

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON/NORTHERN/SANTA FE

AND

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

**Claimant:
Timothy James Ingison, Jr.**

**CASE NO. 51
AWARD NO. 52**

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.

STATEMENT OF FACTS

Claimant, Timothy James Ingison, Jr., has been a structural welder with the Carrier for (9) nine years. On September 18, 2002, an investigation was held at 2601 20th West, Seattle Washington. This charge of dismissal was based upon his alleged failure to provide factual information concerning his alleged left back injury, which occurred on July 5, 2001. The alleged injury to Allen C. Gabbard occurred October 15, 2000. Both the Claimant and Allen Gabbard claimed to have permanent work restrictions

Inter-related to this allegation and investigation is the falsification of injuries as depicted by a videotape showing the Claimant and Allen Gabbard engaging jointly in strenuous physical labor manifested by the pouring of concrete and landscaping on the Claimant's yard on August 6, 7, and 8, 2002. Specifically, the Carrier charged the Claimant on Aug 23, 2002 with the following violations:

Rule 26.8,

"Officers of the company hold a position of trust with respect to the execution of their duty to appropriately apply all company policies."

Rule 1.2.7

"Employees must not withhold information, or fail to give all the facts to these authorized to receive information regarding unusual event, accidents, personal injuries, or rule violations."

Rule 1.4

“Employees must cooperate and assist in carrying out the rules and instruction. They must promptly report any violations to the proper supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers, or employees, and any misconduct or negligence that may affect the interest of the railroad.”

Rule 1.6

“Employees must not be: Careless of the safety of themselves or others, negligent, insubordinate, dishonest, immoral, quarrelsome or discourteous.”

The Organization argues that Rule 40C was violated as the Carrier failed to specify the charges in writing as required. In addition, the Organization points out that Rule 40A was also violated as the injury occurred on July 5, 2001. The investigation, however, was not until August 30, 2002, more than the 15 days as required. Thus, the Organization requests a “Motion to Dismiss” this claim in its entirety.

It is the position of the Organization that the place of the investigation was not at the headquarters (Everett, Washington) of the Claimant, in violation of Rule 40C. Instead, the Organization asserts that the investigation was held in Seattle, Washington.

Based on the merits of the dispute, the Organization argues that the investigation and admission of Exhibit 8 (videotape) was unfair and prejudicial to the Claimant. In particular, the Organization’s representative was denied the opportunity to speak with the Claimant prior to the admission of various exhibits. The Organization was also denied the opportunity to cross-examine the authors of the Affidavits, admitted into evidence and personified by Exhibits 11 and 17.

In response to the authenticity of the videotape and the assessments of this tape, the Organization disputes Manager Hillstrom’s qualifications as a safety expert.

In response to the various charges against the Claimant, the Organization asserts that the Claimant has supplied all of the factual information known concerning its work-related injuries. Lastly, the Organization contends that the Claimant committed no impropriety. Based on the above, the Organization requests that the Board dismiss this claim and/or reinstate the Claimant with his seniority right unimpaired, and be compensated for wage loss resulting from this unjust discipline.

The Carrier rebuts the Organization's arguments. Instead, the Carrier contends that the Claimant knew the circumstances surrounding his work-related injuries as well as the factual information of Allen Gabbard. In particular, the Carrier asserts that the Claimant knew full well of the physical restrictions as set forth in Exhibit 7. Notwithstanding these medical and physical limitations to avoid repetitive use of this shoulders and arms as well as the prohibition regarding lifting more than forty (40) pounds, the Carrier points out that the Claimant engaged in physically strenuous activity during yard work and landscaping to his home and garden areas, as exemplified by Exhibit 8, the videotape. Besides the videotape, the Carrier asserts that additional damaging evidence were presented in two affidavits from his neighbors who were eye-witnesses to these above event as well as describing the Claimant's extensive remodeling projects within his home.

In response to the Organization's challenge of Manager Hillstrom's qualifications the Carrier counters that he is a certified safety professional. For all the above reasons, the Carrier reasons that the Claimant violated Rule 1.6 and Rule 1.27 as he was dishonest regarding his own physical restrictions and his refusal to reveal salient facts regarding his injury of the car man Gabbard, as the rule requires. Therefore, the Carrier requests that the Board discharge the Claimant for all the above cited violations.

FINDINGS AND OPINION

After a careful review of the record, the Board finds that the Claimant's appeal should be denied for the following reasons.

First, although Rules 40 A and C were technically violated, the Board finds that the Claimant was not deprived of due process. That is, the investigation was conducted in a fair and impartial manner. Notwithstanding the tardiness of the investigation, this factor did not work to the Claimant's disadvantage. In response to these procedural irregularities, this Board finds that the process itself was fundamentally fair.

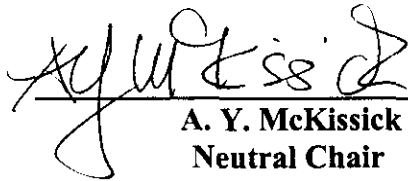
Second, looking at the merits of this controversy, the evidence is overwhelming. Exhibit 8 (the videotape) alone is demonstrative of the Claimant's ability to utilize fully his shoulders, knees, arms and back with frequent repetitive motions over a prolonged period of time, contrary to the physical restrictions specified in Exhibit 7 by the Everett Clinic on July 5, 2001. In addition, the videotape shows the Claimant stooping, bending, squatting, twisting and lifting a full load from a portable concrete mixer as well as cement bags well over one-hundred (100) pounds.

Third, the Board credits the assessments of Manager Hillstrom, a certified Safety Professional for over 20 years. Moreover, the Board finds it difficult to believe that the Claimant was unaware of the physical restrictions set forth in Exhibit 7 validated by Dr. Schaff, MD at the Everett Clinic. Dr. Schaff's restrictions specifically prohibited lifting over forty (40) pounds, any repetitive use of his shoulder or arms as well as no bending or twisting.

Fourth, this Board is compelled to find that the Claimant was dishonest and/or negligent in not knowing of these physical limitations resulting from his job-related injury on July 5, 2001. In addition, this Board finds that the Claimant has omitted to fully explain the circumstances of his injury or those of Canman Gabbard. For all of these reasons, the Board concludes that the Claimant was justly discharged. Accordingly, this Claimant's appeal is denied.

Award

Claimant, Timothy James Ingison, Jr., was discharged for just cause. Thus, his appeal is DENIED for the aforementioned reasons.



**A. Y. McKissick
Neutral Chair
SBA No. 1112**

Dated: January 22, 2002