

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 157

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 157

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. Westley J. Wenger, hereinafter the Claimant, entered the Carrier's service as a Laborer on April 5, 1976, and he was re-employed first on April 21, 1976 and then on April 24, 1978. The Claimant was occupying the position of Welder when he was suspended from the Carrier's service on March 2, 1993 for his alleged violation of certain Carrier safety rules as the result of an incident which occurred on January 19, 1993 near Mandan, North Dakota, which resulted in a "personal injury to yourself". The Claimant received a twenty (20) day suspension, which was reduced "as a matter of leniency" to four (4) days and he was "only required to actually serve the suspension from Tuesday, March 2 through and including Saturday, March 6, 1993."

The Claimant was suspended as a result of an investigation which was held on February 1, 1993 in the Car Shop Conference Room in Mandan, 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 certain of the Carrier's safety rules.

Findings and Opinion

Mr. Patrick Yaune, the Carrier's Roadmaster at Mandan, North Dakota, testified that Tuesday, January 19, 1993 was a "cold, clear morning, very frosty, very slick". Mr. Yaune testified that at approximately 10:00 a.m., after attending a safety meeting on the morning in question, he was advised that there had been an accident at Bridge 3.9 west of Mandan, and that the Claimant had been injured.

The testimony of Mr. Yaune and the Claimant establishes that the Claimant had driven his pick-up truck to, a place underneath Bridge 3.9; that he had stepped from the flatbed of the pick-up "up onto a tool box", where he first knelt; that he then stood on the tool box as a torch was passed from B&B employees who were working on the bridge above to the Claimant; and that as the Claimant descended from the tool box his foot slipped and he suffered a severe sprain of his ankle.

In spite of a fifty-eight page transcript, the relevant facts are as simple as recounted in the paragraph above.

The thrust of the Carrier's contention that the Claimant had violated applicable safety rules is based upon the view [the Organization Representative characterizes it as "hindsight"] that the Claimant should have obtained a rope for the purpose of passing the torch from the B&B employees to himself; and, thereby, he would not have had to step upon the tool box in the back of the pick-up truck and use a track shunt for purposes of retrieving the torch.

There is evidence in the record that the Claimant initially requested other employees with whom he was working to obtain a rope for the purpose of lowering the torch; but that when a rope was not found immediately, the track shunt was used by the employees involved in the operation of "passing the torch". A rope was subsequently found in one of the maintenance of way vehicles at the job site where the incident occurred. It is this fact which, apparently, led the Carrier to conclude that the Claimant did not follow adequate safety precautions.

Mr. Yaune testified that as he was transporting the Claimant to a medical clinic and was "interviewing [him] on the way over there, he [the Claimant] informed me that he could've avoided the problem of getting onto the tool box if they had utilized a rope, rather than improvising and using the track shunt to transport the equipment".

The Organization produced witnesses, specifically B&B Foreman Dietz, Grinder Operator Kuntz and Signal Maintainer Walter, who testified on behalf of the Claimant. The Organization Representative asked each of these employees, all of whom had fourteen or more years of service with the Carrier, whether they "eyewitnessed" the incident, and they all responded that they had not. Messrs. Dietz, Kuntz and the Claimant all testified, in response to questions by the Organization Representative, that (1) they were unaware of any Carrier safety rule which expressly required the use of a rope to pull a torch and hoses "up through a bridge deck", (2) to their knowledge there was no Carrier safety rule which expressly prohibited an employee from "climbing onto truck tool cases or boxes to gain a height advantage", and (3) it was common practice for employees, in seeking such a height advantage, to routinely climb into the back of a pick-up truck and ascend by climbing onto the tool box.

The Organization Representative also pointed out, through his questioning, that (1) the Claimant was wearing Carrier-approved boots, known as "packs", which are larger than ordinary boots, and, while they provide greater comfort in terms of warmth, provide less ankle support and (2) the ground was frost-covered and slippery on the day in question.

The issue in this case is whether the Claimant was negligent and thus violated Carrier safety rules or whether the accident was not attributable to his fault.

Before deciding that issue, the Board should address two procedural issues raised by the Organization. The Organization contends that the charges in the notice of investigation were not sufficiently precise. This Board has ruled on numerous occasions that where the notice of investigation gives the Claimant sufficient notice as to the time, place and nature of the incident which is being investigated that the notice meets the requirements of Schedule Rule 40 of the parties' agreement. The notice of investigation specified the date of the incident, the time of the incident and the incident itself, the personal injury. Therefore, it is this Board's opinion that the Claimant had sufficient notice and was prepared to present evidence and argument in support of his contention that he was not responsible for the injury. If the Claimant was disciplined for the violation of some esoteric rule, the existence of which he may reasonably have not been aware, then there might be merit in this procedural objection. However, the Claimant here was found to have violated several basic general safety rules of which he must be presumed to have knowledge.

The second procedural issue raised by the Organization concerns a contention that the Conducting Officer failed to abide by the rule of sequestration, which was imposed at the opening of


the hearing at the Organization's request. The Organization pointed out to the Conducting Officer that Roadmaster Yauney continued to remain in the hearing room after his testimony was completed. That fact, in and of itself, would not have violated the rule of sequestration of Roadmaster Yauney was not recalled to rebut the testimony of the Claimant or the Claimant's witnesses. At page 47 of the transcript the Organization Representative renewed his objection to Mr. Yauney's "remaining in this room after I requested that the witnesses be sequestered". That objection would have had no merit if Mr. Yauney did not resume the stand, beginning at page 48 of the transcript and testified in contradiction to the Claimant.

Accordingly, it is this Board's opinion that the Carrier violated the rule of sequestration, to the prejudice of the Claimant, and that justification therefore exists to conclude that the investigation was not as fair and as impartial as it should have been. This finding does not, in any way, impute the testimony of Mr. Yauney, who appeared to be non-evasive and candid in the testimony he proffered. However, if the rule of sequestration is to have any meaning, then once it has been established, "fact" witnesses should not be permitted to remain in the hearing room and to hear the testimony of other fact witnesses, and to then take or resume the stand to confirm or contradict such testimony.

By way of dicta, the Board would observe that there was substantial merit in the defenses raised by the Organization regarding the fact that the incident was just an "accident" not attributable to any negligence by the Claimant or violation of any rule or method of operation. The record supports a finding that employees regularly stand upon tool boxes in the beds of pick-up trucks for purposes of obtaining a height advantage, and that there is no Carrier rule prohibiting such a practice.

In any event, the claim will be sustained in view of the fact that the rule of sequestration was not adequately followed during the course of the investigation.

Award: The claim is sustained. The Carrier is directed to rescind the Claimant's suspension and to make him whole for all lost wages and benefits. The Carrier is further directed to physically expunge any reference to this discipline from the Claimant's Personal Record. This Award was signed this 7th day of February, 1994.


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