Public Law Board No. 6204

Parties to Dispute

Brotherhood of Maintenance of Way Employees	)	
	)	
vs	)	**Case 11/Award 11**
	)	
Burlington Northern Santa Fe	)	

Statement of Claim

Claim of the System Committee of the Brotherhood that:

1. That the thirty (30) day suspension of Machine Operator R. A. Fritz for alleged violation of Safety and General Rules 567,585 and 589 in connection with a personal injury was improper and a violation of the labor Agreement.

2. As a consequence of the violation referred to in Part (1) above, the Claimant's record shall be cleared of the charge leveled against bim and he shall be compensated for all wage loss suffered.

Background

The Claimant was advised on March 17, 1994 to attend an investigation in order to determine facts and place responsibility, if any, in connection with an alleged personal injury which he sustained while working at Broadview (Boardview), Montana on March 11, 1994 and with his failure to report this injury. After an investigation was held on March 23, 1994 the Claimant was advised that he had been found guilty "of failure to promptly report an injury to (his) supervisor...". He was assessed a thirty (30) day suspension. The Claimant's suspension letter states the following, in pertinent part, which is cited here for the record.

"You are hereby suspended from the service of the Burlington Northern Railroad for a period of thirty (30) days effective April 21, 1994 through and including May 20, 1994 for violation of BN Safety Rules and General Rules 567 for your failure to exercise proper care and judgment resulting in your injury of March 11, 1994 and.. .for your failure to promptly report this injury to your supervisor in a timely manner as indicated in the investigation afforded you on March 23, 1994...".[1]

This suspension was appealed in the proper manner on property under Section 3 of the Railway Labor Act and the operant Agreement up to and including the highest Carrier officer designated to hear such. Absent settlement of this claim on property it was docketed before this Board for final adjudication,

Dual Jurisdiction Question

The letter of appeal states that the Organizaton requests that "...Mr. Frik be paid, at his proper rate of pay, for all time lost as a result of this improper discipline...".

The record shows that the Claimant last "...rendered compensated service..." for this Carrier on March 30, 1994. This was prior to the time he was to serve the thirty (30) day suspension assessed after the March 23, 1994 investigation was held.'

The record also shows that the Claimant, with representation by an attorney, settled a claim involving an incident which took place at "...Broadview, Montana (on) 3/11/94...". There can be little doubt in the mind of the Board that the claim tiled by the Claimant's attorney deals with the same event involved in the instant case.

'Employees' Exhibit A-l.

[2]Employeer's Notice of Qualifying Event signed by a representative of the BNSF on October 29, 1994.

As a result of the claim filed by the Claimant's attorney a settlement was arrived at between the Claimant/Attorney and the BNSF with provision whereby the Claimant started to receive disability retirment on the date of September 30, 1994.

The question remains whether the separate claim filed by the Organization on behalf of the Claimant for payment for the suspension dates of April 21-May 20, 1994 remains valid in view of the settlement negotiated on behalf of the Claimant on September 30, 1994. This issue will be addressed by the Board since the Carrier introduces the language of the settlement agreement, in pertinent part, for consideration by this Board. The language of the settlement agreement states the following which will be cited here for the record:

> "In further consideration of this settlement, it is understood (that) the injuries I, Robert A. Fritz, have sustained will forever and permanently disable me from returning to work for Burlington Northern Railroad Company or any of its subsidiaries, and I hereby release any claim or right which I have to return to employment with the Burlington Northern and I hereby specifically agree that I will not apply for or seek employment with Burlington Northern Railroad Company at any time in the future. In further consideration of this settlement, it is understood and agreed that I will not progress any claim or pursue any remedy that may be available to me under the provisions of 42 USC Sections 12101 et seq., (popularly referred to as the American with Disabilities Act of 1990), and that any such claims or remedies have been settled...".

In view of the above language, as well as all other information of record in this case, the Board is not persuaded that it should not address the merits of the claim before it. Under the settlement agreement negotiated between the Carrier and the Claimant's attorney, the Claimant has agreednot to return to work for the Carrier and/or to progress any claim under the American with Disabilities Act. The language does not state that the Claimant

forfeits his right to progress a claim filed on his behalf under the Railway Labor Act and the operant Agreement for allegedly having been improperly disciplined because of the manner in which the injury he sustained on March 11, 1994 was reported.

Discussi & indings

The record shows that the Claimant was assigned to work as a crane operator in the Broadview ~~Boardview~~, Montana area on March 11, 1994 which was a Friday. He was operating a Pettibone crane. When the Claimant started work on that day he had a bucket attached to the boom of his crane. Because he had to move some railroad ties and rails he needed a fork attachment on his boom. The incident involving the Claimant's injury took place when he took the bucket off the boom and installed the fork.

The common procedure for removing a bucket is to lower the boom and set the bucket on the ground and then remove the pins attaching the bucket to the boom. Then the boom is moved and lined up to the fork. At that point pins have to be inserted to attach the bucket to the boom. This is a fairly elementary procedure. The practical problem usually centers on lining up the holes to insert the pins on the piece of equipment being attached to the boom. Operators commonly use a short iron bar and a hammer to line up the holes in order to insert the pins.

Testimony at the investigation is that it was common procedure for an operator to have some help when removing and installing attachments to booms. But it was also common practice for operators to change attachments singlehandedly. The latter is a point

of some importance in this case since the Carrier implies that it was unsafe for the Claimant to have tried to change the boom attachments by himself.

