

SBA No. 1112
BNSF/BMWE
Case No. 36
Award No. 37

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON/NORTHERN/SANTA FE

AND

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

**Claimant:
John D. Horn**

**CASE NO. 36
AWARD NO. 37**

On February 2, 2001 the Brotherhood of Maintenance of Way Employees (“Organization”) and the Burlington Northern/Santa Fe (“Carrier”) entered into an Agreement establishing a Special Board of Adjustment in accordance with the provisions of the Railway Labor Act. The Agreement was docketed by the National Mediation Board as Special Board of Adjustment No. 1112 (“Board”).

This Agreement contains certain relatively unique provisions concerning the processing of claims and grievances under Section 3 of the Railroad Labor Act. The Board’s jurisdiction was limited to disciplinary disputes involving employees dismissed, suspended, or censured by the Carrier. Moreover, although the Board consists of three members, a Carrier Member, an Organization Member, and a Neutral Referee, awards of the Board only contain the signature of the Referee and they are final and binding in accordance with the provisions of Section 3 of the Railroad Labor Act.

Employees in the Maintenance of Way craft or class who have been dismissed or suspended from the Carrier’s service or who have been censured may choose to appeal their claims to this Board. The employee has a sixty (60) day period from the effective date of the discipline to elect to handle his/her appeal through the usual channels (Schedule Rule 40) or to submit the appeal directly to this Board in anticipation of receiving an expedited decision. An employee who is dismissed, suspended, or censured may elect either option. However, upon such election that employee waives any rights to the other appeal procedure.

This Agreement further established that within thirty (30) days after a disciplined employee notifies the Carrier Member of the Board, in writing, of his/her desire for expedited handling of his/her appeal, the Carrier Member shall **arrange** to transmit one copy of the notice of the investigation, the transcript of the investigation, the notice of discipline and the disciplined employee’s service record to the Referee. These

documents constitute the record of the proceedings and are to be reviewed by the Referee.

The Agreement further provides that the Referee, in deciding whether the discipline assessed should be upheld, modified, or set aside, will determine whether there was compliance with Schedule Rule 40; whether substantial evidence was adduced at the investigation to prove the charges made; and, whether the discipline assessed was arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

In the instant case, this Board has carefully reviewed each of the above-captioned documents prior to reaching findings of fact and conclusions.

BACKGROUND FACTS

Claimant, John D. Horn, Section Foreman, for Burlington Northern Sante Fe Railroad was charged with failure to work safely and exceeding his personal capabilities resulting in personal injury to himself on Tuesday, July 31, 2001 in Chariton, Iowa. While using a Stanley Hydraulic Jack and while horizontally jacking the switch point and stock rail over to put bolts on a connecting rod, the Claimant injured his right shoulder.

The violation for which a Formal Reprimand was issued, was Maintenance of Way Safety Rule 1.4.7, Physical Exertion, which states as follows:

Employees must only use BNSF approved stretches when stretching at the beginning of the shift, before physical exertion, after rest breaks, and after a long period of sitting or maintaining the same posture. Employees are to stretch without exceeding personal capabilities, but must participate to the extent of their ability or as directed by a physician. Stretches following rest breaks may consist of a subset of the approved stretches.

Always use safe lifting practices *when* lifting, carrying, or performing other tasks that might cause back pain, injury, or property damage. Do not use excessive force to accomplish tasks. If one person cannot manually handle a load safely, then use mechanical assistance. Where mechanical assistance is not readily available, request assistance or stop and obtain means necessary to complete the task.

and Maintenance of Way Operating Rule 1.2.5, Reporting, which states as follows:

All cases of personal injury, while on duty or on Company property must be immediately reported to the proper manager and the prescribed form completed.

A personal injury that occurs while off duty that will in any way affect employee performance of duties must be reported to the proper manager as soon as possible. The injured employee must also complete the prescribed written form before returning to service.

The investigation was held at 10:00 a.m. on Wednesday, August 29, 2001 at the Burlington Northern Sante Fe Section Headquarters in Ottumwa, Iowa.

FINDINGS AND OPINION

The Organization asserts that the Claimant correctly employed the necessary techniques and skills required during the jacking, consistent with the skills others employed while using the Stanley Hydraulic Jack. The Organization points out that Claimant's version of events was corroborated by his partner, Co-employee **Rupp**, who specifically stated at the investigation that the jacking process was done with the "normal motion" of "pulling the jack handle." It is the position of the Organization that the Claimant's prior surgery had no connection with this second injury to his right shoulder. Besides, the Organization maintains that the Claimant immediately resumed his original work duties, without exception. In sum, the Organization argues that the Claimant's entire personal health record was unfairly utilized against him. Based on all the above, the Organization requests that the Board set aside this censure and expunge his record.

The Carrier contends that the Claimant preformed his duties unsafely and used excessive force causing aggravation to a pre-existing, right shoulder injury. It is the position of the Carrier that the Claimant exerted undue stress on the hydraulic jack on July 31, 2001, the date of this incident. The Carrier asserts that the Claimant was unduly careless, **negligent**, and possibly dishonest in making his claim, thus violating these safety rules which allegedly caused the current injury. In response to the absence of procedural safeguards, the Carrier rebuts that the investigation was fair and the health inquiries were necessary to ascertain the validity of this claim. Based on all the above, the Carrier requests that the Board sustain the censure of this Claimant for the aforementioned reasons.

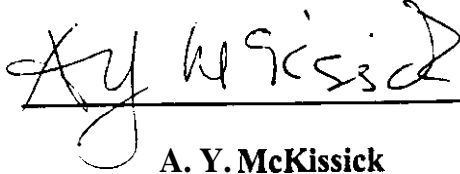
After a careful review of the record, the Board finds the Claimant was attentive, not negligent, nor dishonest in making this claim of injury. Moreover, the Board further finds that based on corroborative testimony of ~~the~~ co-worker's past methods of operation of the hydraulic jack that the Claimant did not mishandle or unsafely operate this machinery. Additionally, evidence reveals that there were two separate and distinct injuries as the Claimant resumed all the same duties, without exception, **after** his initial surgery. Lastly, the Board finds that the broad, long-winded inquiry into the Claimant's other related health **problems** was excessive. This is in distinction with a narrow, restrictive but necessary inquiry into relevant and pertinent factors of this specific claim of injury.

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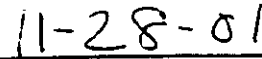
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AWARD

The censure shall be set aside and his record shall be expunged. Accordingly, this claim is sustained.

A handwritten signature in dark ink, appearing to read "A. Y. McKissick", written over a horizontal line.

A. Y. McKissick
Neutral Chair
SBA No. 1112

A handwritten date "11-28-01" in dark ink, written over a horizontal line.

Dated

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