

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37090
Docket No. MS-36852
04-3-01-3-439**

The Third Division consisted of the regular members and in addition Referee James E. Nash when award was rendered.

(Nael Suleiman

PARTIES TO DISPUTE: (

(The Burlington Northern and Santa Fe Railway Company

STATEMENT OF CLAIM:

"This is to serve notice, as required by the Uniform Rules of Procedure of the National Railroad Adjustment Board effective March 12, 1999, of my intention to file an Ex Parte Submission within 75 days covering an unadjusted dispute between me and the Burlington Northern Santa Fe involving the following.

I have been working for 31 years for Burlington Northern Santa Fe Railroad in the Building and Bridges department in Cicero, Illinois. While working on January 29, 1997, I was hit by a vehicle while I was a passenger in a company pickup truck. I not only sustained serious injuries as a result of the car accident, but the accident exacerbated an existing condition in my back, caused by years of heavy lifting for Burlington Northern Santa Fe.

After surgery due to these injuries, I was told by the Claims Department that Burlington Northern Santa Fe was not responsible for my condition, that I was not able to receive a wage continuance and fiat I must seek a lawyer. While I was recovering, I was only able to receive sick benefit until I was placed on disability. To date, I have extinguished my entire savings paying back the sick pay I received from the railroad retirement board.

I feel that I have been wronged by Burlington Northern Santa Fe Railroad because I have not been compensated fully for my injuries

sustained while I was carrying on my employment with the company. I am claiming full compensation due to this accident and the resulting aggravation of my condition.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

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

During all times pertinent to this dispute, the Claimant was a BMW Bridge and Building (B&B) employee of The Burlington Northern and Santa Fe Railway Company. On January 29, 1997, while on duty and a passenger in a Carrier pickup truck, he was involved in a motor vehicle accident in which he sustained personal injuries. During his recovery period, he received sick benefits, and salary continuation, and was eventually placed on disability.

The Claimant agreed to a settlement of \$20,000.00 with the driver of the other vehicle, but now asserts that the Carrier shares in the responsibility for his personal injuries. He alleges that his injuries were due also to the nature of his work during his 30-year career as a railroad employee. He argues that his injuries were sustained over the years while working as a railroad Carpenter and were merely exacerbated by the accident of January 29, 1997. In support of his claim, he presented the medical opinion of his Orthopaedic Surgeon affirming:

“The records clearly indicated that the patient’s considerable cervical degeneration and stenosis predate the accident. The patient’s history of work as a carpenter required heavy duty work,

including frame construction, including the breaking of concrete structures with the use of pneumatic tools, busting guns, jack hammers and electric mixers did subject this individual to the substantial long term vibratory stress.

It is highly likely that: there is an association between the progressive development of arthritic condition involving the cervical spine, as well as the lumbar spine and the heavy duty repetitive vibratory stress activity that this patient was subjected to over the twenty-five year period."

The Carrier takes great exception, both in form as well as substance, to this dispute as presented by the Claimant. The Carrier argues, first, that claim was never made on the property and is, therefore, fatally flawed procedurally and should be dismissed on that basis. In support of its position, the Carrier relies on Section 3, First (i) of the Railway Labor Act, which reads as follows:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the dispute may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The Carrier further contends that this claim fails, if merits are considered, because the Claimant did not cite any probative evidence of wrongdoing or violation of any provision of the Agreement.

After listening to oral arguments, reading and evaluating the briefs, attachments and exhibits presented by both parties, the Board is unable to find any evidence - either in the form correspondence, formal claims or notes - that this

dispute had been raised on the property. The Carrier was therefore unable to address this dispute and attempt to resolve it before it appeared before the Board.

The Board is aware that in order for the system to work both parties must perceive it to be fair. The perception of fairness will not prevail unless both parties are confident they will get their day in court. Getting to court, however, must follow a procedural path of orderliness and efficiency. It must honor established time limits and must protect against abridgement of rights.

In the case now before us, the Claimant attempted to short circuit a system that was designed to efficiently and fairly dispose of labor disputes by resolving all that are amenable to resolution before rising to the level of arbitration. When that happens, the system becomes clogged and inefficient and slows down the processing of those claims that are more worthy of attention.

Because this issue was never raised on the property, one of the primary objectives of the system was thwarted and the Carrier was not afforded the opportunity to make an attempt to resolve a dispute that may have been settled at a lower level. For that reason, we find this claim to be fatally flawed and we cannot get to its merits.

We must mention that had the dispute been properly raised on the property, we would still have been unable to consider it because of lack of subject matter jurisdiction. Because the claim has to do with monetary compensation arising from a personal injury and does not involve an allegation of violation of the Agreement it is beyond the scope of the Board's jurisdiction.

AWARD

Claim dismissed.

Form 1
Page 5

Award No. 37090
Docket No. MS-36852
04-3-01-3-439

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of July 2004.