

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 184

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Case/Award No. 184

On May 13, 1983 the Brotherhood of Maintenance of Way Employes (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. Ronald C. Hart, hereinafter the Claimant, entered the Carrier's service as a Sectionman on May 7, 1990. The Claimant was subsequently promoted to the position of Truck Driver and he was occupying that position when he was suspended from the Carrier's service effective February 21, 1994 through and including February 25, 1994 for his alleged violation of Rules 1 and 40 of the Safety and General Rules.

The Claimant was suspended as a result of an investigation which was held on January 21, 1994 in the Carrier's Conference Room in Spokane, Washington. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rules 1 and 40 for allegedly failing to work safely while working as a truck driver at Rosalia, Washington, which alleged failure resulted in a personal injury.

Findings and Opinion

On January 7, 1994 the Claimant was working at the Rosalia Section as a Truck Driver, and he was instructed to accompany Mr. Lew Harrington, Section Foreman, and proceed to Potlatch to pick up a tie saw.

Section Foreman Harrington testified that when they arrived at Potlatch the tie saw was on a loading dock and the truck was backed into position. Mr. Harrington testified that "we got out and I said something to the effect that 'I think the saw is pretty heavy,' and as I recall Chris (the Claimant) said something to the effect that, 'Why, I think we can lift it in there,' and Chris and I lifted up one end of it." Mr. Harrington stated that "I said 'No, it's too heavy, we ought to use the --,' we have an electric winch on our truck -- or electric boom on our truck", and so "[I] said 'We'll use the electric boom to load it,' which we did".

Later in the day the tie saw was unloaded at Cheney; when, by Mr. Harrington's testimony, "The four of us lifted the tie saw and set it onto the carriage". When it was discovered that the tie saw was not operative, because the oil was "low and dirty" and there was no gas in the vicinity, Mr. Leroy McKinnon, the Section Foreman at Cheney, instructed the Claimant and Laborer Holmes to push the tie saw, which was on a dolly, "up the track by the compound".

The evidence of record indicates that the tie saw with the dolly frame weighed 460 pounds and the tie saw alone weighed 340 pounds.

The Claimant testified that he pushed the machine to the vicinity of the compound and that then he and Mr. Holmes lifted the tie saw and carried it approximately 40 to 50 feet where it was placed within the compound.

The Claimant testified that on the evening after performing this activity, after his shift was completed, he discovered that he had injured his neck and felt a pain which "kind of reaches down through my left arm".

At the time the Claimant moved/lifted the tie saw with the help of Mr. Holmes the approximate 40 to 50 feet to the compound he had available the electric boom/winch which had been previously used to move the tie saw from the dock to the truck.

The Claimant was found to have violated several safety rules, the most relevant of which, in the opinion of the Board, is Rule 40 which states, inter alia, that "Lifting and carrying beyond normal physical capabilities is prohibited. . . ."

In his defense of the Claimant the Organization Representative has stated that the Claimant "did exactly what he was instructed to do by the foreman [Mr. McKinnon] that day", and that the foreman did not advise the Claimant to "be sure to use the truck".

The Claimant testified that he did not believe that "lifting that machine up and setting it in the bullpen . . . was . . . beyond my limits"; and that the tie saw was approximately "the same size as a bolt machine and it only took two guys to take that thing off the track".

This is a close case; because it is not uncommon for Maintenance of Way employees to lift and move heavy equipment. It is also not uncommon for Maintenance of Way employees, who are engaged in such strenuous work to, occasionally, injure themselves through no fault of their own, but because muscle strains and similar ailments are a part of the job.

However, this case is a bit different. Shortly before the Claimant and Mr. Holmes made their lift and carry, the Claimant had tested the weight of the tie saw at Potlatch and had been informed by Foreman Harrington that it was "too heavy" to be lifted by two men.

The Claimant is expected to exercise reasonable care. The Claimant's failure to obtain additional help or to use the electric boom available to him justified the Carrier in concluding that the Claimant was negligent, and had violated applicable rules when he did not ensure that the lift could be made, with reasonable certainty, in a manner so that he would not be injured. He clearly, in violation of Rule 40, "lifted and carried beyond normal physical capabilities".

Accordingly, the Board finds that the Carrier had just cause to discipline the Claimant for the safety violation, and further finds that the penalty was neither harsh nor overly severe. Therefore the claim will be denied.

SBA No. 925
BN and BMW
Case/Award No. 184
Page 5

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