

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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CASE NO. 108

AWARD NO. 108

RECEIVED

DATE

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. Robert E. Purchase, Sr., hereinafter the Claimant, entered the Carrier's service as a Laborer on April 23, 1990. The Claimant was occupying that position when he was suspended for thirty (30) days by the Carrier effective August 22, 1991.

The Claimant was suspended as a result of an investigation which was held on July 23, 1991 in the Roadmaster's Office in Galesburg, Illinois. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated several Safety and General Rules by his alleged failure to exercise care to prevent injury to himself and his alleged failure to promptly report a personal injury sustained on July 10, 1991.



Findings and Opinion

The Claimant and fellow employees Scot Lox, Saul Interrial and Gary Pherigo were working as a Section Gang under the supervision of Assistant Foreman R.D. Showalter, and they were engaged in the moving of steel ties which would be used to replace some wooden ties.

The incident which gave rise to the Carrier's imposition of discipline occurred on July 10, 1991 while the Claimant and his fellow employees were working in the Galesburg Terminal.

It is not clear exactly at what time the incident took place, but it is undisputed that Mr. Lox and the Claimant picked up a steel tie, which weighs between 150 and 250 pounds. The two men carried the tie several feet and Mr. Lox gave verbal notice to the Claimant that he was ready to drop his end of the tie. Mr. Lox dropped his end of the tie, but the Claimant, by his testimony, did not drop his end of the tie at the same time. The Claimant testified that he was unsure of whether he could drop the tie without injuring himself, since he felt his foot was in the downward path of the tie and so he held the tie until the end Mr. Lox had dropped hit the ground.

As a result of the end of the tie held by Mr. Lox striking the ground, the Claimant apparently suffered a vibrating trauma to his neck and shoulders.

Messrs. Lox, Interrial, Pherigo and Showalter all were witnesses to the incident, and their testimony establishes that the Claimant, after dropping his end of the tie, reached up to hold his neck as he had apparently suffered some pain and/or injury.

The Claimant worked through the completion of his shift. He made no written or verbal injury report to any fellow employee or member of supervision. The following day, July 11, 1991, the Claimant called off injured and spoke with Roadmaster R.E. Wagoner. Mr. Wagoner testified that the Claimant told him during a telephone conversation at approximately 6:45 a.m. on July 11, 1991 that he had suffered an injury to his neck and shoulders on the previous day while handling a steel tie with fellow employee Lox. Roadmaster Wagoner testified that he directed the Claimant to appear at the Roadmaster's office that afternoon in order to fill out a personal injury report. The Claimant did not appear at the Roadmaster's office on July 11, 1991, as he testified that he had been suffering some substantial pain and that he slept for a good part of the day.

Subsequently, on July 12, 1991, the Claimant did complete the personal injury report and also obtained pain medication from several physicians whom he visited. As a result of the injury, the Claimant missed several days of work.

The two charges against the Claimant, (1) the failure to exercise care to prevent injury to himself and (2) the failure to promptly report a personal injury, have been established in the record before the Board by clear and convincing evidence, which is essentially found in the Claimant's testimony.

While steel ties are heavy objects, the testimony of several members of the Section Gang establish, without contradiction, that wooden ties, which the Claimant had handled in the past, are heavier than the steel tie he was lifting on the day in question, and that two (2) man teams regularly lift and move such ties. Record evidence also establishes that the Claimant should have been knowledgeable regarding the safe manner in lifting and dropping ties.

Although the Claimant testified that he did not believe that Mr. Lox had "shouted [to him] loud enough for Mr. Showalter to hear", it is clear from the testimony of Mr. Showalter and Mr. Lox that Mr. Lox clearly communicated to the Claimant that he was "ready" to drop the tie. It is also clear that the Claimant had the opportunity to tell Mr. Lox "hold it, I can't drop it now" or "wait a second, let me get a better grip" or to make some other comment which would have permitted him time to readjust his stance in order that he could avoid dropping the tie on his foot. The Claimant admitted that he heard Mr. Lox's "ready" statement and that he made no effort to coordinate his dropping of the tie with Mr. Lox's release of his grip.

Several Carrier rules establish that employees are required to exercise care in the handling of ties and heavy objects in order to avoid injury to themselves and fellow employees. The evidence of record clearly establishes that the Claimant failed to take necessary and reasonable precaution to insure that he would not be injured. His failure led directly to his injury, and therefore the Board finds that the Carrier had just cause to conclude that the Claimant violated the cited safety rules.

It is equally clear that the Claimant understood that he injured himself on July 10, 1991. In responding to questions by his Organization Representative, he indicated that he did not tell anybody "what had happened" after the incident occurred, that he felt that he could have continued to work but that he was "still in a lot of pain".

The rules requiring prompt reporting of personal injuries are clear and should have been well-known to the Claimant. Assistant Foreman Showalter was on the scene and readily accessible for the purpose of reporting the injury. The injury sustained, by the Claimant's own testimony, was not the type which manifested itself hours or days subsequent to its being incurred. The injury was immediate; the Claimant felt the pain and reacted to it physically by grabbing his neck; and he was "still in a lot of pain" as he continued to work on the day in question.

In the face of these un rebutted facts, and in light of the justification for the Carrier's requiring employees to "promptly" report injuries, there can be no doubt that the Claimant was properly disciplined for his failure to comply with the rule. It is conceivable that had the Claimant promptly reported to supervision that he suffered a trauma to his neck and shoulders as a result of the "dropping of the tie" incident, that the Claimant would have been relieved of any further physical activity that day and immediately taken to or referred to medical practitioners. Had the Claimant made his injury known timely it is also conceivable that some of the soft muscle tissue or other injuries could have been medically addressed and some of the subsequent pain could have been ameliorated or avoided. That is the purpose of the rule; that is, to give Carrier management and medical staff an opportunity to address and resolve a personal injury as soon as possible.

The Claimant's delay in reporting the injury and seeking medical attention violated the letter, spirit and intent of the rule. Accordingly, the Board finds that the Carrier had just and sufficient cause for concluding that the Claimant had violated the rule regarding prompt reporting of personal injuries.

Based upon the foregoing findings, the Board concludes that the Carrier had just and proper cause to discipline the Claimant, and the Board further finds that the thirty (30) day suspension was not an arbitrary or harsh penalty in the circumstances.

Award: The claim is denied. This Award was signed this 9th day of December, 1991.

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