

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 134

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 134

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.

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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. Perry Brown, hereinafter the Claimant, entered the Carrier's service as a First Class Carpenter in 1972; he resigned on May 23, 1972 and began his current seniority, when he entered the Carrier's service as a Laborer on June 5, 1978. He was subsequently promoted to the Position of Section Foreman and he was occupying the position of Truck Driver when he was censured by the Carrier by letter dated October 16, 1992.

The Claimant was censured as a result of an investigation which was held on September 18, 1992 at the depot at Havre, Montana. At the investigation the Claimant was represented by the Organization. The Carrier censured the Claimant based upon its findings that he had violated Rule 576 by his alleged failure to comply with instructions from proper authority in connection with an injury he sustained on July 3, 1992, after being instructed by his Roadmaster not to perform any duties that could result in injury.

Findings and Opinion

The notice of investigation in this case advised the Claimant in proper and timely form that he was to attend an investigation to "ascertain the facts and determine your responsibility, if any," regarding (1) his alleged injury on July 3, 1992 at approximately 1330 hours and (2) the late reporting of said injury.

By the Claimant's testimony the injury occurred as follows:

Q. As far as the incident itself, describe to me exactly what you were doing at the time that you . . . /

A. To the best of my knowledge, the most - I was lifting plank from underneath the back of a truck. I was on one end of the plank, Sam Jara was on the other end of the plank. We were sliding them to the rear and to the clear of the truck, stacking them up by hand. At this time, this was the only hard physical labor that I had done, other than adjusting tools on the back of the truck. Shortly thereafter, I felt a pain in my shoulder and numbness of the arm.

Mr. Brian Olson, the Roadmaster at Havre, Montana and the Claimant's ultimate supervisor for approximately the past three years, testified that he had "many times before" advised the Claimant "not to do heavy physical lifting" because "I knew of Perry's [the Claimant's] sore back condition.

The Claimant testified that "Brian [Roadmaster Olson] has reminded me several times not to reinjure my back or to do anything that would cause further aggravation"; and that he could have advised the laborers "to stack this plank so [he] wouldn't have to handle that lumber". The Claimant estimated that Roadmaster Olson had told him on approximately five occasions "not to do any lifting".

The above brief excerpts from the transcript of the investigation constitute substantial and convincing evidence that the Claimant did not follow proper directions from supervision in order to avoid further aggravation of a pre-existing back injury. Accordingly, the Carrier has established that the Claimant did, in fact, violate Rule 576, and this Board concludes that the issuance of a censure was not arbitrary or overly severe in the context of the facts.

The Organization has argued that the Claimant did not have sufficient notice of the rules with which he was being charged, and that the facts did not establish that the Claimant failed to timely report his injury.

Although much of the transcript of the investigation was consumed with testimony and argument regarding when the injury occurred, to whom the injury was verbally reported and when the Claimant completed the required paperwork, the fact is that the Claimant was not disciplined for failure to timely report his injury. Accordingly, there is no reason for this Board to opine regarding the timeliness of the Claimant's filing an injury report.

On the other hand, the notice of investigation gave the Claimant sufficient information, in this Board's opinion, regarding the nature of the charges. The Claimant was more than adequately prepared, as his testimony reflects, to respond to questions regarding the cause of the injury, the extent to which he could have utilized fellow employees to perform the lifting activities, and the fact that he had been placed on repeated specific notice by Roadmaster Olson not to engage in heavy lifting activities.

Although the investigation was not held until September, 1992, when the injury occurred in July, 1992, the cause of this delay was attributable to the fact that the written report of the injury was not processed by the Claimant until several months after the injury occurred. The Carrier cannot be blamed for the delay in issuing the notice of investigation.

Based upon these findings, this Board concludes that there is no merit in the procedural objections raised by the Organization Representative regarding the adequacy of the notice, and accordingly, the claim will be denied.

Award: The claim is denied. This Award was signed
this 24th day of December, 1992.

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