

PUBLIC LAW BOARD NO. 5939

Case No. 48

Award No. 48

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE
ENGINEERS & TRAINMEN

-and-

BNSF RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim on behalf of Engineer J. C. Mungaard for removal of discipline from his personal record (30 record day suspension and a three year probationary period) and pay for all lost time and benefits.

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.

The Claimant entered the Carrier's service on August 8, 1970, as a Locomotive Engineer. In 2003, he was working at Omaha, Nebraska.

The Claimant maintains that sometime in early 2002, he began to experience discomfort in his left shoulder. However, he did not seek medical attention until June 27, 2003. The Claimant had an MRI but his physician was unable to diagnose the discomfort in his left shoulder. On August 14, 2003, Patrick Clare, MD, performed surgery on the Claimant's left shoulder. He repaired a rotator cuff tear. The Claimant was out on medical leave as a result of this surgery.

On January 21, 2004, the Claimant went to Lincoln, Nebraska and completed a Personal Injury/Occupational Illness Report. He had assumed that his rotator cuff tear was accumulative from old age until his surgeon, Dr. Patrick Clare, opined that

"... it is more likely than not that the repetitive use of Mr. Mumgaard's left arm while operating a locomotive for his employer contributed to the diagnosed condition and the need for the treatment I have given to date for those conditions."

Dr. Clare's medical opinion was expressed in a note dated January 9, 2004, addressed "To whom it may concern." The note was not written on Dr. Clare's stationery. The Claimant explained that he obtained Dr. Clare's note from his attorney on January 20, 2004. The Claimant had retained an attorney in December 2003. Evidently, the Claimant's attorney had contacted Dr. Clare.


The Claimant was notified to attend an investigation to ascertain the facts and determine his responsibility, if any, for his alleged late reporting of a purported personal injury that occurred sometime prior to June 27, 2003. The investigation was held on February 18 and March 4, 2004. On March 19, 2004, the Claimant was issued Level S discipline (30-day record suspension) and was assigned a probationary period of three years for his putative violation of Rule 1.2 and Rule 1.2.5 of the General Code of Operating Rules.

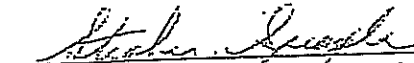
This Board looks askance at the Claimant's contention that he did not know until January 20, 2004, that his surgeon, Dr. Patrick Clare, considered his rotator cuff tear related to his repetitive motion as a locomotive engineer. He was examined on or about June 27, 2003, and Dr. Clare performed surgery to repair his rotator cuff tear on August 14, 2003. The Claimant either knew or should have known at that time that his rotator cuff tear was arguably related to his repetitive motion as a locomotive engineer. Waiting five months before reporting this alleged work related injury was inexcusable, in our opinion.


The Level S discipline assessed the Claimant for not reporting his purported personal injury before January 21, 2004, was justified, in this Board's view. However, the three year probationary period was excessive, in our opinion. Accordingly, it shall be reduced to a one year probationary period.

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