

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7258**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)	
)	Case No. 24
and)	
)	Award No. 24
UNION PACIFIC RAILROAD COMPANY)	
<hr/>		

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: May 1, 2009

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The five (5) day suspension imposed upon Robert D. Abel for violation of GCOR Rules 1.2.5 and 1.13 in connection with the late reporting of a personal injury is based on unproven charges, unjust, unwarranted and in violation of the Agreement (Carrier's File 1505966 SPW)).
2. As a consequence of Part (1) above, we request that the Level 2 discipline imposed on Mr. Abel be expunged from his personal record and that he be reimbursed for any and all wages and benefits lost as directly resulting from this formal investigation."

FINDINGS:

Public Law Board No. 7258 upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Claimant, during the time that this dispute arose, was employed as a Bridge and Building Welder with seniority to August 26, 1996. Claimant was ordered to report for an investigation on April 11, 2008 concerning Carrier's allegations that he failed to comply with instructions by not immediately reporting an injury to his manager and completing a prescribed form in violation of Rules 1.2.5 and 1.13. The investigation was held as scheduled and on April 21, 2008 the Claimant was informed that a substantial degree of evidence supported sustaining the charges lodged. Claimant was assessed a Level 2 discipline. The Organization submitted a claim in regard to Carrier's finding dated June 10, 2008 that was denied August 1, 2008. Appeal was made on September 24, 2008 and denied by the Carrier on November 21, 2008. A conference was held in regard to the dispute without reaching resolution.

The Organization contends that there are three issues involved in this dispute: whether Claimant was afforded a fair and impartial hearing pursuant to Rule 45; whether the Carrier proved the charges leveled against Claimant; and, whether the discipline imposed was arbitrary or capricious and thus, in violation of the Agreement.

The Carrier asserts that substantial testimony was introduced in the hearing transcript to justify its conclusion that the Claimant indeed violated Rules 1.2.5 and 1.13. Moreover, the Carrier maintains that an examination of the record reveals that the Organization has not raised any procedural issues on the property that would warrant overturning of the discipline. Finally, the Carrier asserts that late reporting of injuries and failure to comply with instructions cannot be condoned and that the assessment of discipline under the circumstances found here was reasonable and should not be mitigated.

In regard to the rules violations, review of the hearing transcript reveals that Claimant testified that sometime in late July, 2006, he was assigned to work underneath a bridge in a cramped, confined space. Claimant testified that at one point he cried out and that his foreman peeked under the bridge and asked him if he got hurt to which he replied that he did. Claimant further relates that his foreman at that time instructed him to come out from under the bridge and asked if he needed medical attention and that Claimant answered that he did not require medical attention and that he just needed to rest for a minute. The record shows that the foreman assigned Claimant to easier work for the rest of the day and that Claimant completed the rest of the shift.

In correspondence between the parties during the processing of this claim on the property, Mr. B.W. Hanquist quotes to General Chairman Louis Below from a hearing in a subsequent matter the following testimony of Claimant's foreman:

- Q: Mr. Bourruel, the day of the incident, R.D. Abel said that he did report it to you, that he hurt his neck?
- A: Not hurt his neck. He said he was sore.
- Q: Okay.
- A: That's a little different.
- Q: Well, Okay.
- A: Yeah, it was - his neck was sore.
- Q: Okay. And at that time, you -you stated that you pulled him out, put him on the job, and put him up top where it wouldn't hurt his neck?
- A: I say, I -I change it in that position because he was not comfortable underneath, that's correct.

- Q: Yeah, okay. Okay. And when did you contact Mr. Young about the incident, his sore neck?
- A: That -that same day, I call him and he come the next day.
- Q: Okay. And he came the next day and then he had a one on one with you. What was discussed in that one on one?
- A: It was not a one on one, like I said. He just talked to a couple of people.
- Q: Uh huh.
- A: And then uh - and that's all I know. That's all I remember.
- Q: Did he talk to you?
- A: Yes sir, that was the first person who talked to me.
- Q: Okay, then what did he ask you?
- A: How was everything? And I say fine. Everything is fine except one person he got his neck sore.
- Q: Okay, how did uh - your knowledge, how did R. D. get a sore neck? R. D. Abel.
- A: No idea, sir. I was on the top of the - I was right by the truck and he came out and he was - his neck was sore, and I absolutely change it to the boom truck and make the change.

Based on the above testimony Mr. Hanquist argues that the Organization's "insinuation that a sore neck equates to an injured neck is incorrect and misleading."

Claimant's Manager was asked at this Investigation:

- Q: Sometime between July, August, 2006 were you informed that Mr. Abel was injured?
- A: No, I was not.
- Q: Were you informed by his foreman?
- A: No, I was not.

