

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 4055

BURLINGTON NORTHERN RAILROAD COMPANY *
(Former Frisco) *
-and- *
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES *

CASE NO. 9

AWARD NO. 9

On January 21, 1986, the Brotherhood of Maintenance of Way Employees (hereinafter the "Organization") and the Burlington Northern Railroad Company (hereinafter the "Carrier") entered into an Agreement establishing a special board of adjustment in accordance with the provisions of Section 3, Second of the Railway Labor Act, Public Law 89-456. The Agreement was docketed by the National Mediation Board as Public Law Board No. 4055 (hereinafter the "Board").

This Agreement contains certain relatively unique provisions regarding the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction is limited to disciplinary disputes involving Carrier employees represented by the Organization. Although the Board consists of three members, a Carrier Member, an Employee Member and a Neutral Member, awards of the Board only contain the signature of the Neutral Member, and the parties have agreed that such awards will be final and binding in accordance with the provisions of Section 3 of the Railway Labor Act.

In accepting the assignment, the below-signed Neutral Member agreed to render awards in disputes submitted within thirty (30) days of the date required documentation was received from the parties.

In initiating a case before the Board, the parties have agreed that they will provide the Neutral Member, by mail, with the following documentation: the notice of investigation; the transcript of investigation; the letter assessing discipline; and, the correspondence exchanged on the property. The Board has the authority to require or permit the production of such additional written evidence as the Neutral Member may decide is appropriate for review. The above documentation shall constitute the record of proceedings before the Board. The parties have agreed that it is not necessary to have oral hearings in the cases presented to this Board.

The Board's review is limited to the documentation provided and any additional argument, evidence or awards which the Board might require after review of the initial submission of the dispute. In deciding whether the discipline assessed should be upheld, modified or set aside, the Neutral Member shall determine (1) whether there was compliance with the applicable provisions of Schedule Rule 91; (2) whether substantial evidence was adduced at the investigation to prove the charges made; and (3) if discipline is found to be appropriate, whether the discipline assessed was excessive.

Background Facts

Mr. Donald Charles Hall (hereinafter the "Claimant") entered the Carrier's service as a Laborer on August 23, 1966. He was subsequently promoted to Machine Operator and was occupying this position when he was dismissed from the Carrier's service for ten (10) calendar days effective December 19, 1985. The Claimant was dismissed for his alleged failure to properly secure a jack frame on BNX-54-0181 while he was temporarily assigned as an operator in the vicinity of Wetumka, Oklahoma.

Findings and Opinion

The record reflects that significant damage was caused on the morning of December 16, 1985 when the power shoulder jacks on a Tamper (BNX-54-0181), which were required by operating procedures to be in a secured upright position, dropped down and hit a road crossing as the Tamper was being driven over a portion of track by Surfacing Gang Foreman S.D. Conaway.

On the morning in question the Claimant was assigned to operate a Ballast Regulator; the regularly assigned Tamper operator was not available for duty; and Gang Foreman Conaway was operating the Tamper. Gang Foreman Conaway testified that he was having trouble operating the machine and so "I got off and told (the Claimant) to get on there and finish the spot". The Claimant completed the tamping operation and then he and Foreman Conaway ran the regulator and completed the operation at the point of track involved. Foreman Conaway then resumed control over the Tamper and began to drive that machine to another point on the track some six (6) miles away. As he was moving the Tamper, Foreman Conaway was on the radio talking to the Claimant when the power jacks hit a road crossing.

The essence of the Carrier's position, reflected by the record, is that the Claimant, who was last responsible for the operation of the Tamper, failed to secure the power jacks and by that failure was responsible for the damage which occurred.

The Board should first address the Organization's contention that the notice of investigation is procedurally defective because it fails to contain precise charges. The notice of investigation, dated January 3, 1986, states in relevant part that the Claimant was charged for his failure to "properly secure jack frame on BNX-54-0181 while temporary assigned as operator". Technically, the Organization is correct. The investigation was concerned with the Claimant's alleged failure to secure the power jacks and not any alleged failure to secure the jack frame. However, the Organization's technical objection does not establish that the Claimant did not have clear and unequivocal notice of the nature of the charges against him. He came to the hearing more than adequately prepared to address the events of the day in question, and to fully establish why, in his opinion, he had acted responsibly and within the Carrier's safety rules. Accordingly, we find no merit in the Organization's procedural objection and thus we will address the merits of the claim.

The Board should first observe that the transcript in this case provided us with minimal guidance and understanding regarding the proper, customary and complex operation of the particular piece of machinery involved. It is obvious that Conducting Officer Switzer has a thorough knowledge and understanding of the intricate workings of the machine, and in particular the power jacks.

As best we can understand the operation of the system, we would tend to agree with the Carrier's conclusion that the power jacks did not "bleed down" as the result of a pressure loss, and that they did not drop down as result of their photoelectric sensors being activated or short-circuited by the radio transmission involving Foreman Conaway and the Claimant.

However, there is no evidence in the record to support the Carrier's conclusion that the Claimant did not, as he testified, place 3/8 inch bolts, which were approximately two and one half to three inches long in the safety pinholes to secure the jacks. The Claimant testified that he installed the pins (the bolts) that he found available. He further testified that he did not place nuts on these bolts and that the original pins, which had been provided by the machine manufacturer, had long ago been lost or misplaced. There is corroborating testimony in the record to the effect that the safety pins, which were the proper securing devices for the jacks, were not available on the property.

There are two reasons to conclude that the Carrier, while it may have presented preponderant evidence to establish that the Claimant was responsible for the accident, has not established by substantial evidence that the accident was the Claimant's responsibility.

First, there is reason to conclude that while the Tamper was being driven over six (6) miles of track that the bolts, which were not specially fitted to act as securing devices but which were the only available devices used for this purpose, "vibrated out" and caused the jacks to drop down.

Secondly, there is some reason to conclude that Foreman Conaway, who was responsible for the movement of the Tamper, could have and should have verified that the machine could be safely and properly operated over the track.

In light of these uncertainties in the record, and in view of the Carrier's failure to establish the Claimant's negligence by substantial and convincing evidence, the Board concludes that the claim should be sustained.

Award The claim is sustained. The Carrier is directed, within fifteen (15) days of the receipt of this Award, to reimburse the Claimant for all time lost and to restore any benefits or seniority he may have lost as a result of the instant discipline. The Carrier is further directed to immediately remove any reference to this discipline from the Claimant's Personal Record.

This Award was signed this 20th day of December 1986 in Bryn Mawr, Pennsylvania.

Richard R. Kasher
Richard R. Kasher, Neutral Member
Public Law Board No. 4055