

PUBLIC LAW BOARD NO. 5939

Case No. 49

Award No. 49

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE
ENGINEERS & TRAINMEN

-and-

BNSF RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim on behalf of Engineer Patrick L. Flahive for reinstatement to service with seniority unimpaired; pay for all time lost; and removal of dismissal from his personal record.

FINDINGS:

This Board, upon the whole record and all the evidence, finds as follows:

That the parties were given due notice of the hearing;

That the Carrier and Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1932;

That this Board has jurisdiction over the dispute involved herein.

In 1976, the Claimant was hired as a Brakeman. In 1977, he was promoted to a Locomotive Engineer. In 2004, the Claimant was working on the Barstow Subdivision. On April 19, 2004, Claimant was the Engineer on road switcher assignment R-CHI4291-19F. He went on duty at Barstow, Illinois at 11:30 p.m. Trainmaster L. E. Piper was one of his immediate supervisors.¹

On April 20, 2004, the Claimant was switching flat cars when he felt a "pop" in his neck. He had experienced a stiff neck on and off for ten years. The Claimant saw a chiropractor for his stiff neck in 1991, 1992, 1998 and 2002.

¹ Road Foreman of Engines M.A. Copeland was also his supervisor.

The Claimant maintains that he left a voicemail message with Trainmaster Piper on April 20, 2004, advising him that he felt discomfort in his neck after switching flat cars. However, Trainmaster Piper did not have any record of this voicemail message. Later in the day on April 20, 2004, the Claimant was treated by Dr. Berthold for his neck discomfort. He claims that Dr. Berthold's treatment actually exacerbated his discomfort.

The Claimant worked his regular road switcher assignment on April 20 - 21 and on April 21 - 22, 2004. On April 22, 2004, he left two voicemail messages with Trainmaster Piper advising him that he was still experiencing neck problems and would be unable to protect his road switcher assignment that night. The Claimant went to a hospital emergency room on April 22, 2004, because of his neck discomfort.

Trainmaster Piper instructed the Claimant to meet him in Barstow on April 23, 2004, to discuss his injury. The Claimant contends that he had no intention of filing a personal injury report but Trainmaster Piper required him to submit one. In his report, the Claimant stated that on April 20, 2004, he was switching flat cars at Barstow when slack ran out and popped his neck.

The Claimant was notified to attend an investigation to ascertain the facts and determine his responsibility, if any, for his alleged misrepresentation of facts concerning his purported personal injury on April 20, 2004, and his reputed failure to immediately report his alleged personal injury. The investigation was held on May 11, 2004. On May 28, 2004, the Claimant was dismissed from service for his putative violation of Rules 1.13, 1.2.5, 1.2.7, 1.3.3, 1.6 and 1.13 of the Carrier's General Code of Operating Rules and General Notice No. 75.

The Claimant did not misrepresent any facts concerning the personal injury he incurred on April 20, 2004, in this Board's opinion. That he had previous problems with his neck is not evidence that his neck did not "pop" while switching in Barstow on April 20, 2004.

At most, the facts reveal that the Claimant waited two days before reporting his injury. His claim that he reported it to Trainmaster Piper by voicemail on April 20, 2004, could not be substantiated. Evidently, there was nothing wrong with the Trainmaster's voicemail since the Claimant left three voicemail messages on April 23, 2004.

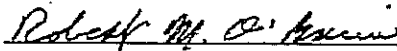
In view of the Claimant's 28 years of service and his commendable record, his failure to immediately report his personal injury would have warranted no more than a 30 day record suspension, in our opinion. However, he filed a lawsuit against the Carrier asserting that he had sustained permanent disabling damage as a result of a personal injury to his knee while working on April 10, 2004, ten days prior to his neck injury. In a September 22, 2005, deposition in his lawsuit, the Claimant unequivocally declared that given his physical condition, he could not think of any railroad job he could hold.

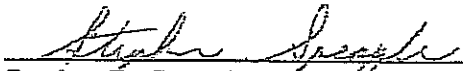
In the light of the lawsuit the Claimant filed in which he insisted that he had sustained permanent disabling injuries and his declaration that he could not think of any

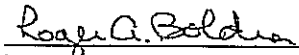
job he could hold on the Burlington Northern Santa Fe because of his physical condition, the Claimant is not entitled to reinstatement to service with the Carrier. The only relief to which he is entitled is removal of any reference to his dismissal from his personal record. Accordingly, any reference to the Claimant's dismissal shall be removed from his personal record and a 30-day record suspension shall be substituted therefore.

AWARD: Claim sustained to the extent indicated in the Findings.

The Carrier is ordered to make the within Award effective on or before thirty (30) days from the date hereof.


Robert M. O'Brien, Neutral Member


Stephen D. Speagle, Employee Member


Roger A. Boldra, Carrier Member

Dated: Oct 3, 2006