Eleven month's later, on January 23, 2009, that same manager was deposed in Case No. C08-33561 SI ADR before the United States District Court, Northern District of California¹ and testified:

¹See NRAB, Third Division, Award 31141 (Hicks) (...Court documents are, however, a matter of public record and, as such, are admissible in proceedings before this Board at any time...).

Q: Just so we're clear, in 2006 Mr. Abel's foreman contacted you and said Abel was complaining about a sore neck; is that correct?

A: Correct

Q: All right, who was the foreman?

A: Felix Borrueal.

Q: And after Mr. Borrueal informed you that Mr. Abel was complaining of a sore neck you went to the job site?

A: Yes.

Q: And do you recall where the job site was?

A: A Place called Suisun, S-u-i-s-u-n.

Q: Okay. And when you went to the Suisun job site in 2006, you spoke with Mr. Abel?

A: Upon driving up I stopped my truck to view the gang and see if they were moving around to get my own perspective of whether Mr. Abel was hurt. He was engaged in the work. He was climbing. He was handling material. He did not appear to be injured. I continued to the job site and I had a direct interview with Mr. Abel.

Q: What did you ask him?

A: I asked him if he was injured.

Q: And his response in each case was that his neck was sore?

A: He said he declined being injured. He said he's just sore.

It is clear to this Board that Claimant informed his immediate supervisor on the job site at the time of the incident that he was hurt but did not require medical attention. It is also clear that foreman informed the Manager on the same day as the incident that he had an employee who was hurt and sore. The Manager visited the job site the next day and spoke with all involved.

Claimant's manager acknowledged that he received and read a memorandum from his Director dated 8/19/2005 that instructed managers in this type of situation "...if any employee says he got hurt on the job but doesn't want to fill out any paperwork, that you are duty bound to report the incident. It gets reported as an incident and goes on the employee's record. You need to be crystal clear with your employees that if they tell you they got hurt in any manner on the job, you must fill out an accident report..." That is how the Carrier anticipated a situation such as this to be handled.

Carrier, in the on the property handling of this dispute argues that “obviously, your insinuation that a sore neck equates to an injured neck is incorrect and misleading.” Thus, with the Carrier, the charging manager and the Claimant’s foreman all arguing that Claimant was not injured in July 2006, but merely sore, we do not see how the Carrier has proved by substantial evidence that Claimant was in violation of Rule 1.2.5 that requires immediate reporting of personal injury and not mere soreness. If reporting soreness is different than reporting an injury, and the only evidence in the record shows Claimant, his foreman and his manager claiming soreness, then Claimant was under no duty to report the soreness as a personal injury. If, on the other hand, feeling soreness is considered an injury, then the Claimant reported it to both his foreman and his manager, as the record shows.

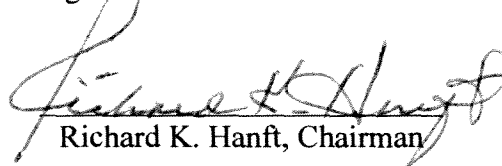
The fact that some 19 months later this soreness escalated to the point that it required medical attention does not change the fact that the Claimant did not violate the rule by not reporting personal injury or filling out the proper form. Moreover, it is also clear from the above that the Claimant’s soreness was immediately reported to Claimant’s manager by the Claimant’s foreman. In light of the fact that Claimant immediately told his immediate supervisor of the pain in his neck, and that information was shortly thereafter conveyed to the Claimant’s manager, we fail to see how the Claimant failed to comply with instructions of a supervisor or manager pursuant to Rule 1.13. Carrier has failed to prove by substantial evidence that Claimant was in violation of rules charged.

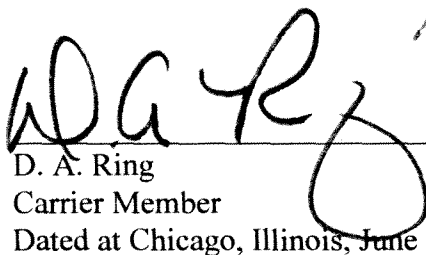
AWARD

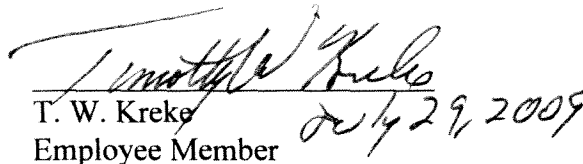
Claim sustained.

ORDER

The Board, having determined that an award favorable to the Claimant be made, hereby orders the Carrier to make the Award effective within thirty (30) days following the date two members of the Board affix their signatures hereto.


Richard K. Hanft, Chairman


D. A. Ring
Carrier Member
Dated at Chicago, Illinois, June 18, 2009


T. W. Kreke
Employee Member
July 29, 2009

7-29-09