B-1987-6

PUBLIC LAW BOARD NO. 5696
AWARD NO. 22
CASE NO. 22

BURLINGTON NORTHERN RAILROAD

PARTIES
TO DISPUTE: and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when dismissing Mr. D. A. Williams from service for allegedly failing to promptly report a personal injury he had received on September 25, 1995.

(2) As a consequence of the Carrier's violation referred to above, Claimant should be reinstated to service, paid for all time lost and the discipline shall be removed from his record.

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant, a trackman with over 16 years of service, was dismissed

from service by letter dated November 17, 1995 which reads, in pertinent part:

> As a result of investigation accorded you on October 27, 1995, you are hereby notified that effective immediately ... you are dismissed from the service of the Burlington Northern Santa Fe Railway, for violation of Burlington Northern Santa Fe Safety Policy and Four Principles of Safety. Also for violation of the following Maintenance of Way Operating Rules; (MWOR)-1.1, Safety; (MWOR)-1.1.1, Maintaining a Safe Course; (MWOR)-1.2.7, Furnishing Information; (MWOR)-1.6, Conduct, specifically item No. 1, Careless of the safety of themselves or others; (MWOR)-1.9, Respect of Railroad Company; and (MWOR)-30.5, Lockout/Tagout. Violation of these rules is in connection with your last personal injury, while assigned to Rail Gang RP-15, working in the vicinity of Pierce City, MO., on September 25, 1995, failing to adhere to Burlington Northern Santa Fe Safety Policy, that working safely is a condition of employment, making statements prior to this injury of your intention to get hurt, and failing to lockout equipment as required. Also failing to report incident promptly and give all he facts to supervisor pertaining to this incident, and previous personal injuries.

The October 27, 1995 investigation was conducted pursuant to notice given to Claimant on October 12, 1995 which referenced Claimant's injury bruising his left hand while operating spike driver BNX 44-00093 on September 25, 1995 and his failure to file a prompt report; it makes no mention of any specific rule violations or safety policies.

The October 27, 1995 investigation reveals that at the time of the injury in question, Claimant worked as a trackman on Rail Gang RP-15, and had been working with that gang since March, 1995. As a Class 3 Machine

Operator with the most seniority on that gang, he often filled the vacancies caused by days off and vacations of other machine operators, and in such capacity operated various equipment including a spike driver, although he is not officially qualified on this type of machine. On September 25, 1995 he was assigned by acting Roadmaster Richard Hood to operate the spike driver on regular operator Tom Howerton's day off.

Claimant testified that he operated the old spike driver from 7:00 a.m. until about 3:00 p.m. when a new piece of equipment was sent to replace the one he was working on. Claimant stated without contradiction that he had never operated this type of Nordberg spike driver with this particular gun set-up before, since all others had only one block on each guide rod, while this machine had two blocks on each side. Roadmasters Hood and McQueary confirmed that it was unusual to have two blocks on each side of this type of equipment and they could not recall receiving one in such condition before.

Claimant explained what caused his accident as follows. In attempting to get the machine ready for operation, he lowered the inside gun down, and the gun anvil came all the way down and would not go back up. The same thing occurred on the outside gun. Assistant foreman Walter Clay, who was helping Claimant by feeding him spikes that day, confirmed that neither he nor Claimant could initially determine what was wrong. Claimant turned off the engine, shut down the machine, locked it up with a maintenance lock since there was no lockout/tagout kit with this machine, and inspected to see why the guns would not come back up. He noted that each side had two blocks, one on top and the other on the bottom. Claimant saw that the bottom block had been tightened for shipment and was preventing the guide rods from coming down, and he determined that he

had to loosen that block to correct the problem. Claimant testified that he was not sure what would happen. Claimant explained that when he loosened the bottom block, the jaw, guide rod and top block all slammed down catching his hand between the two blocks. Clay confirmed that despite being qualified on this machine, he would not have known that this would happen if the bottom lock was loosened.

Clay testified that he had his back turned at the time, heard Claimant yell, and asked if he was okay and whether he should call Hood. Claimant indicated that he should wait a while to see if the pain subsided. Neither Clay nor Claimant made any further report of the incident that day.

During a job briefing the following morning, Claimant reported to Roadmaster Hood what had happened, and after the briefing took him to see how the accident occurred, indicating that he had a sore hand. Hood testified that he did not fill out any paperwork on the incident nor instruct Claimant to do so since he did not feel that it was a serious enough injury to require a report at the time. Claimant testified that Hood asked if he thought his hand would be all right, and that he was willing to work with the company to wait and see if everything was okay before further reporting it or seeking medical attention. Hood admitted that he did consider Claimant's verbal report to be an injury report.

The record reflects that on Hood's last day of temporary assignment to the gang, Friday, October 6, 1995, Claimant informed Hood that his hand was still sore and indicated that he might seek medical attention. Hood recalled asking Claimant if it could be the result of running the spike driver or of his previous carpel tunnel surgery, and Claimant indicating that it could be. Claimant recalled Hood asking him to wait a few more

days; neither filled out any paperwork on that date.

