

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 925  
Case/Award No. 164

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 164

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

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 Wenger, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on April 21, 1976. The Claimant was subsequently promoted to the position of Welder and he was occupying that position when he was censured by the Carrier for his alleged violation of General Rule 1 because of his persisting in unsafe practices to the jeopardy of himself and others.

The Claimant was censured as a result of an investigation which was held on April 20, 1993 in the Carrier's Conference Room in the Car Shop at Mandan, North Dakota. At the investigation the Claimant was represented by the Organization. The Carrier censured the Claimant based upon its findings that he had violated General Rule 1 in light of "Your work record of a minimum of eleven (11) on-duty injuries to yourself as reported to BN over your career [which] indicates that you are injury prone".

#### Findings and Opinion

Mr. Patrick Yaune, Roadmaster at Mandan, North Dakota, testified regarding the Claimant's prior record of eleven on-duty

injuries. The purpose of Mr. Yauney's testimony was, apparently, to demonstrate that the Claimant, as compared to other employees of the Carrier, had incurred and reported substantially more on-duty injuries/accidents.

Mr. Yauney testified that he had no independent knowledge of any of the eleven accidents/injuries; that the investigation had not been scheduled because the Claimant had incurred a particular injury, but as the result of a general review of the Claimant's Personal Record; that his knowledge of the Claimant's injury record was based exclusively upon what appeared in the Claimant's Personal Record; and that he concluded that the Claimant's injury record was excessive based upon a statistical/computer analysis titled "Burlington Northern Railroad Company Casualty and Compensated Lost Work Experience, Ratios Calculated on Basis of 200,000 Manhours".

The Claimant testified regarding his recollection of each of the eleven on-duty personal injuries listed in his record.

This case raises some very significant and substantial questions. The Organization improperly relies upon Schedule Rule 40 when it alleges that the Carrier cannot retrospectively, because of the fifteen day time limit, consider an employee's prior record of injuries in determining whether that employee is "injury prone". There is no question, in the realm of industrial jurisprudence, that a company has the right to take corrective action, which may even result in termination, when an employee clearly demonstrates that he/she is not capable of performing his/her duties and responsibilities in a manner that ensures the safety of himself/herself and fellow employees. Applying the fifteen day time limit for conducting an investigation, where injury proneness is the issue at hand, would improperly limit the Carrier's justifiable concerns about safety.

However, there is some merit in the Organization's procedural objection regarding time limits; because the instant investigation was not scheduled because of any particular injury incident but was held as the result of a general review of the Claimant's record. That fact raises the question of whether the Carrier could, for example, two or three years after an employee's last reported on-duty injury schedule an investigation to determine whether over the previous ten or fifteen years that employee had demonstrated a record of injury proneness. Some standards need to be developed as to when and under what circumstances the Carrier may justifiably embark upon such an inquiry. This Board is neither capable of nor does it have the jurisdiction to establish such standards. The simple first step in any standard, however, must be that an injury proneness investigation can only be properly initiated when as the

result of a new/current injury the Carrier seeks to determine (1) the cause and responsibility for that injury and (2) whether the injured employee has a record which demonstrates that he/she is "injury prone".

Even if this Board were to reach the merits of the instant matter, it would be difficult to conclude, in view of (1) the Claimant's "fuzzy" recollection of several of the injuries/incidents, (2) the lack of firsthand knowledge of any of those injuries/incidents by any representative of management, and (3) the inability to assess with any degree of certainty whether all or most of those injuries/incidents were due, in whole or in part, to the Claimant's negligence or contributory negligence, that the Carrier has presented substantial and convincing evidence that the Claimant was properly charged and censured for being injury prone.

Based upon the foregoing findings and rationale, it is this Board's opinion that the claim should be sustained.

By way of dicta, the Board would observe that Mr. Wenger certainly shows the indicia of being injury prone; and it is disappointing, indeed, that the Organization, the Carrier, and Mr. Wenger cannot cooperate in a non-adversarial process to ensure that Mr. Wenger's safety and the safety of others is better protected.

Award: The claim is sustained. The Carrier is directed to physically expunge any reference to this discipline from the Claimant's Personal Record. This Award was signed this 10th day of March, 1994.

Richard R. Kasher

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