

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON/NORTHERN/SANTA FE

AND

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

**Claimant:
A. L. Grubbs**

**CASE NO. 50
AWARD NO. 51**

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 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 establishes that within thirty (30) days after a disciplined employee notifies the Carrier Member of the Board, in writing, of one's desire for expedited handling of this 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 substantiate 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 the instant case, this Board has carefully reviewed each of the above-captioned documents prior to reaching findings of fact and conclusions.

BACKGROUND FACTS

Anthony L. Grubbs, Claimant and Track Laborer, was injured while working in the Mobile Gang UC-01, on the rail, at or near 22 on the Orin Subdivision at Powder River at approximately 1000 hours on Thursday, June 20, 2002. His Headquarters was located in Alliance, Nebraska. Injuries included: a broken right foot and a severe laceration to his upper lip, requiring eight (8) stitches. (Exhibit – 3(b)) The Claimant was injured while putting new soaps in the insulators when the wedge that he was utilizing “popped out” and “hit him in the upper lip”.

An investigation of this accident occurred at 301 1st Avenue, Edgemont, South Dakota, on Wednesday, July 3, 2003 at 0900 hours. The record reveals that the Claimant was injured while using a welding wedge to manipulate the rail on June 20, 2002. Based on this investigation, Claimant was charged on record with a ten (10) day suspension having violated several rules for his failure to use the proper tools and equipment for the purposes intended and for his failure to be alert, attentive and to avoid injury when performing his duties. The Rules, at issue, are as follows:

Maintenance of Way Safety Rule 1.2.3, Alert and Attentive:

Assure that you are alert and attentive when performing duties.

Maintenance of Way Safety Rule 1.4.2, Tools and Equipment:

Use tools and equipment for the purposes intended.

Maintenance of Way Safety Rule 7.7, Correct Tool Use:

Use tools only for what they are designed to do. If unsure about a tool's correct use, ask your supervisor.

It is the Carrier's position that the manipulator is the proper tool for the job, not the lining or welding wedge nor a sledgehammer. That is, the thrust of Rule 1.4.2 is that the use of the correct tool should be for its intended purpose. The Carrier argues that one and only one tool for this claim is the manipulator. The Carrier maintains that it was designed with this specific purpose in mind, the installation of insulators, as Safety Rule 7.7 specifically notes. Still further, the Carrier points out that the Claimant had a duty to prevent this type of injury and could have prevented it, had he used the correct tool for its intended purpose, as the Rules contemplate. Lastly, the Carrier contends that the Claimant failed to be alert and attentive, as this injury should have been prevented. Based on all of the above, the Carrier requests that the suspension should be upheld and the claim denied for all the aforementioned reasons.

The Organization counters the Carrier's argument that the proper tool is the manipulator, the Organization asserts, since 1991 until the Claimant's injury, the welding or lining wedge was regularly employed. Moreover, the Organization points out that there were no exceptions taken to its regular usage until the Claimant's unfortunate accident on June 20, 2002. In response to the Carrier's argument that the manipulator was designed for the installation of insulators, the Organization rebuts that there was not enough space between the saddle and the rail to carefully implement the task-at-hand.

In response to the Carrier's argument that the manipulator is a safer tool, the Organization notes that both tools cause injuries. Besides, the Organization argues, if the use of the manipulator was safer, then it would have been in use, not the welding wedge. Lastly, the Organization disagrees that this type of accident could have been prevented. Based on all of the above, the Organization requests that the Claimant's appeal be sustained.

After a careful review of the above record, the Board finds that the suspension should be rescinded for the following reasons. First, the record reflects that it was the past practice of the Carrier to use the welder since 1991. Assistant Foreman Kepner admitted that such a practice was routine, since "day one". Second, no supervisor has ever taken exception to this practice until the injury of the Claimant. Thus, the Board must hold that the Carrier acquiesced to this usage of the welder as it was regularly utilized. Irrespective of the written Rules 1.4.2. and 7.7, the Board finds that the Carrier knew, and by omission, allowed this past practice to continue from 1991 until June 20, 2002, the date of the Claimant's accident. In light of this eleven year-past practice, it would be contradictory and patently unfair to suspend the Claimant under these circumstances.

In response to the Carrier's argument that the proper tool was only the manipulator, Assistant Foreman Kepner also admitted that either tool – the manipulator or lining wedge – was the correct tool for the job. Lastly, it would appear from the record that the Claimant could not have prevented some type of injury, even if he had utilized the manipulator, the tool now in use. Based upon all of the evidence submitted, this Board finds that the Claimant's appeal must be sustained.

AWARD

The Claim is sustained; and the suspension shall be rescinded for the aforementioned reasons.

Oct. 8, 2002
Date

A. Y. McKissick
Referee