NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	
- and -	CASE NO. 123
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	AWARD NO. 123

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. Robert M. Treftz, hereinafter the Claimant, entered the Carrier's service as a Sectionman on August 24, 1978. The Claimant was subsequently promoted to the position of Grinder Operator and he was occupying the position when he was suspended by the Carrier for a period of twenty-five (25)) days effective March 19, 1992.

The Claimant was suspended as a result of an investigation which was held on March 23, 1992 in the BN depot in Beach, North Dakota. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rule 567 for his alleged failure to exercise care to prevent injury to himself on March 10, 1992 near Rider, North Dakota and also based the discipline upon the Claimant's alleged "injury proneness" in light of the Claimant's having filed seven (7) personal injury reports between the dates of December 28, 1988 and March 10, 1992 . The Carrier took the Claimant's Personal Record into consideration in assessing the discipline.

Findings of the Board

The Claimant alleged that he felt pain in his lower back and his left side when he pulled the starter rope on a grinder motor on March 10, 1992.

As a result of this alleged injury and the Claimant's filing of an injury report,

Roadmaster Lane Ross testified that he met with the Claimant on March 12, 1992 to discuss the circumstances concerning the injury. Roadmaster Ross testified that during his interview with the Claimant, "Mr. Treftz admitted that he has had 12 personal injuries in less than 15 years of employment" . Mr. Ross testified that as a result of this admission he determined to recommend that the Claimant undergo a complete physical examination and that the Claimant be held out of service pending investigation in order to determine whether (1) the Claimant had violated safety rules which resulted in his injury of March 10, 1992 and/or (2) the Claimant was "injury prone".

It is appropriate here for the Board to address two objections which the Organization Representative made repeatedly and vociferously; (1) that Schedule Rule 40 prohibited the Carrier from reviewing accidents/incidents/injuries which occurred more than fifteen days prior to the investigation and (2) that Roadmaster Ross' meeting/hearing with the Claimant on March 12, 1992, at which the Claimant's prior injury/accident record was discussed, violated the Claimant's right to procedural due process since the Claimant was not provided with representation by the Organization at said meeting/hearing.

In spite of the Organization Representative's impassioned and loud claims of impropriety, this Board finds no merit in either objection.

First, by necessity, when an employee is charged with "injury proneness" it is mandatory and logical that that employee's prior record be reviewed to determine if, in fact, that employee represents a hazard to himself/herself, to his/her fellow employees or to his/her employer. Adopting the Organization Representative's argument could lead to the ludicrous result that an employee who represented just such a hazard but who only had a serious accident every sixteen days would be immunized from a charge of injury or accident proneness.

It is in the best interests of all concerned that an employer, rationally, fairly and equitably, investigate circumstances when an employee appears to represent an ongoing danger to himself/herself because that employee either has physical difficulties in performing his/her assigned tasks safely or because that employee is regularly involved in "accidental mishaps". Such fair investigations protect not only the employee who is the subject of the investigation but the other employees who have the right to be protected by both the Carrier and the Organization's concerted diligent efforts regarding safety.

Accordingly, we find no merit in the Organization's claim that the Carrier violated Schedule Rule 40 when it reviewed the Claimant's recent injury/accident record to determine if, in its opinion, the Claimant was injury prone.

Insofar as the objection that the Claimant was not afforded Organization representation at the March 12, 1992 meeting with Roadmaster Ross is concerned, this Board finds that that meeting did not constitute a formal investigation and that the Claimant did not request the presence of an Organization Representative. Had the Claimant made such a request, and if the request was refused, and if it was determined that the character of the March 12, 1992 meeting was "disciplinary in nature", then there might be some merit in the Organization's contention. As none of these facts are present, it is this Board's finding that the Claimant was not denied his rights to the presence of an Organization Representative and that the Carrier's investigation is not tainted by the fact that Roadmaster Ross did not, on his own motion, invite an Organization Representative to be at the March 12, 1992 interview with the Claimant.

Until we reached the end of page 19 of the transcript, this Board was predisposed to conclude that, although the Claimant appeared to be "injury prone" and had regularly injured himself during the course of performing his normal duties as a Grinder Operator, the evidence was not sufficient for the Board to draw a reasonable conclusion that the Claimant, in comparison to his fellow employees, represented a hazard to himself or others because of his tendency to suffer on-the-job injuries or to be involved in on-the -job accidents.

The course of the investigation expanded at page 19 of the transcript when the Carrier introduced records and data analysis obtained from its Safety Department which tended to establish that the Claimant ranked in the "highest percentile" of employees in terms of injuries on-the-job. The Organization Representative and the Claimant refused to review that documentation or to ask any questions regarding what those analyses sought to demonstrate. They took a substantial risk by not doing so; because that documentation appears to establish that the Claimant, in comparison to a broad data base which assessed the injury records of 9,540 BN employees, ranked at the very top in terms of the number of injuries suffered on-the-job.

The evidence in this record persuades the Board that (1) the Claimant does, in fact, rank in the "highest percentile" of Carrier employees who injure themselves at work, (2) the Claimant is a thirty-seven year old employee, who, apparently, regularly injures his back and adjacent areas of his body performing routine maintenance of way tasks required of a Grinder Operator and (3) on March 10, 1992, although the Claimant felt "pain in lower back and left side" when he pulled the starter rope on the grinder

motor, he continued to work through the end of his shift. None of these facts redounds to the Claimant's benefit in determining whether the Carrier had just or good and sufficient cause to impose the discipline that it did.

This Board is of the firm opinion that an employer has the right to determine at some point, in terms of the number of incidents/accidents and/or the severity of injury, that an employee may be removed from service temporarily or permanently because that employee will always represent a danger/hazard to himself/herself and/or to others.

The Claimant appears to fit in this category. Either the Claimant is not capable of performing the ordinary tasks of a Grinder Operator without injuring himself or he is not sufficiently coordinated to avoid work-related injuries or he has a physical condition which results in continuing injuries when he performs normal, routine Grinder Operator duties.

Based upon any of the above premises, this Board concludes that the Carrier had the right to discipline the Claimant for the injury incurred on March 10, 1992 in the context of the Claimant's prior injury record, which demonstrates, conclusively, that he is injury prone.

In addressing the question of whether the discipline was arbitrary, there is no showing that either the Claimant or the Organization had notice regarding any general or specific guidelines regarding what would constitute "injury proneness" in the opinion of the Carrier. The exhibits submitted in this case, which reflect Carrier statistical analyses concerning injuries, may lend some guidance for future courses of conduct and/or future cases. However, since the Claimant had not been previously counseled, warned or disciplined regarding his "injury proneness", it is this Board's opinion that a twenty-five (25) day suspension represents harsh and arbitrary discipline.

Accordingly, this Board finds that a notice of discipline may be placed in the Claimant's Personal Record, indicating that he has been found to have violated applicable safety rules and further noting that he has been counseled/warned regarding his "injury proneness". The disciplinary suspension, however, should be removed from his Personal Record and the Carrier will be directed to make the Claimant whole for any lost pay or benefits resulting from the imposition of what the Board considers to be an arbitrary penalty.

Award: The claim is sustained in part and denied in part. In accordance with the above findings a notice of discipline may be entered in the Claimant's Personal Record. However, the Carrier is directed to make the Claimant whole for any lost wages or benefits associated with his twenty-five (25) day suspension, and reference to the suspension shall be removed from the Claimant's Personal Record. 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