

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 161

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 161

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. Richard Allan Becker, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on February 1, 1974 and he was occupying that position when he was censured and suspended from the Carrier's service on April 12, 1993 for his alleged violation of rules of the Maintenance of Way Department regarding his alleged failure to "give factual report on F-27 and Personal Injury Report Form 12504 dated 11-23-92 while assigned as a Trackman on UC03 on 10-22-92".

The Claimant was censured and suspended for thirty (30) days as a result of an investigation which was held on March 16, 1993 in the Trainmaster's Office in Scottsbluff, Nebraska. At the investigation the Claimant was represented by the Organization. The Carrier censured and suspended the Claimant based upon its findings that he had violated Rule 530A, the rule which addresses the question of providing factual reports.

Findings and Opinion

On October 22, 1992 the Claimant, while engaged in using an undercutter, either slipped or fell or in some way had his left hand crushed when box car BN95007722 ran over it.

Manager of Production Projects William Seeger testified that he was made aware of the accident/injury when he was contacted by Roadmaster Eugene Muniz, who came onto the scene and transported the Claimant to a medical facility. Mr. Seeger testified that he proceeded to the hospital to determine the Claimant's condition. Mr. Seeger testified that although the rules of the Carrier provide that a written injury report be filed promptly, a report was not filed by the Claimant at that time because "I felt it was inappropriate due to Mr. Becker's condition" for him to file such a report. Mr. Seeger testified that a written report by the Claimant regarding the injury was submitted on or about November 23, 1992, approximately thirty (30) days after the incident.

Insofar as the alleged rules violation in this case is concerned, Mr. Seeger testified that he had received a report of the injury from Roadmaster Muniz; which report was submitted shortly after the occurrence and which report was based, apparently, upon the Claimant's verbal description of the cause of the injury/accident to Roadmaster Muniz. Mr. Seeger testified that in comparing the two reports they were not, in his opinion, "substantially similar in their description of the injury to Mr. Becker and how it came about".

Simply stated, the report of Roadmaster Muniz submitted on the date of the incident, October 22, 1992, indicates that the Claimant, while "removing ballast from between rail and tie" and working under box car BN9500772, "slipped" and grabbed the rail and that the box car then ran over his hand. The report submitted by the Claimant on November 23, 1992 states that he was "standing next to down tie, waiting for box car to pass, ballast gave way", that he then "fell" and that his left hand was "run over by box car".

Roadmaster Muniz testified that he was working with the Claimant on the day in question, and that at some point he observed the Claimant walking toward a crossing and discovered that the Claimant had sustained a serious injury. Roadmaster Muniz testified that he drove the Claimant to the hospital, which took approximately thirty minutes, and that the Claimant was "conscious" during the drive. Roadmaster Muniz testified that the Claimant "verbally" reported to him what had happened while they were driving to the hospital, and that he did not have the Claimant file

a written report because "He was in pain and we didn't think it a good idea for him to be filling [out] these reports".

While the evidentiary record in this case is fairly "thick", the relevant and material facts, from the perspective of the Board, are reasonably simple. Neither Mr. Seeger nor Roadmaster Muniz observed the incident/accident. Because the Claimant was wearing a glove on his left hand, neither Mr. Seeger nor Roadmaster Muniz observed the extraordinary extent of physical damage done to the Claimant's left hand, which damage resulted in the amputation of four of his fingers. The evidence of record, particularly the documentation regarding the number and amount of pain killing medications given to the Claimant at the hospital, establish without doubt that the Claimant was in excruciating pain; and raises a significant question as to how coherent the Claimant was or how focused he could have been at the time regarding the specific cause of his injury. The evidence also establishes that the Claimant had to give Roadmaster Muniz directions regarding the location of the hospital, because Roadmaster Muniz was not familiar with the territory. The record is clear that during the thirty minute drive to the hospital the Claimant was continually encouraging Mr. Muniz to drive as fast as possible because of the extent of his pain.

It is in the context of these simple facts that this Board must conclude that there is substantial reason to doubt that the Claimant, under the circumstances, could have given Roadmaster Muniz an accurate, detailed verbal report as to how the injury occurred, or that Roadmaster Muniz, with his hands gripped on the wheel and speeding through unfamiliar terrain, could have recalled with specific accuracy what the Claimant told him and transferred that rendition to a written report. In any event, the differences between the report written by Roadmaster Muniz on October 22, 1992 and the report submitted by the Claimant on November 23, 1992 do not contain, in this Board's opinion, substantially significant differences so that one might conclude that the Claimant through any deliberate intention filed a report for the purpose of misleading the Carrier.

It should also be observed that the Claimant was not charged with a "late filing" of his personal injury report; although the record, for some reason, seems to imply that there was some possible dereliction on the Claimant's part because the report was not filed as promptly as it should have been. The Claimant had permission from supervision to file the report after he was recovered, and thus no negative inference should be drawn because the report was not filed "promptly".

Most importantly, Mr. Seeger testified, when he was recalled to the stand, that he could not state "without question that the information submitted by Mr. Becker [was] incorrect".

The Organization Representative, who conducted a highly intelligent and insightful examination in this case, asked the following rhetorically question:

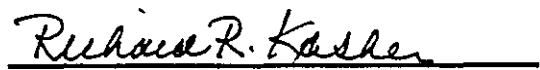
Is [it] plausible that Mr. Muniz, did in fact, conduct a detailed interview on the way to the emergency room over unfamiliar roads while also attempting to communicate on the BN radio in the truck while driving at a high rate of speed?

That question must be answered in the negative. That is, it is not reasonable to conclude that Roadmaster Muniz conducted a thorough interview of the Claimant while they were driving to the hospital. Even if he did conduct such an interview, it is reasonable to conclude that the Claimant's condition would have contributed to the unreliability of any information proffered.

Based upon the foregoing facts and findings, it is this Board's opinion that the Carrier has failed to present sufficient evidence which would lead to the conclusion that the Claimant violated Carrier rules regarding providing factual information concerning his injury of October 22, 1992. Therefore, the claim will be sustained.

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 all reference to the censure and suspension from the Claimant's Personal Record.

This Award was signed this 11th day of February, 1994.


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