NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	CASE NO. 120
- and -	AWARD NO. 120
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	

On May 13, 1983 the Brotherhood of Maintenance of Way Employes (hereinafter the Organization) 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 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. Kenneth P. Wittmuss, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on April 14, 1977. The Claimant was subsequently promoted to the position of Assistant Foreman, and he was occupying the position of Section Laborer when he was suspended for a period of ten (10) days by the Carrier effective January 27, 1992. The Claimant was also "moved from Phase 4 to Phase 5 for violation of Rule 585 and Rule 589 of the Safety Rules and General Rules Book.

The Claimant was suspended as a result of an investigation which was held on December 17, 1991 at the Carrier's Depot 201, North 7th Street, Lincoln, Nebraska. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated several Safety Rules as the result of his alleged failure to promptly report personal injuries sustained on November 26 and November 27, 1991.

Findings of the Board

The Claimant was working as a member of Steel Gang RP 60 on November 26 and 27, 1991 and subject to the supervision of Assistant Roadmaster John Crisler.

Mr. Crisler testified that he had "first knowledge" of the fact that the Claimant

injured himself at work on both November 26 and 27, 1991 when he received a telephone call from the Claimant on Tuesday, December 3, 1991 in which the Claimant advised that he had "hurt his back and he needed to fill out an F-27". Mr. Crisler testified that the Claimant advised him that "he had hurt his neck and shoulder while pulling a spike" on Tuesday, November 26, 1991 and that "on the 27th he said he hurt his lower back when attempting to pull a spike and slipped on wet tie or footing conditions".

The issue in this case is whether the Claimant reported his injury timely in accordance with established and well-known Carrier rules. The Carrier has raised no question regarding the legitimacy of the Claimant's contention that he was injured on the job.

There is no question that the Claimant did not report the injuries which he suffered on November 26 and 27, 1991 to either Mr. Crisler or to an appropriate on-site supervisory employee.

There is some question, apparently, regarding when the injuries sufficiently manifested themselves so that the Claimant would have or should have known that he had injured himself in work-related activities, and was, therefore, required to promptly report such injuries.

By the Claimant's testimony and the Organization's arguments the Board might be led to believe that the Claimant's injuries did not manifest themselves until sometime during the Thanksgiving holiday period including the November 30 and December 1, 1991 weekend; and, therefore, by implication the Claimant reported the injury as soon as possible.

In defending the Claimant, the Organization relies upon the wording of Rule 45B, which states, inter alia, that employees injured while at work are not required to make accident reports before they are given medical care and attention; but that they will file such reports "as soon as practicable thereafter".

The Organization's reliance on this Rule is misplaced. The applicable rules, Rules 585 and 589, provide, respectively, "all accidents/incidents must be reported to immediate supervisor as soon as possible by first available means of communication, F-27 to follow to the immediate supervisor" and "an employee having any knowledge or information concerning an accident or injury to himself or others must complete form 12504, report of personal injury in triplicate before his tour of duty ends or as soon thereafter as possible".

Without doubt, as the Organization correctly argues, the work of pulling spikes is physically onerous and the inclement weather conditions on the days in question made the job more difficult.

However, those facts are not relevant in light of the Claimant's testimony and the admission in the personal injury report that he filed that he knew or should have known that he had injured himself on the job and he was required to report such circumstance to supervision. In his own writing and in his own words the Claimant stated that on "Tuesday, November 26 I was working with rattle spiker it was slick on the ties from rain. I was pulling deadhead spikes and I slipped on slick ties wrenched by neck and shoulder. November 27 neck and shoulder was sore & went back out with spiker again and wrenched lower back on slick ties". The Claimant's candid testimony at the investigation supports a conclusion that the Claimant knew that he had injured himself on November 26, 1991, that the injury had residual effects on November 27, 1991, that he "went back out" on November 27, 1991 and injured himself further and that he made no report to any responsible management representative until December 3, 1991.

The Claimant's conduct was in clear violation of rules with which he is intimately familiar as a result of his having reported personal injuries in the past.

In light of the justification for the Carrier's requiring employees to "promptly" report injuries, there can be no doubt that the Claimant was properly disciplined for his failure to comply with Rules 585 and 589. It is likely that had the Claimant promptly reported to supervision that he wrenched his neck and shoulder on November 26, 1991 the Claimant would have been relieved of any further physical activity that day and immediately taken to or referred to medical practitioners. Had the Claimant made his injury known timely it is also conceivable that some of the soft muscle tissue or other injuries could have been medically addressed and some of the subsequent pain could have been ameliorated or avoided. That is the purpose of the rule; that is, to give Carrier management and medical staff an opportunity to address and resolve a personal injury as soon as possible.

The Claimant's delay in reporting the injury and seeking medical attention violated the letter, spirit and intent of the rule. Accordingly, the Board finds that the Carrier had just and sufficient cause for concluding that the Claimant had violated the rules regarding prompt reporting of personal injuries.

Based upon the foregoing findings, the Board concludes that the Carrier had just and proper cause to discipline the Claimant, and the Board further finds that the discipline imposed was not an arbitrary or harsh penalty in the circumstances.

Award: The claim is denied. This Award was signed this 30th day of June, 1992.

Richard R. Kasher

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