

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 158

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 158

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 choose 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. Robert J. Blacken, hereinafter the Claimant, entered the Carrier's service as a Truck Driver in October, 1978 and he was occupying that position when he was suspended for five days from the Carrier's service on March 1, 1993 for his alleged violation of several of the Carrier's safety rules as the result of an incident which occurred on January 27, 1993 at the Delta Yard in Everett, Washington.

The Claimant was suspended as a result of an investigation which was held on February 8, 1993 in the Trainmaster's Office in Everett, Washington. 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 as the result of his failing to secure the boom on Vehicle No. 11425.

Findings and Opinion

Mr. Thomas Driscoll, B&B Supervisor, testified that he was advised on January 27, 1993 by B&B Foreman Paul Miller that a truck being driven by the Claimant, with its boom extended, had "knocked the wire down at Delta".

B&B Foreman Miller testified that Vehicle No. 11425, a boom truck operated by the Claimant, was subject to his jurisdiction; and that on January 27, 1993 "The boom was up and it hooked a wire and pulled the wire down". Mr. Miller testified that when the wire was pulled down he saw "sparks" and that there was arcing "when it broke".

The evidence of record establishes that proper authorities were notified; that the wire was determined not to be "live" and dangerous; that the wire was removed from where it lay on the truck; and that the wire was then reconnected and power restored.

The evidence of record further establishes that the Claimant and fellow employee Steve West, a First Class B&B Carpenter, were engaged on the day in question in "cleaning up the yard"; and that they had made several trips using the boom truck to pick up and dump "garbage".

Both the Claimant and Mr. West testified that they did not notice that the boom was up when it made contact with the wire.

The Claimant testified that the boom truck was a new vehicle; that he had not been operating it for more than a few weeks; that he had discerned a problem with the truck which he described as the boom light coming on intermittently; that at the time of incident/accident when the boom hit the wire he did not notice whether the light was on or not; and that the boom light "is what indicates where your, if your boom is above the rest on the truck". The Claimant further testified that if he is traveling a "long distance and not coming back I strap the boom on the truck somehow on top of the load I'm carrying or if we're making a bunch of little short trips like we were, I think that day it was inside the bull pin leaning against the bull pin fence". The Claimant testified that when the boom hit the wire, the boom "was up in the air".

The Claimant also testified that when he had first been assigned to operate this new boom truck, and went to Seattle to pick up the truck, he was told by Mr. Driscoll "If I tear up his new boom truck he would hold an investigation and fire my ass". The Claimant testified that at the time this comment was made Mr. Driscoll "had his arm around me". Mr. West confirmed that he heard Mr. Driscoll make this comment to the Claimant. The Claimant

testified that he did not know whether Mr. Driscoll's comment was made in jest or whether he was serious.

Mr. Driscoll was recalled and testified that he did not tell the Claimant that he would "fire his ass" or hold an investigation if he "wrecked that vehicle in any way". Mr. Driscoll testified that he did ask the Claimant not to "get himself in a position where disciplinary action might have to be taken".

The Organization argues that the investigation should have been cancelled when the testimony emerged regarding Mr. Driscoll's "discrimination and intimidation" manifested against the Claimant. The Organization also contends that the incident was "minor in nature"; that it did not cause any significant monetary loss to the Carrier; that there was no real danger involved; and that other more serious incidents/accidents involving other Carrier employees and supervisors, which the Organization referenced and specified by year of occurrence and by the names of the individuals involved including an accident involving a hi-rail truck operated by B&B Supervisor Driscoll, did not result in investigations and/or discipline. Based upon these arguments the Organization submits that the Carrier should not impose any discipline upon the Claimant.

The Claimant by his own admission concedes that he did not ensure that the boom on his truck was secured while moving about the yard in areas where an extended boom could result in damage or injury. The fact that the struck and downed wire did not result in a dangerous situation, once the initial electrical current was dispersed, is immaterial to the question of whether the Claimant was negligent and in violation of certain Carrier safety rules. The Claimant's admissions provide more than sufficient evidence to support the Carrier's imposition of discipline.

The fact that the "boom light" came on "intermittently", while that represents evidence of a defect in the truck's signaling system, does not explain why the Claimant did not ensure that the boom was secured. In fact, the Claimant's knowledge that the boom light was defective should have resulted in his being more diligent in terms of verifying that the boom was secured.

The alleged "discriminatory and intimidating" comment made by Supervisor Driscoll that he would "fire the Claimant's ass" if the Claimant wrecked Mr. Driscoll's new truck, was made, apparently, while Mr. Driscoll had his arm on the Claimant in what the Claimant implied was a non-threatening manner. Additionally, the Claimant testified that he did not know whether the comment by Mr. Driscoll was made in jest or not. The question as to whether the comment was made, and, if it was, whether it was made with the intent to intimidate or discriminate, requires a credibility determination.

Such determinations are to be made by the Carrier. If the Carrier has concluded that the comment was not made with any anti-Claimant animus, this Board must accept that finding.

Finally, the Organization Representative has cited a number of other incidents/accidents where property damage occurred and no discipline was imposed. On its face, while the failure to conduct investigations and/or to impose discipline as a result of these incidents/accidents may appear to represent disparate treatment, this Board cannot make the comparative analyses required, because the nature of those accidents/incidents are not in the record nor are the personal records of the individuals involved.

In the instant case the Carrier was justified in concluding that the Claimant, through negligence, had failed to secure the boom on Vehicle No. 11425, and thereby violated applicable Carrier safety rules. The Carrier was further justified in concluding, in light of the incident, that discipline was properly imposed; and had the right to consider and the Claimant's prior record in determining the quantum of discipline to be imposed. This Board does not find that the discipline imposed was arbitrary or overly severe, and therefore the claim will be denied.

Award: The claim is denied. This Award was signed this 11th day of February, 1994.

Richard R. Kasher

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