

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 160

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 160

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. Bruce A. Ruleau, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on June 25, 1979 and he was promoted to the position of Welder. The Claimant was occupying that position when he was dismissed from the Carrier's service on March 29, 1993 for his alleged violation of Rules 585 and 351(F) as the result of his activities on January 28, 1993 while working as a Welder near Marsland, Nebraska.

The Claimant was dismissed as a result of two investigations which were held on March 2 and 3, 1993 in the Keane Conference Room in Alliance, Nebraska. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had (1) failed to report a personal injury allegedly sustained at or about 2:20 p.m. on January 28, 1993 and (2) failed to obtain a track and time permit and/or provide proper flag protection for his men on January 28, 1993.

Findings and Opinion

The testimony of record establishes that the Claimant was the Welder in charge of a two man crew, including himself and Grinder Operator G.J. Schilling, and that they were working in the vicinity of M.P. 403.9 at or near Marsland, Nebraska on January 28, 1993.

The record of the first investigation, the one conducted on March 2, 1993, establishes that Grinder Operator Schilling observed the Claimant slip as they were moving the grinder off the track at approximately 2:20 p.m.

The testimony of Roadmaster John Powers, confirmed by the Claimant, establishes that the Claimant did not report his injury until the following morning, January 29, 1993.

The Claimant testified regarding the alleged injury and his attempts to contact a supervisor, relevantly, as follows:

Q. Mr. Ruleau, when you got injured, did you attempt to make any telephone calls to Mr. Powers?

A. I tried communicating on the radio, and the radio wouldn't work. I couldn't get through. The phone's on low. I couldn't get through on it.

* * *

Q. When did you attempt to make the phone calls?

A. Well, I figured I had 24 hours to do it. I wasn't, didn't want to make a P.I. I made the phone calls along the following day.

* * *

Q. And, how about the radio, Mr. Ruleau?

A. I got a recording on it. I don't like to talk to recordings. I want to talk to the person.

While the Claimant testified that he suffered an injury to his back which did not begin to seriously manifest itself until after he left work on January 28, 1993, his position is somewhat contradicted by the fact that he acknowledged that he attempted to contact management during the course of his work day, indicating that he recognized he had sustained an injury.

The Claimant, as his Personal Record reflects, is not unfamiliar with the Carrier's rules, specifically the rules regarding prompt reporting of personal injuries. The Claimant's defense that he believed that by way of practice he had twenty-four hours within which to report the occurrence of a personal injury is not consistent with the rules or what his understanding of the rules should have been.

This Board has expressed itself numerous times regarding the justifiable rationale for the Carrier requiring prompt/immediate reporting of personal injuries, and will not burden this decision with a restatement of that position.

The Claimant, by his candid admission, did not comply with the rule regarding the prompt reporting of the personal injury he allegedly suffered on January 28, 1993, and, accordingly, the Carrier had cause to impose some discipline.

Insofar as the second investigation is concerned, the record evidence establishes conclusively that when operating an on-track vehicle, such as the MC3 grinder that the Claimant and Operator Schilling were using, it is necessary to obtain some form of track warrant or to provide flag protection in order to assure the safety of the operators and their machinery, and trains and train service employees who may be utilizing the track at the same time.

Despite the interesting colloquies between Roadmaster Powers, the Organization Representative and the Conducting Officer regarding line of sight, the curve of the track, whether diesel engine smoke can be observed before a train comes into one's line of vision at M.P. 403.9, the fact remains that the Claimant acknowledged that he did not comply with Rule 351(F).

That Rule, which applies to maintenance of way employees who are working in CTC (Centralized Traffic Control) territory, such as the territory in which the Claimant and Grinder Operator Schilling were working, provides, relevantly, as follows:

When necessary to perform work which require the use of track flags or to move on-track equipment on a main track or controlled siding in CTC territory, employee in charge must obtain track and time limits as prescribed by Rules 351 and 351(B), unless protected by track bulletin Form B. Line-up must also be obtained where required by the general manager. This authority will permit work to be performed or on-track equipment to occupy track(s) within the limits specified without flag protection against trains or engines. Track and time limits must be copied on the prescribed form and repeated by person copying.

It should also be observed that the Claimant's Personal Record discloses that he had been previously censured for failure to comply with this same rule.

Accordingly, it is this Board's finding that the Carrier has presented substantial and convincing evidence that the Claimant was properly disciplined.

After carefully considering the Claimant's admissions that he violated the rules regarding (1) prompt reporting of a personal injury and (2) obtaining proper protection while being responsible for the operation of on-track equipment, and after reviewing the Claimant's Personal Record, this Board concludes that the Carrier did not act arbitrarily or in an overly severe manner when it determined to dismiss the Claimant from service. Accordingly, the claim will be denied.

Award: The claim is denied. This Award was signed this 20th day of December, 1993.

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