

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award Nos. 124, 125 and 126

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Case/Award Nos. 124, 125 and 126

On May 13, 1983 the Brotherhood of Maintenance of Way Employees (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 procedure.

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. Arthur I. Simon, hereinafter Claimant Simon, entered the Carrier's service as a Track Laborer on June 6, 1969. Claimant Simon was subsequently promoted to the position of Truck Driver and he was occupying that position when he was suspended from the Carrier's service for five (5) days effective July 4, 1992. The Carrier suspended Claimant Simon based upon its findings that he had violated Rules 26 and 567 and General Rules by his alleged failure to exercise care to prevent injury to himself on May 21, 1992 while working near Great Falls, Montana.

Mr. James P. Renville, hereinafter Claimant Renville, entered the Carrier's service as a Track Laborer on August 18, 1971. Claimant Renville was subsequently promoted to the position of Truck Driver and he was occupying that position when he was censured by the Carrier. The Carrier censured Claimant Renville based upon its findings that he had violated Rule 306 for his failure to accept signals from only one person for movement of crane or load on May 21, 1992 while working near Great Falls, Montana.

Mr. Gary D. Indreland, hereinafter Claimant Indreland, entered the Carrier's service as Truck Driver on July 20, 1971 and he was occupying that position when he was suspended from the Carrier's service for five (5) days effective July 6, 1992. The Carrier suspended Claimant Indreland based upon its findings that he had violated Rules 301 and 310 and General Rules by his alleged failure to ensure the safety of employees working

with his equipment and for moving load without receiving proper signal on May 21, 1992 while working near Great Falls, Montana.

Claimants Simon, Renville and Indreland were disciplined as a result of an investigation which was held on June 4, 1992 in Great Falls, Montana. At the investigation the Claimants were represented by the Organization.

Findings and Opinion

On May 21, 1992 Claimants Simon and Renville were assigned to accept instruction from Claimant Indreland regarding the basic operating procedures for a two ton boom truck (BN truck 10241). Claimant Indreland had driven the truck from Helena to Great Falls, Montana earlier that day.

As part of the instruction regarding the proper operation of the truck, Claimants Simon, Renville and Indreland had removed the clam bucket from the truck bed and had started to remove the tie cradle from the truck bed. Claimants Simon and Renville attached a sling to the tie cradle and Claimant Renville then requested Claimant Indreland to lift the cradle approximately eight inches from the truck bed to ascertain that the sling would hold, that the tie cradle would not slip and that the sling was centered on the tie cradle. As the preliminary lift was successful, Claimant Renville climbed out of the truck and Claimant Simon went to the right rear of the truck, approximately 10 feet back, while Claimant Indreland began the lift.

Claimant Indreland testified that when the tie cradle was approximately four or four and a half feet above the truck bed and almost three quarters of the way out of the truck it became unhooked. Claimant Indreland further testified that it was his belief that the wind gusted and the tie cradle began rocking, and that he did not know if the tie cradle caught the edge of the truck because the incident occurred so quickly.

The tie cradle apparently then hit Claimant Simon and injured him sufficiently to require that he be sent to the hospital.

A thorough reading of the transcript of the June 4, 1992 investigation raises a serious question concerning the Carrier's responsibility to ensure that employees are properly instructed in the use of new equipment.

This Board has often noted that the Carrier has the right to expect that its employees will operate equipment in a safe and work-man like manner. This right is particularly important when the Carrier's employees are responsible for the handling of heavy equipment and machinery, which equipment and machinery have considerable potential for causing injury to persons and damage to property.

As a necessary corollary, the Carrier has a responsibility to ensure that its employees are properly trained in the operation of such machinery and equipment.

The evidence of record is completely devoid of any contradiction to Claimant Indreland's testimony that no one had instructed him as to the proper use of the truck and its attachments and that he had only "run it four or five times with different attachments". Additionally, the record is clear that Claimants Simon and Renville were to "familiarize" themselves with the truck's operation under the tutelage of Claimant Indreland.

The Claimants were involved in work that in industrial parlance is known as "rigging". Such work is customarily assigned to crane operators or millwrights, who have knowledge of weights and balances and a variety of lifting procedures. This knowledge, which requires minimal training, at least, is critical to the proper and safe operation of equipment which is used to lift and move heavy objects.

The Carrier has failed to establish that any of the Claimants were adequately or properly trained in such safety critical procedures, particularly Claimants Simon and Renville, who it is conceded never had any experience handling this type of equipment. The record is devoid of any indication or evidence that Messrs. Simon and Renville were qualified to handle the equipment, or that Claimant Indreland was a qualified instructor. It is clear that Claimant Indreland could not have completed the procedure by himself. He was assigned to instruct the Claimants in the proper use of this equipment, although the record is devoid of any evidence to contradict Claimant Indreland's assertion that he, himself, was not the beneficiary of any instruction or training regarding the safety and operating procedures to be followed when such equipment was being utilized.

During the questioning of Claimant Simon, the Conducting Officer read Rule 567 which states "Employees must not incur risk which can be avoided by the exercise of care and judgment and must take time to work safely and exercise care to prevent injury to themselves and others". The Conducting Officer then asked Claimant Simon "were you struck by this tie cradle as it fell from the boom, thereby injuring yourself?" Claimant Simon's response was "Yes, I was." It appears to this Board that the Carrier then disciplined Claimant Simon for being injured when the 450 to 490 pound tie cradle struck him. The evidence of record establishes that Claimant Simon removed himself from the immediate vicinity of the boom and the tie cradle. Therefore, it is this Board's opinion that Claimant Simon was neither responsible nor culpable for the incident.

During the questioning of Claimant Renville, the Conducting Officer read Rule 306 which states, in part, that "Equipment operators must take signals from only one designated person for movement of crane or load". The Conducting Officer then asked if Claimant Renville was "giving the signals to Mr. Indreland" and Claimant Renville

responded "Yes". If Claimant Renville was giving the signals and was not operating the crane the Board must conjecture how the Carrier could charge Mr. Renville with a violation of Rule 306. Additionally, there is no showing that Claimant Renville, who removed himself from the immediate vicinity of the boom and tie cradle and who was a novice or trainee, had any responsibility for the incident. His discipline, as the discipline imposed upon Claimant Simon, was not issued for just and proper cause. The record evidence does not meet the test of "substantial and convincing" in establishing that the Carrier justifiably disciplined these two Claimants.

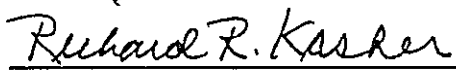
The Board should note that when the Carrier determines that an investigation is properly held, it does not follow that discipline must be issued. An investigation is defined as "a process of inquiring into" the facts and events surrounding an incident. An investigation is not an automatic trigger for discipline.

Claimant Indreland was charged with "unsafe work practices used in the connection with the equipment operation". The Carrier has failed to establish that Claimant Indreland was sufficiently qualified to act as an "instructor/group leader", and to teach new, unqualified employees the proper rigging and lifting procedures which would be accomplished in operating BN truck 10241.

Based upon the foregoing findings, the Board concludes that all discipline issued regarding the incident on May 21, 1992 should be rescinded.

Award: The claims of Messrs. Simon, Renville and Indreland are sustained. The Carrier is directed to expunge all reference to said disciplines from the Claimants' Personal Records and, where appropriate, to reimburse them for all time lost.

This Award was signed this day of August, 1992.


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