

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

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BURLINGTON NORTHERN RAILROAD COMPANY *
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and *
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BROTHERHOOD OF MAINTENANCE *
OF WAY EMPLOYES *
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CASE NO. 118
AWARD NO. 118

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. Westley J. Wenger, hereinafter the Claimant, entered the Carrier's service as a Sectionman on April 4, 1978. The Claimant was subsequently promoted to the position of Foreman and he was occupying that position when he was censured by the Carrier.

The Claimant was censured as a result of an investigation which was held on December 10, 1991 in Glendive, Montana. At the investigation the Claimant was represented by the Organization. The Carrier censured the Claimant based upon its findings that he had violated Rule 589 for his alleged improper reporting of a knee injury sustained on November 12, 1991 near Forsyth, Montana.

Findings of the Board

The evidence of record establishes that the Claimant had a pre-existing problem with his left knee; and that problem,

which first manifested itself approximately twelve (12) years prior to the date of his most recent injury, resulted in the knee "locking up".

Fellow employee M. Seveier, who was working with the Claimant on November 7, 1991, testified that as he and the Claimant were "punching plugs" and as the Claimant began to "straighten up, he started kind of hobbling"; and that the Claimant told him that his knee "locked up on him" and that the Claimant said "it would go away and be okay".

In fact, the Claimant's condition did "go away" and he was "okay" for the remainder of the work day on Thursday, November 7, 1991. After leaving work on Friday, November 8, 1991, the Claimant's knee "locked up" again. Unfortunately, for the Claimant, this time his knee was not "okay".

Evidence of record establishes that the Claimant contacted Carrier supervisors and a Senior Claim Representative, Mr. M.J. Rockenback, to advise of his condition and his doctor's advice that he would have to undergo surgical repair of his left knee.

The Claimant was censured, apparently, either because (1) he did not report the injury on the date it reoccurred, November 7, 1991 or (2) he did not file the appropriate claim forms after being advised to do so by his supervisor, Roadmaster Dan F. Ruddy, to whom the Claimant reported his injury by telephone on Saturday, November 9, 1991.

The Claimant did not file the required written reports until he returned to work, apparently on crutches, on Tuesday, November 12, 1991.

There is no question that the Carrier is entitled, consistent with Rule 589, to expect maintenance of way employees to timely and promptly file reports of injury. Despite the Claimant's protestations to the contrary, regarding his knowledge concerning the appropriate procedures for filing injury reports, this Board is persuaded, based upon a review of the Claimant's Personal Record which indicates that he had suffered, at least, nine (9) on or off-duty injuries most of which were documented by the F-27 injury report forms, that the Claimant should have been very well-versed in his reporting obligations.

Nevertheless, the peculiar facts in this case require the Board to sustain the claim. It is not necessary to address

all of the Organization's procedural objections. The Board would observe, however, that the notice of investigation could have been more specific and referred to the "late filing" of the injury report as the basis for the Carrier's charge that the Claimant may have been guilty of "improper reporting" of his injury. This technical objection, however, was not fatal to the investigation. The Organization Representative demonstrated that he was thoroughly capable of defending the Claimant regarding the allegation of "late reporting" of his injury.

While this Board could spend many pages in philosophizing as to when and under what circumstances an employee is required to report a recurring and apparently non-serious pre-existing injury, which injury is not incapacitating insofar as work is concerned, the Board will resist the temptation to engage in that exercise; primarily because, in this Board's opinion, the Carrier committed a fatal procedural due process error when it refused the Organization's reasonable request to have Senior Claim Representative Rockenback present at the investigation as a witness.

The Carrier is not obligated to fill the investigation with unnecessary and irrelevant testimony from putative witnesses. However, in the instant case, the Organization requested, by letter dated December 1, 1991, that Mr. Rockenback be present at the investigation to present testimony. Mr. Rockenback was in possession of a verbal and/or taped injury report from the Claimant, made to him prior to the Claimant's return to work. Mr. Rockenback, it was likely, could have provided enlightening testimony as to how and under what conditions employees report injuries that occurred on the job, abated, and then reoccurred or exacerbated after the employee left work. By letter dated December 6, 1991, the Carrier declined the Organization's request to have Mr. Rockenback appear as a witness because Claim Representative Rockenback "has no firsthand knowledge of the incident or the personal injury reporting." In fact, Claim Representative Rockenback received an injury report. His testimony would have been as or more valuable than the testimony of other supervisors who, like Mr. Rockenback, were not eyewitnesses to the incident and who had not received an injury report, verbal or written.

In this Board's experience, the Conducting Officer in this case has generally demonstrated that he "runs" a thorough, fair and competent investigation. However, in the instant case,

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the Organization and the Board were handicapped because the testimony of a potentially critical witness was not available.

Based upon the foregoing findings, the claim will be sustained.

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