 2008