

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

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*****
BURLINGTON NORTHERN RAILROAD COMPANY *
and *
BROTHERHOOD OF MAINTENANCE *
OF WAY EMPLOYES *
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CASE NO. 112
AWARD NO. 112

On May 13, 1983 the Brotherhood of Maintenance of Way Employees (hereinafter the "Carrier") 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 (3) 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 procedures.

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. Oraldean Munson, hereinafter the Claimant, entered the Carrier's service as a B&B Helper on May 1, 1969. The Claimant was subsequently promoted to the position of Truck Driver and he was occupying that position when he was suspended for thirty (30) days from the Carrier's service on October 10, 1991.

The Claimant was suspended as a result of an investigation which was held on September 10, 1991 in the Ceco Building in Cicero, Illinois. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rules 563 and 564 for his alleged disregard of safety and careless discharge of duty at approximately 1100 hours, July 25, 1991, in Ceco Building, Cicero, Illinois, which resulted in his personal injury, while assigned as a B&B Truck Driver working at Cicero, Illinois.

Findings of the Board

The Claimant testified that on July 25, 1991 he was asked by his Foreman, Mr. Frank Michuda, to obtain certain parts for the repair of shades in an office building. The Claimant testified that he obtained the parts and the invoice and paperwork associated with their purchase and was delivering same to the Ceco Building in Cicero, Illinois. The Claimant testified that the parts were in a package which he brought to the building; that when he entered the building and could not find Foreman Michuda he asked Assistant Foreman Norman Wright "where he [Foreman Michuda] was"; that Mr. Wright said "Give it to [me]" and that "I said no, Frank said give it to him"; and that Mr. Wright approached him "jerked on the box" and that he, the Claimant, then "went in the elevator". The Claimant testified that he entered the elevator to go to the first floor "to see if Frank was . . . there", and that Mr. Wright "got in the elevator and jerked it [the package] away from me and pushed my back". The Claimant testified that Mr. Wright had said "Give me the box" and that Mr. Wright did not instruct him not to enter the elevator. The Claimant testified that he had both hands on the package and was trying "to resist Mr. Wright from removing it from [my] possession", and that as a result of this action he injured his lower back/side when he struck it against the elevator. The Claimant testified that he felt "a little bit" of immediate pain at the time, and that is why he submitted an injury report. The Claimant testified that Mr. Wright was "angry" and "aggressive".

Mr. Norman Wright, the Assistant Foreman, testified that he was on the third floor of the Ceco Building when the Claimant exited the elevator with a package "under his arms" and when the Claimant asked "Where's Frank?". Mr. Wright testified that he asked the Claimant "What do you want with him?", and that the Claimant said "I got this package for him". Mr. Wright testified that he said to the Claimant "Give me the package", because he, Wright, knew where Mr. Michuda "was"; and that the Claimant said "No" and "I'm supposed to give it to him". Mr. Wright testified that he reached for the box; that the Claimant then turned and bumped into another employee; that the Claimant then pushed the elevator button and entered the elevator when it opened; that he, Wright, also entered the elevator; and as the elevator "started down, I reached over and grabbed the box and put it under my arm". Mr. Wright testified that the Claimant "took off walking" and that he took the box to Foreman Michuda. Mr. Wright testified that he was

not aware of the Claimant's suffering any injury, and that in his opinion, there was no resistance when he took the box from the Claimant and that there was no "struggle over the box".

Both the Claimant and Mr. Wright were represented at the investigation by the BMW. Both Organization Representatives, as well as the Claimant and Mr. Wright stated and testified, respectively, that the incident referred to in questioning by the Conducting Officer was not properly characterized as an "altercation".

This Board is persuaded, by the probative evidence of record, that the Carrier has failed to prove that the Claimant was guilty of violating Rule 563, as there is no showing that he did not "faithfully, intelligently, courteously or safely discharge his duty" or that he was not "courteous" or that he was "boisterous or profane" or that he used "sexist or vulgar language" or that he had entered into an "altercation" with another person; or that the Claimant violated Rule 564 as there is no showing that he was "careless", insofar as safety was concerned, or "disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious".

The Claimant could have exercised better judgment and voluntarily turned the package over to Mr. Wright. However, the Claimant was responding to a direct request from his Foreman and absent a clear, unequivocal order from supervision to "turn the package over", the Claimant's actions can neither be considered quarrelsome or insubordinate. If there was an "altercation", and that issue will be addressed in the companion case, No. 113, involving Mr. Wright being decided contemporaneously this date, the Claimant had no active part in or responsibility for the alleged "altercation" or "struggle". The package was taken or "jerked" from the Claimant's possession; and he allegedly injured his back as the result of the incident.

While the Carrier might have cause to suspect that the Claimant was not injured as a result of the incident, that is not the charge and there is no evidence in the record for this Board to consider concerning the alleged injury.

The Claimant was charged with disregarding safety and careless discharge of duty. There is insufficient evidence to support that disciplinary finding, and accordingly the claim will be sustained.

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Award: The claim is sustained. The Carrier is direct to expunge any reference to this discipline from the Claimant's Personal Record, and to make the Claimant whole for any lost wages or benefits suffered as a result of the thirty (30) day suspension.

This Award was signed this 20th day of March, 1992.

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