

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

*
BURLINGTON NORTHERN RAILROAD COMPANY *
*
and * CASE NO. 115
*
* AWARD NO. 115
*
BROTHERHOOD OF MAINTENANCE *
OF WAY EMPLOYES *
*

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.

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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. Sam M. Titus, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on April 21, 1976. The Claimant was subsequently promoted to the position of Steel Gang Foreman and he was occupying that position when he was censured by the Carrier on December 16, 1991.

The Claimant was censured as a result of an investigation which was held on November 19, 1991 in Havre, Montana. At the investigation the Claimant was represented by the Organization. The Carrier censured the Claimant based upon its findings that he had violated Rule 336L for his alleged failure to protect reverse movement of BN vehicle 5472 at Zurich, Montana on October 22, 1991.

Findings of the Board

On October 22, 1991 the Claimant was serving as Foreman on Steel Gang RC-50. The Claimant testified that he had appeared for work at approximately 6:00 a.m. that morning to "set flags", and that he then spoke with a dispatcher in order to "find out about trains and get the working conditions set up . . . for the gang". The discipline in this case was imposed because the Claimant, while driving a van and engaging in a reverse or backing movement, ran over fellow employee Marshall Kolste.

Concerning the incident, the Claimant testified, in relevant part, as follows:

Q. You went back to tell your Group 3 machines that you had the track, and then you walked back to your vehicle and got in?

A. That's correct.

Q. Did you observe anything behind the vehicle when you walked back?

A. No, sir, I made a point to make sure that the way was clear.

Q. From the time you walked from the rear of the vehicle to the front and got in and made your reverse move, how much time had elapsed?

A. Very little.

Q. Can you describe little?

A. A matter of a few seconds, just long enough to - when I left the van, there was nobody in the van. It was empty. I had just got done talking with the dispatcher. When I got back, there was five or six people that were in the van. I had observed Marshall Kolste at one point earlier getting prepared, or appeared to be prepared, to knock some anchors off, and I think I even had conversation with Marshall about knocking some anchors off, but I can't be sure. I talked to this dispatcher, the bus had just showed up, as I said, and these guys got off and started milling around. . . . On my way back to the van, I made sure that the way was clear behind me. There wasn't alot of room on either side of the van, because there was some rail and some spike kegs and some OTM (on track material) that were there, so one had to be careful as he backed up.

Q. What was the visibility at the time?
A. The visibility was minimal.

* * *

Q. You did say you did check behind the vehicle before you backed up?
A. Definitely.

Q. Did you say there was four people in the van with you, or five?
A. Yeah, I'd say a handful, five to six people.

Q. Was there any conversation when you backed up?
A. Yes, just prior to backing up, I'd told them to go ahead and shut the door, that we were going to the west end to take the OS circuit.

Q. Did you ask anyone to help guide you to back up?
A. People were looking over their shoulder, observing out the rear of the vehicle, I was checking both of my rear view mirrors as I backed up, and watching for the scrap along the track.

Q. But nobody was on the outside to help guide you back?
A. You mean had I specifically appointed somebody to guide my movements?

Q. Yes.
A. No, I hadn't.

The evidence of record establishes that as the Claimant began to back the van, at no more than approximately 5 mph, Laborer Kolste, who was wearing earmuff protection and a wool cap, because of the weather and the noise from proximate machinery, walked, with his head down, behind the van and was struck. The Claimant testified that as he felt the van roll over an object, which he assumed was a person, he purposefully continued backing the van in order that the van not stop on top of the individual and either crush or kill him.

The evidence of record further establishes that as a result of the incident/accident Mr. Kolste was severely injured with trauma to both legs, various and multiple cuts and bruises and a broken collarbone.

A Montana State Police Officer was called to the scene and his report stated, inter alia, that Mr. Kolste was "walking westward with head slightly down because of bitter westerly winds" and that the "machinery and high winds contributed to high noise and confusion".

Rule 336 provides that drivers are to "Check around parked vehicles for obstructions or hazards before moving forward or backward", and that "When possible, have someone guide backing movements that cannot be avoided".

There is no dispute that the Claimant was operating the van which struck and ran over Mr. Kolste.

The Organization and the Claimant have raised several defenses regarding the Claimant's alleged responsibility for the incident. First, the Claimant points out that although the incident took place sometime in the vicinity of 7:20 to 7:30 a.m., visibility was poor or "minimal". Secondly, the Claimant points out that the van did not have a beeper mechanism which would sound during a backing movement, implying that there was a violation of an Occupational Safety and Health Administration rule or regulation. Thirdly, the Claimant points out that he took the necessary precautions in backing, in a particularly confined space between proximate tracks, to avoid striking any object. Fourthly, from a procedural perspective, the Claimant contends that he was prepared with necessary witnesses to proceed at the investigation which was first scheduled for November 5, 1991, and that neither he nor his representative agreed to the postponement of the investigation.

Addressing the procedural objection first, the Board finds insufficient merit in the Claimant's position to conclude that the Carrier erred in postponing the November 5, 1991 investigation. The investigation was called for the purpose of assessing responsibility for the incident/accident, and both the Claimant and Mr. Kolste, separately represented, were listed as principals. The investigation was postponed until November 19, 1991 at the request of Mr. Kolste's representative, because Mr. Kolste was physically unable, due to his injuries, to attend the investigation. It is this Board's opinion that the Carrier acted prudently and appropriately in postponing the investigation. It is understandable why the Carrier desired to have both principals available to listen to testimony and to respond to testimony regarding alleged responsibility for the same incident. The postponement of the investigation was not, in this Board's opinion, prejudicial to the Claimant. There

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is no showing that the two week delay in the investigation caused anyone's memory to fail; and the facts in this case are so simple and straightforward that there is no reason to believe that the Montana State Police Officer or any other witness could have embellished upon the relevant facts.

Accepting the Claimant's contentions that (1) visibility was minimal and (2) the backing movement had to be made in close "quarters" because of the proximity of the track, does not excuse the Claimant from strictly complying with the Rule regarding backing of a vehicle. The Claimant admitted in his testimony that before he entered the van "I made a point to make sure that the way was clear". If when the Claimant entered the van and if because his vision was obscured by the number of employees in the van and if because the early dawn light did not afford adequate visibility and if because the van was not equipped with extended side view or rear view mirrors and if all of these circumstances restricted the Claimant's ability to be perfectly sure that he would not back into or over an object, then he was required by the Rule to have one of the other employees exit the van and guide his reverse movement.

There is no evidence in this record to establish that the Carrier violated an OSHA rule or regulation by failing to equip the van with a reverse beeper system. Additionally, the Claimant was aware that the van was not equipped with such a system and he was, in any event, still required to comply with the literal provisions of Rule 336 regarding the backing of vehicles.

Finally, although the Carrier did not add "insult to injury" when it decided by letter dated December 16, 1991 not to impose any discipline upon Mr. Kolste, a fair reading of the transcript appears to establish that the Claimant was not entirely responsible for the incident/accident. One could convincingly argue that there was some contributory negligence on the part of Mr. Kolste. Nevertheless, the Claimant cannot be totally absolved of responsibility as he was required to ensure that he had clearance in making his backing movement. Accordingly, the claim will be denied.

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


Richard R. Kasher
Chairman and Neutral Member
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