

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 127

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 127

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. Donald G. Schrantz, hereinafter the Claimant, entered the Carrier's service as a Sectionman on November 23, 1970. The Claimant was subsequently promoted to the position of Truck Driver 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 June 5, 1992 at the depot in Garrison, Montana. At the investigation the Claimant was represented by the Organization. The Carrier censured the Claimant based upon its findings that he had violated Rules 26 and 567 and General Rules by his alleged failure to give a factual report in connection with the injury he sustained on April 27, 1992 while working near Garrison, Montana.

Findings and Opinion

On April 27, 1992 the Claimant reported for duty, and under the supervision of Foreman Novakovitch he began performing various clean-up duties at the Garrison Depot.

At approximately 11:00 a.m. while under the direction of Foreman Novakovitch, the Claimant and Laborer M.G. Martinez drove their assigned truck to the DOT inspection center in Drummond. At the inspection center the Claimant was advised that the bolts beneath the truck were loose and would have to be tightened. The Claimant and Laborer

Martinez proceeded to perform that task. Upon the completion of the DOT inspection the Claimant and Laborer Martinez met with Foreman Novakovitch and Laborer T. Fischer at Blossburg. As they were all returning to Garrison to obtain some replacement rail, the Claimant advised Foreman Novakovitch that he had twisted his knee.

Foreman Novakovitch testified that it was approximately 3:30 p.m. when the Claimant advised him of his twisted knee. Foreman Novakovitch testified that he asked the Claimant how and when the injury had occurred, and that the Claimant told him that he was uncertain but that his knee was twisted and swelling. Foreman Novakovitch testified that he then asked the Claimant if he wished to seek medical attention, and that the Claimant responded "no", but he did say that he wanted to complete and file an F-27 and a personal injury report in order to protect himself because "you're supposed to make one out if you think you're hurt".

Foreman Novakovitch testified that upon returning to Garrison and prior to the end of their tour of duty, he and the Claimant completed the requisite forms and that he then faxed those forms, and, after repeated attempts, he finally contacted Roadmaster Sherman at his home to advise him of the Claimant's injured knee.

Foreman Novakovitch testified that he did not observe the Claimant limping or "favoring" his knee. Foreman Novakovitch testified that the Claimant reported for duty on the following day, April 28, 1992, and that the Claimant did seek medical attention on April 29, 1992.

Laborer M. G. Martinez testified that he worked on April 27, 1992 with the Claimant; that he did not notice the Claimant limping or "favoring" his knee; and, that he was first aware of the Claimant's injury at quitting time.

Laborer T. Fischer testified that he became aware of the Claimant's injury at quitting time. During questioning by the Conducting Officer, Laborer Fischer further testified as follows:

Q. During that day were you working with Mr. Schrantz at any time?

A. In the morning a little bit, I guess.

Q. What period are we talking about? What time of day were you working with Mr. Schrantz and describe what duties you and he were performing.

A. I can't really remember what we did that morning. They said we cleaning up, I can't remember that.

Q. You were working with Mr. Schrantz since you came on duty at 7:30 until roughly 10:30?

A. I guess I was, unless him and Manuel - it seemed to me, if I recollect, him and Manuel were by themselves at one time for some reason in the truck. But I can't remember that well.

Q. During that time did you happen to notice Mr. Schrantz sustain any type of injury that you were aware of?

A. When he came in in the morning I usually sit in that chair where Larry is sitting, I noticed that he was walking a little gingerly.

Q. So the last time you saw Mr. Schrantz would have been the previous Friday? Were you both working that day?

A. I can't remember if he was working. I think I was working.

Q. Did Mr. Schrantz assist you and your crew with changing that rail?

A. I guess he did, I can't remember what he did.

The Claimant testified that he was not sure when or how he twisted his left knee. The Claimant testified that the injury may have occurred when he was underneath the truck tightening the bolts. The Claimant testified that when he completed the personal injury reports he put down 11:30 a.m. as the time of the injury because that was generally the time that he was working on the truck. The Claimant testified that he advised his Foreman of his injury and that "I told him that when we got through with our shift, before we went home, we had to make out an F-27 to protect both of us". The Claimant testified that he worked on April 28, 1992, and that on April 29, 1992 he saw a doctor, who advised him that the ligament on the inside of his left knee had been stretched and strained. The Claimant testified that the doctor advised him to use crutches and that he was currently going to physical therapy three times a week and using a cane to walk.

Apparently, the Carrier surmises, based upon the capsulized evidence discussed above, that the Claimant fabricated the report regarding his alleged injury because he did not make a contemporaneous report at the time he "assumed" the strain to his left knee occurred. However, the record is clear that the Claimant could not determine with specificity when the injury occurred, when prior to the conclusion of his tour of duty he began to feel pain and observed that his knee was "swelling".

A review of the Claimant's Personal Record discloses that since his date of hire in November, 1970 he has suffered numerous "non-reportable" injuries while on duty, including an injury listed for May 23, 1988 as a "sprain left knee - recurring injury". It should be further noted that in the vast majority of the injuries reported, the Claimant did not lose any work time. The Claimant's Personal Record reflects that since the May 23, 1988 injury to his left knee, he has filed an F-27 for a "bruised face" (December 21, 1988), he has filed an F-27 for a "sprained shoulder" (October 20, 1989), he has filed an F-27 as the result of breaking two toes on his left foot (December 1, 1989), he was

restricted for a period of approximately one month (between October and November, 1990) as the result of his diabetic condition and state laws which prohibited an insulin dependent individual from operating certain vehicles, and he filed an F-27 as the result of cutting his lower lip "while tightening lug nuts on back wheel" (October 22, 1991).

The accumulation of these injury incidents may have led the Carrier to believe that the Claimant was injury or accident prone. However, there is nothing in the instant record which represents substantial and convincing evidence that the Claimant falsely or improperly reported the injury to his left knee, which he believed occurred during the course of his performing normal duties on April 27, 1992.

The fact that the Claimant has a physical problem with his left knee can easily account for Witness Fischer's observation that the Claimant was "walking a little gingerly" on the morning of April 27, 1992. The fact that no witness actually observed an incident where the "strain" or "sprain" to the Claimant's left knee occurred does not prove that the Claimant did not suffer the injury he reported.

Based upon the foregoing findings and observations, this Board finds that the Carrier has not proven that it had just cause to censure the Claimant, and, therefore, the claim will be sustained.

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

This Award was signed this 17th day of August, 1992.


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