

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

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BURLINGTON NORTHERN RAILROAD COMPANY *
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and                                     *
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BROTHERHOOD OF MAINTENANCE           *
OF WAY EMPLOYES                      *
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CASE NO. 111
AWARD NO. 111

On May 13, 1983 the Brotherhood of Maintenance of Way Employees (hereinafter the "Carrier") 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 the Railway Labor Act. The Agreement was docketed by the National Mediation Board as Special Board of Adjustment No. 925 (hereinafter the "Board").

This Agreement contains certain relatively unique provisions concerning the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction was limited to disciplinary disputes involving employees dismissed from service. On September 28, 1987 the parties expanded the jurisdiction of the Board to cover employees who claimed that they had been improperly suspended from service or censured by the Carrier.

Although the Board consists of three (3) 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 Railway 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 chose 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 procedures.

The Agreement further establishes 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 investigation, the transcript of investigation, the notice of discipline and the disciplined employee's service record to the Referee. These documents constitute the record of proceedings and are to be reviewed by the Referee.

In the instant case, this Board has carefully reviewed each of the above-described documents prior to reaching findings of fact and conclusions. Under the terms of the Agreement the Referee, prior to rendering a final and binding decision, has the option to request the parties to furnish additional data; including argument, evidence, and awards.

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 the applicable provisions of 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.

Background Facts

Mr. David Bex, hereinafter the Claimant, entered the Carrier's service as a Laborer on July 5, 1978 and he was occupying that position when he was suspended from the Carrier's service for five days effective Monday, October 7, 1991 through and including Friday, October 11, 1991.

The Claimant was suspended as a result of an investigation which was held on September 5, 1991 in the Section House in Helena, Montana. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Safety Rule 589 for his failure to properly report his alleged injury on July 11, 1991.

Findings of the Board

On July 11, 1991 the Claimant was working as a Laborer on Steel Gang RC50 at Havre, Montana. Steel Gang RC50 was

involved in replacing a 100-lb switch with a 115-lb switch. Steel Gang Foreman Samuel M. Titus testified that after the Gang had removed the 100-lb switch they had to remove dirt from the area and that the Claimant and other members of the Gang were shoveling that soil. Foreman Titus testified that he decided to use a front end loader to remove the soil, and told the Claimant and other members of the Gang to step back. Foreman Titus testified that as the front end loader lowered its blade the blade dropped and hit a section of 100-lb rail, and that one end of the rail then rose into the air "approximately head high", then fell back to the ground and "bounced around a little bit". Foreman Titus testified that the Claimant was standing directly behind him when the incident occurred and that he, Titus, observed the Claimant's hard hat "fly". Foreman Titus testified that he immediately asked the Claimant if he was all right and that the Claimant replied that he was not hurt, that the rail had just brushed him and that it "scared him more than anything". Foreman Titus testified that he asked the Claimant several times during the day if he was "all right" and that the Claimant replied that he was "fine". Foreman Titus further testified that he observed the Claimant during the remainder of the work day and that the Claimant continued to perform his duties.

Roadmaster Douglas J. Wagner testified that he was on duty on July 11, 1991 and that he observed the incident from his truck. Roadmaster Wagner testified that since he had observed the incident from a distance and could not be certain if the rail had struck the Claimant, he initially questioned Foreman Titus regarding the Claimant's well being. Roadmaster Wagner testified that Foreman Titus advised him that the Claimant was not injured. Roadmaster Wagner further testified that later in the day he personally questioned the Claimant and that the Claimant assured him that he had not been hit by the rail.

The Claimant testified that he had been bent over shoveling the soil and "just happened to stand up and see the rail coming at me, and tried to get away, and it was too late". The Claimant testified that the rail struck him on his left elbow. The Claimant testified that when Foreman Titus asked if he was all right, he replied "Yeah, but my elbow hurts like hell" and that Foreman Titus replied "Good, good". The Claimant testified that later in the day, Roadmaster Wagner spoke to him and said "That was close" and that he replied "Yeah". The Claimant testified that he completed his shift and returned home on the evening of Thursday, July 11, 1991. The Claimant testified

that he awoke on Friday in pain and he went to an emergency room and followed that up with a visit to a Dr. Robbins on Monday, July 15, 1991. The Claimant further testified that he contacted a clerk, Nancy, on Friday, July 12, 1991 and advised her of his injury and requested the appropriate forms so that he could report the accident.

Spike Operator Don W. Gleed appeared as a witness for the Claimant. Mr. Gleed testified that he witnessed the incident and that he observed the Claimant with his arm "in the air and his hardhat on the ground". Mr. Gleed testified that he spoke with the Claimant, approximately five or ten minutes after the incident and "asked him if he was okay and that he should probably fill out an F-27". Mr. Gleed testified that the Claimant told him that "He was okay". Mr. Gleed further testified that the Claimant did not say that he was going to complete an accident report.

The Carrier has found that the Claimant violated Rule 589 of the Burlington Northern Safety Rules. That Rule reads, relevantly, that "An employee having knowledge or information concerning an accident or injury to himself or others must complete out form 12504, Report of Personal Injury, in triplicate, before the tour of duty ends".

The Claimant testified that he was hit by the bouncing rail and that his "elbow hurt like hell". The Claimant testified that he advised Foreman Titus of that fact and that Foreman Titus replied "Good, good" and, therefore, the Claimant continued working out his shift. The Claimant further testified that he did not inform Roadmaster Wagner of his injury because the Roadmaster did not ask him if he was injured.

Obviously, the Carrier has chosen to credit the collective testimony of Messrs. Titus and Wagner who inquired of the Claimant whether he was "all right" and whether he had been "hit" by the rail. The Carrier also credited their testimony to the effect that the Claimant assured them that he was "fine". If, in fact, as the Claimant testified at the investigation his elbow had been hit and it "hurt like hell" the Claimant was under the clear obligation of Rule 589 to report the injury and to fill out the appropriate injury/accident report at that time. The testimony of Mr. Gleed, to the effect that he said to the Claimant "that he should probably fill out an F-27" [the Carrier's injury/accident report form], supports this Board's conclusion that the Claimant was derelict in his responsibility insofar as Rule 589 was concerned.

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A review of the Claimant's Personal Record discloses (1) that the Claimant is a fourteen year employee of the Burlington Northern and (2) that on two prior occasions the Claimant was injured while on duty. Therefore, in the opinion of this Board, the Claimant was well-versed in his obligations to immediately report his being hit with a rail that weighed approximately 400 pounds. This was not an insignificant incident. The concern of Messrs. Titus and Wagner was immediate and the Claimant improperly assured them that he was "all right", if, in fact, any part of his body had been struck by the rail and it "hurt like hell".

Based upon the foregoing findings, this Board concludes that the Carrier had just and proper cause for concluding that the Claimant had failed to comply with a well-known Rule regarding the reporting of injuries/accidents. This Board further concludes that a five (5) day suspension was not an arbitrary or harsh penalty in the circumstances. Accordingly, the claim will be denied.

Award: The claim is denied. This Award was signed this
20th day of March, 1992.

Richard R. Kasher
Richard R. Kasher
Chairman and Neutral Member
Special Board of Adjustment No. 925