PUBLIC LAW BOARD No. 4381: CASE No. 6

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT OF THE CLAIM

1. The thirty (30) days of suspension imposed upon Machine Operator J.R. Whitver for alleged violation of Rules 600 and 602, was arbitrary, unwarranted, without just and sufficient cause and on the basis of unproven charges (System File S-S-394/AMWB 86-01-31B).

2. The Claimant's record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

FINDINGS OF THE BOARD

On September 29, 1985, the Claimant, Mr. J.R. Whitver, was assigned to operate a locomotive crane. In the course of operations, the crane overturned; Mr. Whitver sustained a back injury and the crane was extensively damaged. Based upon its contention that Mr. Whitver was negligent in the performance of his duties, the Carrier suspended Mr. Whitver for thirty (30) days for allegedly violating Rules 600 and 602.

The Carrier argues that Mr. Whitver's claim is moot because he signed a release that states in part:

> "I release and forever discharge Burlington Northern Railroad Company and all other parties whomsoever from all claims and liabilities of every kind or nature, ..."

It is clear from the record that the release pertains to liabilities in connection with and arising out of the accident of September 20, 1985 under the Federal Employee's Liability Act. The Carrier has not convincingly established that it was the mutual intent of the parties to apply the release to claims filed under Rule 42 of the current EMWE-BN Agreement.

We find no procedural defects in the handling of this claim nor in the conduct of the investigative hearing. Mr. Whitver was provided a fair and impartial hearing. This matter must be decided on its merits.

The Carrier has convincingly established, primarily through the testimony of Manager of Gangs J.A. Ohmart, that the Claimant's negligence in the operation of controls was the cause of the accident. The Organization properly argues that simply because an accident occurred, it does not follow that Mr. Whitver was negligent. However, the Organization has not

overcome the persuasiveness of Mr. Ohmart's analysis, especially with regard to the engaged load line lever. Furthermore, there is no evidence of record that a mechanical defect contributed to the accident.

We have considered Mr. Whitver's length of service and work record, and conclude that discipline has served its purpose in this matter.

AWARD

The entry of the disciplinary suspension should be removed from Mr. Whitver's record, however he should not be made whole for any lost wages due to the disciplinary suspension.

Ronald L. Miller
Chairman and Neutral Member

Maxine Timberman
Carrier Member Dissenting
(See attachment)

Bruce G. Glover
Organization Member

16 Sept 1988
Date

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CARRIER'S DISSENT TO AWARD NO. 6
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Contrary to the Board's findings, it is not clear from the record that the release (signed by Claimant Whitver) "pertains to liabilities in connection with and arising out of the accident of September 20, 1985, under the Federal Employees' Liability Act." Nothing in the record so indicates, and certainly not the language from the release quoted in the findings. That language is all inclusive, covering 'all claims and liabilities of every kind or nature," more than broad enough to cover the claim before this Board.

How the majority can read the quoted language as restrictively as it does defies not only the plain meaning of the words used, but a solid line of awards by distinguished railroad industry arbitrators as well. On this property, alone, for example, in Third Division Award 27496 (Referee Gil Vernon), identical language in a release signed by the claimant, there was properly held to render the claim moot:

> "Further, while Claimant submitted this matter to the Board in June, 1985, he executed a release "from all claims and liabilities of every kind and nature" in March, 1987. His subsequent action renders the present claim moot leaving this Board with no issue to decide. (Third Division Awards 27043, 26694, Second Division Award 9875)."

Similarly, in Award 1 of the IBEW-BN Arbitration Committee established pursuant to Article I, Section II of the January 26, 1981 Merger Protective Agreement, a release constituting "full settlement and release of any and all claims of any kind which I have or might have against Burlington Northern Railroad Company" was given its plain meaning effect by Referee John LaRocco as follows:

" The threshold issues before this Committee are whether or not the November 30, 1982 document can be properly introduced into the record, and, if so, does the document dispose of this claim.

In exchange for a substantial lump sum payment, Claimant voluntarily released the Carrier from any claims that Claimant had or might have had against the Carrier. The language in the November 30, 1982 document is so broad that Claimant released the Carrier from all liability arising out of any pending claims. Claimant voluntarily struck a bargain with the Carrier which effectively released the Carrier from any liability. Claimant's action renders this claim moot. Even if we were to sustain the Organization's position on the merits, Claimant would not be entitled to any monetary recovery.'

These awards follow the reasoning presented in a long line of decisions. See Award 20 of Public Law Board 719, UTU v BN (Daughtery); Award 42 of Public Law Board 1033, UTU v BN (Friedman); Award 12 of PUBLIC LAW BOARD 2071, UTU V. BN (Edgett); as well as Award 68 of Special Board of Adjustment pursuant to Memorandum of Agreement of June 21, 1968, UTU v. BN, and a host of other Third Division Awards including 22132, 21188, 21613, 22645, 21011, 20937, and 21633.

In view of the foregoing, there can be no doubt that the instant award stands virtually in isolation and cannot be considered of precedential value.

Maxine Timberman, Carrier Member