On Monday, October 9, 1995 Claimant called Roadmaster Randy McQueary, back from vacation, at his home early in the morning and told him he wanted to see a doctor to make sure there were no broken bones in his hand. He was instructed to report to work, and was thereafter taken by Hood to a medical clinic for assessment and treatment. During that time Hood informed Claimant that it looked like the incident was now reportable and asked him to fill out a Personal Injury Report and sought information from Claimant for his own Engineering Division Personal Injury VMS Report. During that discussion, Hood asked Claimant how many prior injuries he had and was told he thought it was two. Hood testified that a later review of Claimant's Personal Record revealed 7 prior injuries. Claimant testified that he understood Hood to be asking about the number of reportable lost time injuries, explaining that his record contained notations of carpel tunnel surgery and bee sting reactions which he had previously been informed were not considered to be injuries. Hood noted that he did not clarify exactly what information on injuries he was seeking, asserting that any notations of an injury on a Personal File must be the result of an accident.

Roadmaster McQueary explained that as a result of the three man inspection of the equipment that was made after the injury, it was determined that the incident was caused by stored energy which resulted from having two blocks on each side of the equipment fastened on the top and bottom as they were, rather than the normal procedure of having one block on each side. A safety bulletin was written and a safety alert was sent advising operators to have the lockout/tagout kit with them, rather than on the machine. The particular spike driver was altered by removing

one block from each side, conforming it to others used. All witnesses asked indicated that such modification made the machine safer and would eliminate the possibility of a similar accident occurring in the future.

The record confirms that there was no lockout/tagout kit issued for this new piece of equipment at the time of the injury. Both Claimant and regular spike driver operator Howerton testified without contradiction that the lockout/tagout procedure would not have prevented what happened to Claimant since the spring would have caused the other items to drop down immediately upon loosening the lower block bolt with the gun in the lower position regardless of whether the machine was running or not. Both explained in hindsight alternate ways the situation could have been handled, but stated that there was no way to know of them at the time unless one was familiar with this exact set-up before.

During the investigation, McQueary was questioned about an alleged statement made by Claimant at a job briefing shortly after he began working on the gang. Claimant explained that he had bid on the job with another employee, who had just been removed from the job when it was determined that he was not physically qualified to perform the work involved. He recalled McQueary stating at the briefing that he had been told to watch out for that employee and Claimant since they were injury prone, and Claimant's joking comment that they were on the job to get hurt. Claimant testified that he was appropriately responding to McQueary's sarcastic statement with one of his own, and that it was clear he was joking around. McQueary basically agreed with Claimant's version of this conversation.

As an after-thought at the hearing, and over the Organization's

objection, Hood was recalled and recited into the record the various rules and safety procedures cited by Carrier in its dismissal letter, opining that Claimant violated each by his actions. Claimant testified that he felt that he complied with all safety procedures, the lockout/tagout procedure as best he could with the equipment he had, as well as the reporting requirements.

The Carrier argues that Claimant violated very important safety rules and policies, and based upon his prior record including numerous personal injuries, has proven himself to be an unsafe employee. The Organization argues that Claimant did not violate any rules, and that the record supports the conclusion that the two blocks on the machine created a safety hazard which resulted in Claimant's injury, and that he was not to blame for causing it. It also notes that all of Claimant's prior injuries were not his fault and that he was never charged with any rule violations concerning them.

The Organization asserts that Claimant's immediate supervisor knew of his injury at the time it occurred, and that any failure to further report it was the decision of his superiors and not his alone. The Organization contends that the lockout/tagout procedure had nothing to do with the accident, and was followed as best Claimant could under the circumstances. Finally, the Organization relies upon Claimant's uncontested version indicating that he was joking when he made the earlier statement that "he was out there to get hurt" relied upon by Carrier in its dismissal letter.

The threshold and determinative question in this case is the existence of substantial evidence to support a conclusion that Claimant violated safety rules and policies as well as other cited operating rules as

asserted by Carrier. Considering the totality of the evidence presented, we cannot find the existence of the required showing. First Division Award 23923. There is no evidence which could substantiate a contention that Claimant acted improperly in attempting to get the new spike driver working, or in the method by which he did so. His assistant foreman, a qualified operator, did not know of any safety risk to what Claimant was doing, nor had Claimant worked on a spike driver with two blocks before. The allegation that he violated lockout/tagout procedures cannot be sustained since it is undisputed that such machine did not have the requisite kit, Claimant used an available maintenance lock, and that such procedure had nothing to do with the injury.

With respect to his failing to promptly report or furnish information on prior injuries, it is clear that his superiors had full knowledge of what occurred at the time and failed to require him to file an injury report, opting instead to see whether his injury went away on its own without medical attention. It is clear from Hood's testimony that he felt that it was not a reportable injury until October 9, 1995 when it was first documented by Claimant and a supervisor. Further, we find legitimate confusion on what Hood was asking Claimant concerning the number of prior injuries to justify Claimant's response and his explanation for such. Finally, there is no dispute that Claimant's comment concerning getting hurt was made months before in a joking context, and cannot be relied upon to show unsafe proclivities.

Under the circumstances of this case, the Board is of the opinion that Carrier failed to sustain its burden of showing that Claimant violated the cited safety rules and policies, and we conclude that no discipline was warranted. The record reflects that Claimant was reinstated on April 16,

1996. We therefore direct that Carrier make him whole for all loss of earnings suffered as a result of his improper dismissal.

AWARD:

The claim is sustained. Carrier shall make Claimant whole for losses suffered attributable to his dismissal of November 17, 1995.

Margo R. Newman
Neutral Chairperson

Thomas M. Rohling
Carrier Member

E. R. Spears
Employe Member

Fort Worth, Texas
~~September~~ October 21, 1997