

**PUBLIC LAW BOARD NO. 4901**

AWARD NO. 240

CASE NO. 240

PARTIES TO  
THE DISPUTE:

United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company  
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained in accordance with the Findings

STATEMENT OF CLAIM:

“Request in behalf of Arizona Division Conductor B. G. Muse for his reinstatement and for removal of the alleged violations of Rules 1.1, 1.1.3, 1.2.5, 1.2.7, 1.3.1, 1.4, 1.6 and 1.13 of the General Code of Operating Rules in effect April 2, 2000, and rules S-1.2.1, S-1.2.4, and S-1.2.8 of the BNSF Safety Supplement No. 1, in effect April 1, 1998, from the Claimant’s personal record and with pay for all time lost, all rights unimpaired, and with Health and Welfare as a result of the investigation conducted on November 15, 2002.”

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was dismissed from Carrier’s service for violation of rules regarding the late reporting of injuries. At the time of his dismissal, Claimant had less than five years of service. The evidence does not show his work record to contain any instances of prior discipline.

The operative facts are not in dispute. According to the record, Claimant felt a “twinge” in his back as he lifted his bag onto a locomotive in late June, 2002. He did not report this to the Carrier until July 28, 2002. Claimant sought and received unspecified treatment for the “twinge” on or about July 21, 2002 from a doctor in Winslow, Arizona. This fact also went unreported to the Carrier until July 28, 2002.

Despite seeking the unspecified treatment on or about July 21<sup>st</sup>, there is no evidence the effects of the “twinge” caused Claimant to lose time from work or hampered his ability to perform his duties between late June, when it occurred, and late July, when it came to light. The record is silent on these points. It does, however, show that Claimant worked as a conductor on a train from Winslow to Belen, New Mexico on July 27<sup>th</sup>. But the investigation transcript contains no evidence of him having any difficulties whatsoever on that date.

In addition, Claimant’s testimony described a “rough ride” from the locomotive on July 27<sup>th</sup> thus exposing his back to considerable lateral movement on the trip.

The onset of back pain during the evening of July 27-28 at the crew lodging facility caused Claimant to lose sleep. By morning, he was experiencing considerable pain – too much to permit him to shower. He dressed with difficulty and reported to his work location where he informed the trainmaster of his condition and inability to work. The terminal manager took Claimant to a nearby clinic for medical treatment. The terminal manager's testimony corroborates the fact that Claimant was suffering considerable pain at the time.

They discussed the situation while at the clinic. The discussion revealed the "twinge" approximately one month earlier and the treatment received in Winslow one week earlier. The terminal manager asked Claimant to fill out a written report of the injury. Claimant did so.

Later in the same discussion, Claimant also told the terminal manager about the rough ride the previous day and how it might be related to his present pain. The record provides no substantial evidence of a cause for this pain except the rough ride on July 27<sup>th</sup>. Although the testimony of the terminal manager confirms that he was so informed, he did not ask Claimant to complete a separate injury report form for the rough ride of July 27<sup>th</sup> nor did the terminal manager ask Claimant to make any additions or changes to the form that had been completed so as to include any references to the circumstances of the previous day. It is undisputed that Claimant was somewhat disoriented during the discussion due to his pain. Finally, the record contains no proper medical diagnostic evidence to establish a causal connection between Claimant's pain on July 28<sup>th</sup> and the "twinge" in late June.

The Carrier's notice of investigation listed some thirteen rule citations "... concerning your late reporting of a personal injury ..." The notice did not include any allegations of misrepresentation or falsification as being within the scope of the investigation; nor did the hearing officer explore any such allegations during the investigation. Nonetheless, while the Carrier's disciplinary decision letter reduced the number of rules violated from thirteen to eleven, it expanded the scope of the findings to include "... misrepresentation of facts concerning ..." the late reporting of injury. Finally, the first sentence of the Carrier's submission to this Board asserts, "The Claimant falsified a personal injury and deserves to be dismissed."

The notice of investigation listed Southwest Division General Notices 27 D and 92 D as two of the rules that were potentially violated. Both provide that even late injury reports will be immune from any disciplinary consequences as long as they are reported within 72 hours and before medical treatment is sought. In addition to this reporting rule, the two notices go on to describe the Carrier's disciplinary program and the treatment to be accorded serious and non-serious rule violations.

The record herein portrays two distinct events, the "twinge" and the "rough ride," that are separated by approximately one month. It is undisputed that Claimant's reporting of the rough ride he experienced on July 27<sup>th</sup> fell within the 72-hour grace period of paragraph D of the two General Notices. The testimony of the terminal manager conceded as much. Thus, the rough ride and the surrounding circumstances, as they may relate to Claimant's pain on July 27<sup>th</sup>, are immune from disciplinary action per the two General Notices. This is confirmed by the fact that the Carrier's disciplinary decision letter does not cite either of these two General Notices as having been violated by the Claimant.

The record is clear, however, that Claimant did fail to timely report the "twinge" in late June as required by the Carrier's rules. However, Claimant's testimony regarding this event is

straightforward. The same is true of his account of the rough ride on July 27<sup>th</sup>. Accordingly, our review of the record fails to reveal any proper basis upon which the Carrier could conclude that Claimant misrepresented the facts of either event. Moreover, the transcript clearly shows his back pain to be real, both as described by him and corroborated by the terminal manager. Accordingly, the record provides no proper basis for concluding that Claimant falsified an injury.

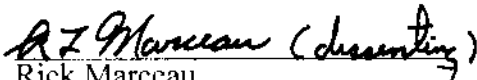
Given the state of the evidence, therefore, this Board is left with only the late reporting of the "twinge" as a basis for Claimant's termination. As previously noted, there is no evidence of prior related discipline in Claimant's personnel file. Moreover, the Carrier's disciplinary program does not explicitly categorize the late reporting of an injury to be an offense warranting immediate discharge. Indeed, the Carrier treats the infraction rather benignly and essentially ignores the first 72 hours of lateness.


According to the discipline program explained in the two General Notices, an employee involved in a first non-serious incident may choose alternative handling. On this record, we are compelled to find that this is the level of discipline that was called for by Carrier's own policy. Accordingly, Claimant's dismissal must be overturned in its entirety in favor of alternative handling. The Carrier is directed to offer Claimant reinstatement to his former employment with seniority and other rights of that status unimpaired and to make him whole for all losses resulting from his improper dismissal. The Carrier may offset against any back pay calculation the amount of any compensation received by Claimant in other employment that he could not have earned had he remained employed by the Carrier.

AWARD:

The Claim is sustained in accordance with the Findings.

  
Gerald F. Wallin, Chairman  
and Neutral Member

  
Rick Marceau,  
Organization Member

  
Gene L. Shire,  
Carrier Member

DATE: 3-4-04

*in part pertaining to deduction of outside earnings.*