

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 128

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Case/Award No. 128

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. John R. Eastman, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on May 3, 1976. The Claimant was subsequently promoted to the position of Assistant Foreman and he was occupying that position when he was restricted by the Carrier from working in a Foreman or Assistant Foreman position.

The Claimant was restricted from occupying either Foreman or Assistant Foreman positions as a result of an investigation which was held on June 29, 1992 in the Roadmaster's Office in West Quincy, Missouri. At the investigation the Claimant was represented by the Organization. The Carrier restricted the Claimant based upon its findings that he had violated General Rules A and I and Rule 550 by failing to ensure that spikes were loaded in a safe manner and by failing to exercise care to prevent injury subordinate employee, B. W. Johnson.

Findings and Opinion

On June 9, 1992 the Claimant was assigned as Assistant Foreman at Palmyra, Missouri, and he was in charge of a three member crew that was engaged in loading kegs of spikes onto a flatbed truck, which truck was equipped with an electric winch.

There were ten steel kegs to be loaded; each keg weighed approximately 200 pounds and contained approximately 241 spikes; and each keg was thirty-six inches high and twenty-four inches wide.

The Claimant was operating the winch and Laborer S.G. Clewell was securing the winch chain on each keg as it was being lifted and deposited in the truck. After loading two to three kegs in this manner, it was determined to transport two kegs in a single lift. Apparently, this procedure was used because the Claimant wished to "speed up" or expedite the process in order to get the kegs loaded and the spikes delivered to a waiting rail gang. In the process of making the first lift of the two keg load, the chain, apparently, slipped because of slack and the kegs fell to the ground. One of the kegs broke open and spikes had to be retrieved.

As a result of this incident, and while the Claimant was realigning the winch, the Claimant directed Laborers B.W. Johnson and L.L. Miller to load kegs by hand into the back of the truck.

The testimony of all witnesses in this proceeding is consistent regarding the matters relevant to this Board's consideration. Messrs. Johnson and Miller testified that they each stood on one side of the keg and that the keg was adjacent to the tailgate of the truck, and that while the tailgate was in a lowered position they "tipped" and pushed or slid the kegs onto and into the truck bed. Messrs. Johnson and Miller handled three kegs in this manner. Sometime after the lifting and tipping and sliding of the third keg, Mr. Johnson advised that he had injured his back. The remaining kegs were loaded using the electric winch.

The Burlington Northern counsels and directs employees in the Maintenance of Way Department, who will be lifting heavy objects, regarding the correct manner to perform such lifts; in order that they not injure themselves, particularly in the cervical area. Mr. Johnson testified that in the process of lifting, tipping and shoving the keg "We were bent at the knees and pushed it up". Mr. Johnson further testified that to the best of his ability and knowledge he followed "proper lifting rules" in handling the kegs.

The essence of the discipline is based upon the Carrier's view that since the Claimant, Assistant Foreman Eastman, had the use of a truck with an electric winch he should not have directed Laborers Miller and Johnson to manually load the kegs. The Carrier also implies that the injury to Mr. Johnson was caused because of the Claimant's desire to "speed up" the loading of the kegs.

The Board will briefly deal with two tangential issues, one raised by the Organization and the other implicit in the questions of the Conducting Officer.

First, the Organization Representative objected at the outset and then at the conclusion of the investigation because he, allegedly, did not have sufficient time to prepare his defense. The Board finds no merit in this objection. The Board notes that the investigation had been postponed once for a week based upon the Organization Representative's request, and that the Conducting Officer offered the Organization Representative several hours to prepare for the case before the investigation would be started. The Board finds that neither the Organization nor the Claimant was prejudiced by the investigation proceeding as scheduled.

The second issue concerns evidence in the record regarding when and if Mr. Johnson advised the Claimant that he had injured his back. The evidence in the record clearly establishes that Mr. Johnson did not express to anyone that he had injured his back until the third keg was lifted, tipped and pushed into the truck. After that action the remaining kegs were lifted by winch. If Mr. Johnson had advised the Claimant that he had hurt his back or he was concerned about further injury to his back and if the Claimant, in spite of that knowledge, continued to require Mr. Johnson to engage in strenuous physical activity, then the timing of when Mr. Johnson allegedly told the Claimant of his injury would be material. Those are not the facts, however, and therefore the Board finds no relevance in the question of whether the Claimant heard or did not hear Mr. Johnson complain about the injury to his back.

In this Board's opinion, the Carrier has failed to prove by substantial and convincing evidence that the Claimant's direction to Messrs. Johnson and Miller was neither reasonable nor prudent. There is no evidence which would establish that Laborers in the Maintenance of Way Department are not regularly required to perform strenuous manual labor, some of which involves the lifting of heavy objects. Had the Claimant directed Mr. Johnson, without help, to lift a 200 pound steel keg of spikes, and absent evidence to establish that Mr. Johnson was "John Henry" strong, then there would be substantial reason to conclude that the Claimant violated safety rules applicable to Assistant Foremen by not taking sufficient care to ensure that employees subject to his authority were not placed in circumstances which would lead to injury. There is no showing in this record that it is inherently dangerous for two men to cooperatively lift, tip and slide a keg of spikes into the flatbed of a truck. There is no showing in this record that there is a rule which prohibits the lifting of equipment or supplies by hand, which equipment and/or supplies exceeds certain weight limitations. There is no evidence in this record which establishes that a Foreman or an Assistant Foreman must use mechanical devices, such as winches or cranes, if those devices are available, and never rely upon manual labor to perform any tasks associated with the lifting and moving of supplies or equipment.

Finally, Rule 550 provides that Foremen "are responsible for the safe, proper and economical performance of work" The Conducting Officer focused upon this Rule as

well as the contention that the Claimant was, apparently, negligent because he attempted to "speed up" the loading of the kegs. The record does not support a finding that the Claimant directed his laborers to "rush" or to handle the kegs without concern for their physical safety. The Claimant did believe that loading the kegs by winch was taking more time than necessary. He wished to expedite the process or "economically perform" work for the Carrier. There is no basis in this record to fault the Claimant for the manner in which he sought to have the work completed timely, so that the Carrier's business of replacing and laying new track could be completed economically.

Based upon the foregoing findings, this Board concludes that the Carrier has failed to prove by substantial and convincing evidence that the Claimant failed to act reasonably and prudently and therefore violated any of the cited Rules. Accordingly, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to physically expunge any reference to the restriction or any associated censure from the Claimant's Personal Record, and the Carrier is further directed to make the Claimant whole, in terms of lost wages, if the restriction limited the Claimant's ability to hold a higher paying Foreman or Assistant Foreman position during the period of his restriction. This Award was signed this 29th day of September, 1992.



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