

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY
- and -
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 50
AWARD NO. 50

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. Jerry L. Cozad, hereinafter the Claimant, entered the Carrier's service as a Sectionman on April 6, 1977. He was occupying that position when he was censured by the Carrier on March 23, 1988.

The Claimant was censured as a result of an investigation which was held on March 10, 1988 in Centralia, Washington. At the investigation the Claimant was represented by the Organization. The Carrier issued the censure to the Claimant based upon its findings that he had violated General Rule I of Rules of the Maintenance of Way and Rule 567 of Burlington Northern Safety Rules on February 26, 1988 when he allegedly failed to exercise care by preventing injury to himself when he fell from Bridge 51 located near Centralia, Washington.

Findings and Opinion

On February 26, 1988 the Claimant, working as a track laborer on the north end of Bridge 51, was cutting rail with a rail saw. The Claimant had set up the rail saw on the outside of Bridge 51. Prior to beginning the cuts, the Claimant, his Section Foreman, Mr. J.J. Gudyka and Truck Driver G.L. Holmes "eyeballed" the designated cuts to see that they were appropriately aligned with the previous cuts. While engaged in this process, the Claimant stepped onto freshly poured concrete which collapsed under his weight and he fell approximately eight (8) to ten (10) feet from Bridge 51 to the ground.

The basis of the Carrier's institution of discipline is found in Maintenance of Way Rule I and Safety Rule 587, which require employees to exercise care and appropriate judgment to avoid injury to themselves and others. These rules further require that employees work safely. The Carrier concluded that the Claimant violated these rules and therefore the censure was imposed on March 23, 1988.

The thrust of the Organization's defense is based upon its contention that the Claimant was an "unsuspecting employee" who was required to work in an inherently unsafe area. The Organization further contended that the Claimant was "singled out" for purposes of discipline where other employees may have been equally guilty and/or responsible for the incident. Specifically, the Organization submits that Foreman Gudyka supervised the placement of the rail saw, and if that rail saw was placed in error then the Claimant was not solely responsible.

Although this appears to be a case in which "insult is being added to injury", it is not inappropriate to discipline an employee where that employee's negligence or lack of due care results in self-injury. However, in order for any discipline to be sustained in the arbitral forum, no matter how minor the discipline may be, it is incumbent upon the employer to prove by the presentation of substantial and convincing evidence that the charged employee was guilty of some violation.

In the instant case, while this Board would agree that the Claimant could have been more circumspect in terms of where he set the saw, so that he would not have had to traverse a more narrow part of the bridge, we cannot conclude with sufficient certainty that this alleged act of negligence was the cause of his injury.

The evidence of record would appear to support a conclusion that had the newly poured concrete set, no accident would have occurred; in spite of the fact that the Claimant was standing on the

more narrow part of the bridge structure. We are unable to draw any definitive conclusion that those who poured the concrete were remiss or negligent in not marking the area with warning signs or some other barrier, since it appears that the concrete had been poured approximately eighteen (18) to twenty-four (24) hours prior to the incident, and it is reasonable to assume that in ordinary circumstances the concrete would have sufficiently set by the time the Claimant stepped on it so that it would not have given way.

There is also no substantial or convincing evidence to show that the Claimant should have known that he was risking injury when he stepped on the concrete retaining wall. In these circumstances, we are constrained to sustain the claim.

This Board's finding, in the context of an arbitration decision, should not be read to imply that the Claimant was totally innocent of some degree of contributory negligence. All this Board's decision stands for is the principle that the Carrier has failed to provide sufficient evidence for us to conclude that the Claimant's negligence was responsible for the incident.

Accordingly, the claim will be sustained.

Award The claim is sustained. The Carrier is directed to expunge the censure from the Claimant's Personal Record.

This Award was signed this 25th day of April 1988
in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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