According to the record, the Claimant had planned to have an assistant help him on the day in question change the attachments to his boom. But when it was time to change the attachments the assistant was not there. So the Claimant attempted the installation of the fork ***on*** the boom of his crane by himself. While doing so he felt a "crick" in his back. Shortly after the Claimant states that he felt a "crick", two fellow workers did arrive on the scene and they helped the Claimant put one of the pins in to hold the fork to the boom so that he could get on with his work. It was when the Clamant was lining up the holes to attach the fork to the boom, and trying to get the fork attached to the boom, that he did feel the "crick" in his back. The Claimant testified that he did not pay much attention to this "crick". Information of record is that it is not uncommon for crane operators to feel such "cricks" and/or other aches and pains as normal side-effects of their job. The Claimant testified that he felt the "crick" while attempting to hammer a pin in place while holding the fork with an iron bar.) He states that he then "straightened up and stretched out-and did not feel quite right...". So he went and sat on the seat of the crane to rest his back. After that, he testified, he "...did feel better...". The Claimant states that he did not report anything to his supervisor because he felt okay and worked the rest of the day.

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[3]This was the third pin holding the fork to the boom. The Claimant had already inserted the two others by himself.

Throughout the following week-end and on the following Monday the Claimant continued to feel some discomfort which he associated with the normal aches and pains related to his normal railroad duties. During the night on Tuesday of the following week, however, tbe Claimant began to feel some numbness in his leg. When the Claimant went to work on Tuesday he contacted his foreman and asked for paper work in order to fill out an injury report because his leg was still feeling numb. The Claimant testifies that he was subsequently told by two doctors who examined him that the numbness in his leg was related to the "crick" he felt in his back on the preceding Friday.

In view of the record before it the Board concludes as follows. That the Claimant sustained an injury from having changed the attachments on the boom of his crane on the date of March 11, 1994 cannot be disputed. The first issue is whether the injury was caused by the Claimant attempting to change the attachments by himself' rather than with help. There is sufficient evidence of record to warrant conclusion that it was not uncommon for operators to change attachments without assistance. In fact, according to statements by other operators which were offered to the Carrier during the handling of this case on property, which is acceptable evidence of record, it was quite common for operators to change attachments by themselves.[4] This is, in fact, never disputed by the Carrier during the handling of this case on property. Thus reasonable minds would conclude that this in itself is insufficient grounds to conclude that the Claimant was

[4]See Employees' Exhibit A-6 and attachments.

negligent and unsafe in the conduct of his duties. The second issue centers on whether the Claimant was negligent in not reporting an injury when he felt a "crick" in his hack on the date of March 11, 1994 while changing the attachments on his boom. Subsequent medical diagnoses established that there was a relationship between the "crick" the Claimant felt on March 11, 1994 and the subsequent numbness in his leg which he felt on March 15, 1994 which was some four days later. But the Claimant himself testifies at the investigation that he did not feel any out of the ordinary pain from the March 11, 1994 "crick" until four days later. There is simply no evidence of record to warrant conclusion that the Claimant acted in a devious manner and/or that he attempted to deliberately deceive supervision by waiting four days to advise supervision of the numbness he was feeling in his leg. On the face of it this Board can find no grounds for concluding that the Claimant deliberately attempted to circumvent his obligations to report an injury while on the job.

The Rules at bar in this case are the following.

Rule 567

Employees must:

a. Not incur risk which can be avoided by exercise of care and judgment.
b. Take time to work safely.
c. Exercise care to prevent injury to themselves and others.

Rule 585

All accidents/incidents must be reported to immediate supervisor as soon as possible by first available means of communciation...

Rule 589

> An employee having any knowledge or information concerning an accident or injury to himself or others must complete Form 12504, Reprot of Personal Injury, in triplicate, before his tour of duty ends (or as soon as thereafter possible), supplying the information required. All copies are to be sent to the superintendent.

There is insufficient evidence in this case to warrant conclusion that the Claimant was in violation of the Rules cited above. On merits the claim is sustained.

With respect to relief the Board rules as follows. The Claimant last rendered compensated service on this Carrier on the date of March 30, 1994. This is clearly ~~stated~~ stated Ace IR in information provided to this Board. The Claimant started to receive disability retirement on September 30, 1994. Thus the Claimant was off work from March 3 1, 1994 through September 29, 1994. There is no information on whether the Claimant received any compensation, while off work, from the dates of April 21, 1994 through May 20, 1994, which fell between the time-frame cited in the immediate foregoing. If, in fact, the Claimant served the April/May suspension and did not receive any compensation from the Carrier or from any other source between these two dates, this Award mandates that the Clamant shall be paid for all time lost, at the rate then applicable, because of the suspension assessed by the Carrier on the date of April 19, 1994. If the Claimant was receiving some compensation, however, in the form of sick leave, other compensation available under the labor Agreement, or under unemployment comp, or compensation from any other source because of his injuries during the period of April 21, 1994 through May 20, 1994 such shah be deducted, in implementing this Award, from any compensation which the Claimant may have lost because of the suspension he received.

The patties shall do a joint search of the record in order to determine what the situation here might be and then implement this Award accordingly. In either case, all information related to the suspension shall be removed from the Claimant's file if the file continues to exist in the Carrier's records.

Award

The claim is sustained in accordance with the Findings. This Award shall be implemented within thirty (30) days of its date.

Edward L. Suntrup, Neutral Member

Thomas M. Rohling, Carrier Member

Roy C. Robinson, Employee Member

Date: October 10, 2001