

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 180

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 180

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. Nathaniel Hopkins, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on July 7, 1982 and he was occupying that position when he was suspended from the Carrier's service for thirty days effective November 24, 1993 for his alleged failure to comply with safety rules regarding the prompt and proper reporting of a personal injury.

The Claimant was suspended as a result of an investigation which was held on November 9, 1993 in the Roadmaster's Office in Minneapolis, Minnesota. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Safety Rules 585 and 589 as a result of his alleged failure to promptly report a personal injury sustained on September 27, 1993 while he was assigned as a Laborer on Tie Gang TP10.

Findings and Opinion

Roadmaster Kenneth Kiefer testified that the Claimant was subject to his jurisdiction on September 27, 1993, and that he was available to the crew upon which the Claimant worked on September 27, 28 and 29 (the day the crew was laid off), 1993.

Roadmaster Kiefer testified that he was "out with the crew every day", and that the Claimant did not report any type of incident to him on either September 27, 28 or 29, 1993. Roadmaster Kiefer testified that at the conclusion of the work day on September 29, 1993 he had the occasion to speak with the Claimant, but that the Claimant did not make reference to any personal injury he sustained on September 27, 1993.

Roadmaster Kiefer testified that he subsequently "heard rumors" that the Claimant had hurt himself while working on the tie gang, and that he investigated the matter. Roadmaster Kiefer testified that he made several attempts to contact the Claimant, and left a message for the Claimant advising him that "if he did sustain a personal injury, [he should proceed] to the Northtown General Office Building and have any officer help him fill out the proper forms".

In fact, the Claimant did appear at the Carrier's designated office on October 11, 1993 and completed several personal injury report forms which contained, inter alia, the statement that "Gun bunny machine bent spike and machine bounces up and down causing pain to back".

Roadmaster Kiefer described how a "spiker" operates, and the circumstances when a spike that is being dumped into the bin bends or gets misdirected and can "raise the machine off of the rail three or four inches". Roadmaster Kiefer testified that in this circumstance the operator could be subjected to "some jarring".

The Claimant described the incident on September 27, 1993 which resulted in his filing personal injury report forms on October 11, 1993 as follows:

Because the only time when I was standing up dogging spikes, this spike bent and then the machine made the (inaudible) action, you know, shake, you know. So I went backwards and so I had the can in my hand and that's when my finger got caught between the can and the back (inaudible) that, you know. Well, I didn't think nothing of it because I figure a couple of days and my back will be all right, you

know. And so I -- when it didn't get all right, and on that Thursday I tried to contact the roadmaster but I didn't get ahold of him. He did get ahold of me and so I called this office here and talked to Barb and she told me to come back in Monday and so I tried to fill the things in, she wouldn't accept it because -- not until she talked to Kiefer. She wouldn't accept it when I tried to put it out the following Monday. She said wait until she contacted him to see what he's got to say and so that we had missed one another, but he kept calling my house. I called his house once and so he finally left a message to my wife, excuse me, to tell me, you know, I was just to fill out the necessary papers here through this office here.

That portion of the Claimant's testimony, as well as the remainder of his testimony, establishes that the Claimant was subjected to a physical trauma on September 27, 1993, and that he realized at the time or shortly thereafter that he had injured his back.

The Claimant has provided no reasonable excuse for his not complying with well-known Carrier rules regarding the prompt reporting of personal injuries. The Claimant's personal record reflects that he has sustained and/or reported at least four prior personal injuries; so that the Carrier and the Board can conclude that the Claimant knew and should have known what his responsibilities were regarding the reporting of such injuries.

Under the circumstances this Board concludes that the Carrier has proven by substantial and convincing evidence that the Claimant failed to comply with the rules regarding the prompt reporting of personal injuries, and therefore the claim will be denied. The Board further concludes, in view of the Claimant's prior personal record and the fact that he was familiar with the requirements regarding the filing of personal injury report forms, that the discipline in this case was neither arbitrary nor overly severe.

Award: The claim is denied. This Award was signed this 5th day of April, 1994.

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