

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 165

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 165

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. Johnny R. Hutson, hereinafter the Claimant, entered the Carrier's service as a Laborer sometime in the late 1970s or early 1980s. The Claimant was subsequently promoted to the position of Machine Operator and he was occupying that position when he was censured by the Carrier for his alleged violation of Rule 50 on February 9, 1993.

The Claimant was censured as a result of an investigation which was held on March 23, 1993 in the Trainmaster's Office in Cheyenne, Wyoming. At the investigation the Claimant was represented by the Organization. The Carrier censured the Claimant based upon its findings that he had violated Rule 50 for his alleged failure to maintain [his] machine in the proper condition while working as a machine operator on an Earth Scraper at Altus, Wyoming on February 9, 1993.

Findings and Opinion

On the date in question the Claimant was operating a leased Caterpillar Scraper, and was assigned to "take a hill down" and "build a platform". The Claimant testified that he was "hauling loads from a hill to the platform and, at one time or another, I smelled the brakes". The Claimant testified that "I got out and examined the machine, [and] could not see anything wrong with it"; and that he then "turned the machinery on and took it to the crossing by the fuel tank and reported [it] as broken down".

The testimony of Roadmaster Scott Peterson and Traveling Mechanic Al Clark establishes that when the Scraper was examined it was determined that there was a dent in the steel "belly pan" of the machine and that the master cylinder had been damaged. It was Roadmaster Peterson's opinion that "it would take a severe impact to bend 3/8 inch steel" the width of the belly pan. Roadmaster Peterson also testified that the mounting bolts for the master cylinder had been "torn loose".

Traveling Mechanic Clark testified that because he did not know where or when the damage to the belly pan and master cylinder had occurred he could not offer an opinion as to whether the machine was "operated for any time or any distance after the initial damage was done". Mr. Clark also testified that the cylinder, which he had brought to the investigation, contained rust at the broken bolt holes, and that at "one of those breaks there is very little rust and on the other two they are extensively rusted". Mr. Clark opined that if all of the bolts had been broken at the same time he believed that the "layer of rust on each would have been similar". Mr. Clark further testified that it was possible that "part of the damage to the cylinder could have been done previous to the incident" under investigation; and that he was not "positive when the various damage to that cylinder occurred".

The Claimant testified, relevantly, as follows:

Q. During your tour of duty and operating the machine on February 9, 1993 did you feel any kind of impact or any kind of bounce or something out of the ordinary? I understand when you're operating these machines, that you're operating on rough terrain, you bounce a lot, and -- and move around in the cab, but was it -- would you consider anything out of the ordinary happening that day? Like striking something?

A. No more than normal. No, sir. No more than normal.

The Carrier determined to discipline the Claimant apparently because it was concluded that he and he alone was responsible for


the damage to the belly pan and the master cylinder of the leased Caterpillar Scraper.

There was no eyewitness to any incident which resulted in the damage to the scraper. There is no evidence to establish that all or any of the damage occurred while the Claimant was operating the scraper on the day in question. There is evidence in the record which raises the strong probability that the damage to the belly pan and the master cylinder occurred over a period of time. There is also evidence in the record to the effect that machine operators other than the Claimant were in charge of the scraper at different times prior to the Claimant's operation on February 9, 1993.

Accordingly, this is not a simple case of res ipsa loquiter; that is, "the thing speaks for itself". Liability and responsibility can be found in the absence of eyewitnesses or other "hard evidence" where there is only one reasonable or logical explanation for how a particular event resulting in damage or injury occurred. If, for example, the Caterpillar Scraper had been leased on the morning in question and was carefully examined and found to be free of any damage to its undercarriage, and if, when the Claimant brought the scraper back after operating it for an hour or two, there was damage to the belly pan and master cylinder, then, if the Claimant had been the only operator of the scraper during the time in question, the principle of res ipsa loquiter would apply; and the Claimant would properly be charged as the individual responsible for the damage.

However, in this case there are questions as to when and under what circumstances the damage occurred. Therefore, it is this Board's conclusion that the Carrier has failed to establish by substantial and convincing evidence that it was the Claimant who was solely responsible for the failure to maintain equipment and thus in violation of Rule 50. Accordingly, the claim will be sustained.

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
Chairman and Neutral Member
Special Board of Adjustment No. 925