

PUBLIC LAW BOARD NO. 7566

BROTHERHOOD OF MAINTENANCE)	
OF WAY EMPLOYES DIVISION)	
IBT RAIL CONFERENCE)	Docket No. 13
)	
and)	
)	
CANADIAN NATIONAL/WISCONSIN)	
CENTRAL LTD.)	Claimant C. Roback

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

1. The discipline in the form of a fifteen (15) working day suspension and a fifteen (15) working day deferred suspension for one (1) year, imposed upon Foreman C. Roback for the alleged violation of USOR- General Rule C, Alert and Attentive; General Rule D, Reporting Injuries and Defects; General Rule H, Furnishing Information and Conduct; and General Rule K, Equipment Inspection, in connection with an incident resulting in a personal injury sustained by him on March 19, 2010 is on the basis of unproven charges, unjust, unwarranted and in violation of the Agreement (Carrier's File WC-BMWED-20 1 0-00023).

2. As a consequence of the violation referred to in Part 1 above, Claimant C. Roback shall receive the remedy prescribed in Rule 31I of the Agreement."

Findings:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7566 has jurisdiction over the parties and the dispute involved herein.

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

A formal investigation held on May 11, 2010 in connection with the following charges:

... for the purpose of ascertaining the facts and determine your responsibility, if any, and to determine whether or not you violated any company rules, instructions or policies in connection with an incident which occurred on Friday, March 19, 2010 at approximately 1440 hours, near the south 100 switch, Milepost 98.5 in Waukesha, Wisconsin. It is alleged that while you were operating a hydraulic spiker, you experienced an injury to yourself which you reported to your Supervisor on Saturday, March 20, 2010.

The Organization contends that there is no substantial evidence in the record to warrant discipline because: the supervisor who testified had no first-hand knowledge and merely supplied hearsay; the employee who testified offered an impossible version of events; the re-enactment was fatally flawed because it was held on the level surface of a parking lot and not on an uneven grade; and Claimant had what he thought was a minor injury and did not have an immediately apparent or manifesting injury.

The Carrier responds that the Claimant failed to timely file an injury report, continued to use defective equipment, filed a false report and was not alert and attentive as required by the Rules. A witness saw him walking bent and injured after Claimant caught the spiker when it fell. Claimant stated that the spiker was defective but subsequent testing and examination revealed it to be functioning properly. Claimant provided false statements about his injury and the equipment.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

After a review of the record, the Board finds that there is substantial evidence in the record to support some of the charges, but not all the charges. There is no substantial evidence that Claimant failed to timely report his injury. Claimant agreed that he felt pain when the spiker slipped. However, he also stated that he has occasional back pain due to the nature of the work he performs for the Carrier. He discussed whether to fill out an injury report, but did not because it felt better and he could "walk it off." Only after sleeping on it did he realize that it was more than a sore back.

There is nothing in the record to contradict Claimant's version of the nature of his injury. He thought his back was sore and that was a known occurrence in his job. Not reporting a sore back does not rise to the level of failing to file an injury report.

There is substantial evidence in the record that Claimant continued to use a spiker that he thought defective because it was running continuously. According to Claimant, the spiker had previously been sent to Otter's Repair for running continuously. Claimant continued to use it despite knowing that it was problematic. Claimant knew he had a duty to remove it and report it. This is a violation of the Rule – regardless of Claimant's desire to avoid hand hammering the pre-set spikes.

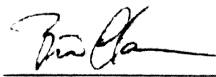
There is not substantial evidence in the record that Claimant falsely reported his injury. The Carrier relies on the re-enactment and the testimony of two coworkers in support of the conclusion that the injury did not occur as described. Those coworkers testified that the spiker worked normally before and after Claimant's use. However, there was testimony from a coworker that the reel would pull back if at the end. That coworker was walking back to the reel to move the hose. It appears that he turned and looked towards Claimant as he was walking towards the truck. His opportunity to observe was fleeting and not for the entire event due to his walking away from Claimant.

There is substantial evidence in the record that Claimant was not alert and attentive. The evidence establishes that he was holding the spiker with one hand and moving the hose with another. That is when the spiker twisted and caused his back pain. He testified that the spiker was defective because it was running continuously. It is obvious to this Board that a continuously-running large power tool should not have been held with one hand.

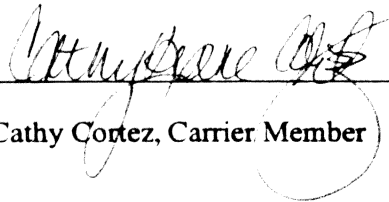
There is substantial evidence in the record of two of the four charges. Accordingly, Claimant's suspension is reduced from 15 days actual to 10 days actual.

Award:

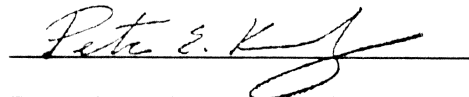
Claim sustained in part and denied in part as discussed above.



Brian Clauss, Chairman



Cathy Cortez, Carrier Member



Peter Kennedy, Organization Member

Signed on June 10, 2013