

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 170

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 170

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. Dale F. Dunnihoo, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on October 10, 1962. The Claimant was subsequently promoted to the position of Head Welder and he was occupying that position when he was censured and suspended for ten days from the Carrier's service commencing on July 8, 1993 for his alleged violation of Rule 1 on May 27, 1993 at Hardin, Montana.

The Claimant was censured and suspended as a result of an investigation which was held on June 10, 1993 in the Burlington Northern Railroad Depot in Hardin, Montana. 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 1 in connection with the personal injury sustained on May 27, 1993 in Hardin, Montana. The Claimant's previous record was taken into consideration in assessing the discipline.

Findings and Opinion

The evidence of record regarding the personal injury sustained by the Claimant on May 27, 1993 establishes, with sufficient certainty, that he fell in the parking lot at Hardin, Montana, for no ostensible reason. The testimony of Roadmaster Adler, to the effect that the parking lot was in "good shape, no holes [and provided a] good rocked surface", and the findings of an inspection committee that the parking lot was in good condition could be credited by the Carrier in determining that the Claimant was responsible for his fall and resulting injuries.

While a substantial amount of testimony and documentation in the record was introduced for the purpose of establishing that the Claimant had demonstrated his "injury proneness" as the result of suffering five reportable injuries during 1990, 1991, 1992 and the first four months of 1993, the fact remains that the Claimant was disciplined for his negligence as a result of the May 27, 1993 injury.

The Claimant offered no reasonable explanation for the cause of his injury on May 27, 1993; and, in fact, was inconsistent and contradictory in explaining the reason for the incident.

The Organization representative objected to the Carrier's introduction of evidence regarding the Claimant's prior injuries; based upon his misinterpretation of the fifteen day time limit in Schedule Rule 40. As the Board observed in Case No. 164:

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".

That rationale is equally applicable in the instant case. While the Carrier did not conclude that the Claimant was injury prone, although there is some evidence in the record to establish that certain of the Claimant's prior injuries were due to his negligence and not the negligence of others, it did have the right to determine that the Claimant was not sufficiently diligent regarding his own safety on May 27, 1993, and that his prior safety/injury record could be considered in determining the measure of discipline to be imposed.

The Board would observe that based upon the information available to him, the Conducting Officer held a fair and impartial hearing and elicited all available data in an unbiased manner.

Based upon the foregoing findings, the Board concludes that the Carrier had just cause, based upon substantial and convincing evidence, to discipline the Claimant for the May 27, 1993 incident, and to conclude, based upon the Claimant's prior safety/injury record, that a ten day suspension was the proper quantum of discipline. Accordingly, the claim will be denied.

Award: The claim is denied. This Award was signed this 10th day of March, 1994.



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