

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 131

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 131

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 C. Oros, hereinafter the Claimant, entered the Carrier's service as a B&B Helper on October 29, 1974. The Claimant was subsequently promoted to the position of Foreman and he was occupying that position when he was suspended from the Carrier's service for five days.

The Claimant was suspended as a result of an investigation which was held on July 9, 1992 in the Ceco Building in Cicero, Illinois. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rules 550 and 881 by his alleged failure to properly provide medical attention to C.J. Cody, at approximately 1100 hours on June 17, 1992, while assigned as B&B Foreman, working in Cicero, Illinois.

Findings and Opinion

On June 17, 1992 the Claimant, B&B Mechanic C.J. Cody and Steamfitter R.A. Krzyzaniak, among others, were assigned to work at the Ceco Rip Track Building performing building repair and maintenance.

had not been contacted in any way as to [his] status and . . . condition".

The Conducting Officer asked Mr. Cody the following question:

Q. Mr. Cody, had not the clinic felt the necessity to call Mr. Sutherland's office for authority to treat you, would you have personally notified that office of your status and condition?

A. Yes, as soon as I got through at the doctor. I wanted to have somebody look at me first.

Mr. R.A. Krzyzaniak, testified that he was asked by Mr. Cody to "go upstairs and talk to J.C., and have J.C. come down, because I slipped and hurt my back and I'm in a lot of pain", and that "I got to go see somebody". Mr. Krzyzaniak testified that when he approached the Claimant the Claimant was "quite busy . . . putting in windows", and that the Claimant told him "if he [Cody] wants to talk to me, you have him come and see me". Mr. Krzyzaniak testified that he told the Claimant that Mr. Cody was in pain and that he had a back injury, and that the Claimant said that he was busy and that if Mr. Cody wanted to speak to him he would have to come upstairs.

The Claimant testified that on the day of Mr. Cody's injury he was the immediate supervisor, and that Mr. Krzyzaniak "came up and informed me . . . after asking a few times has anybody seen Mr. Cody" that "he saw Clinton [Cody] downstairs in the truck and that he had slipped and hurt his back".

The Claimant testified that he had been looking for Mr. Cody as "we were in the process of installing windows . . . my crew of six men . . . myself and five other men installing windows at the Rip Track Building on the second floor". The Claimant testified that "I had men all over", and that "some guys were outside cleaning up the debris of what was being thrown out the window, watching out to make sure no one was injured by anything falling"; and that Mr. Cody was "going back and farther to the truck to get different tools that we needed".

The Claimant testified that when Mr. Krzyzaniak, whom he had sent looking for Mr. Cody, returned and told him that Mr. Cody had "slipped . . . walking down the hallway" and that he was laying down in the truck, "because he thought maybe if he laid down for a little bit, it might help him out a little bit", that he told Mr. Krzyzaniak to "tell Clinton if he can to come up and talk to me" because he was in the process of holding a window which was being installed. The Claimant testified that as Mr. Krzyzaniak was

walking away, and was approximately ten to fifteen feet away from him, he yelled to tell him "if C.J. cannot make it upstairs, come back and let me know and I will come down".

There is testimony in the record regarding the extent to which Mr. Cody and the Claimant examined the area where Mr. Cody slipped. The Claimant testified that he did examine the general area, and found nothing which would have contributed to the incident; but that he was not sure of exactly where Mr. Cody had slipped.

The Claimant was charged with violating Rule 881, which provides that if employees are injured "everything possible must be done to care for them properly", and that if they are able to be moved, they should receive care from the nearest Company physician. The Claimant was also charged with violation of Rule 550, which provides that a foreman shall have charge of and be responsible for the safety, supervision and training of employees and "Unless otherwise directed, they will remain with their employees while on duty".

The thrust of the Carrier's conclusion that the Claimant did not fulfill his safety-related responsibilities as a foreman on the day in question focuses on the fact that the Claimant did not "drop what he was doing" and immediately proceed to the area where Mr. Cody was lying injured.

It is clear, in this Board's opinion, that the Claimant did not fully understand the nature of Mr. Cody's condition. If he had, he would not have asked Mr. Krzyzaniak to have Mr. Cody come upstairs to see him. It is clear that there was some understandable miscommunication; however, there is no probative evidence which would establish that the Claimant was responsible for that misunderstanding. The Claimant was involved in physically performing work with his fellow employees, and he had insufficient notice to conclude that there was some type of "emergency condition" which required his immediate attention.

In any event, had the Claimant immediately proceeded downstairs and found Mr. Cody laying in the truck, what different action would have been taken? How much more advance notice would the Carrier have received that Mr. Cody was injured? The answers are obvious. Mr. Cody would have been driven to the Clearing Clinic as he was, and a report would have been made to Supervisor Sutherland as it was that Mr. Cody was at or being transported to the Clearing Clinic and in apparent need of medical attention.

In the circumstances of this case, it appears that the Carrier was "searching" to assess blame against someone for the failure to more promptly report Mr. Cody's condition. Charging the Claimant with dereliction of his responsibilities was part of what appears

to be a "shotgun" approach by the Carrier to find someone responsible. It is noted that Mr. Krzyzaniak was also a principal in this investigation. It is beyond this Board's comprehension as to under what conceivable circumstances Mr. Krzyzaniak, who acted reasonably and diligently and in the best interests of a fellow employee, could have been anything more than a witness to the situation. Charging him as a principal is indicative of the Carrier's approach.

In any event, it is this Board's opinion that the Carrier has failed to prove by substantial and convincing evidence that the Claimant acted unreasonably in the context of what information had been conveyed to him regarding Mr. Cody's condition or that he failed to fulfill his responsibilities under the subject rules.

Accordingly, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to physically expunge any reference to this incident from the Claimant's Personal Record and to reinstate the Claimant with seniority unimpaired and with full back pay and benefits.

This Award was signed this 15th day of December,
1992

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

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E.L. TORSKE