

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 130

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 130

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. Thomas E. Sorman, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on August 15, 1974 and he was occupying that position when he was issued a five day suspension by the Carrier commencing on August 17, 1992.

The Claimant was suspended for five days as a result of an investigation which was held on July 29, 1992 in the Conference Room in Northtown, Minnesota. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rule 585 by his alleged failure to give promptly report to proper authorities a personal injury he sustained on July 1, 1992 while working in Northtown, Minnesota.

Findings and Opinion

Mr. Wayne Morris, the Roadmaster at Northtown, Minnesota, testified that the Claimant was on a crew working out of the Northtown Terminal on July 1, 1992; and that he was not made aware of the fact that the Claimant had been injured on July 1, 1992

until Monday morning July 6, 1992, when the Claimant called in "to report that he got injured and that he was going to see a doctor and he would let us know the outcome after he visited the doctor that morning". Roadmaster Morris testified that he had conducted a safety meeting in April, 1991, which addressed the appropriate procedures for prompt reporting of injuries, no matter how minor, and that the Claimant had attended that meeting. Roadmaster Morris testified, on examination by the Organization Representative, that he had seen the Claimant on July 1 and 2, 1992 performing his duties and that the Claimant did not appear to be injured.

The Claimant was assigned to a schedule of four ten-hour days, the last two of which were Wednesday and Thursday, July 1 and 2, 1992. July 3, 4 and 5, 1992, Friday, Saturday and Sunday, were the Claimant's rest days.

On July 1, 1992 the Claimant was working as a member of the AFE Crew in Northtown, Minnesota. The Claimant testified that while operating a jackhammer during the early afternoon on his shift he felt a "twinge" in his lower back, and that "I could maybe best describe [it] as a twinge or a slight pull - sharp pain". The Claimant testified that he "told a few people on the crew" that he "had a bad back". The Claimant testified that he did not recall if he advised Track Foreman Jeff Schmidt of the injury to his back.

Most significantly, in this Board's opinion, the Claimant testified as follows:

Q. Okay, what time of day did this happen?

A. I believe it was early afternoon.

Q. After that point and time, after that early afternoon time when you felt this, were you able to continue working?

A. Not for - I took it easy for about an hour or so and it was pretty out that day it seemed like it loosened up pretty much as the day progressed and it didn't seem to be so much of a nuisance by the time quitting time rolled around.

Q. So it was enough of an occurrence, enough of a twinge that you felt like it was something that you had to back off working - to take it easy for awhile, right?

A. Yes.

Q. Do you feel like this was an injury to your lower back?

- A. Sometimes, sometimes it takes awhile for my for me to really answer that questions because I have had those twinges before - sharp pains in my lower back where they have just gone away or the muscles have relaxed so I can just go back to normal. And that's what appeared to have happened on Wednesday, I just gave it a short rest and it seemed by the end of the day it was nothing more than the usual back strain although it did feel a little fragile down there.

The Claimant testified that he did not report the problem with his lower back to his supervisor that day because "I didn't think it was serious enough of an injury", and "it seemed like one of those injuries that were just going to run its course of just a little bit of tight muscles and it would go away".

The Claimant further testified that he had a "history" of problems with his back and that "I take all incidents with my back very seriously". The Claimant also testified that he "apologized to a few employees" because he was not able to perform the duties assigned to him "while they were out there busting butt because I did have a sore back".

This is a case where the Claimant knew or should have known that the injury to his back had to be promptly reported to supervision. As early as January 2, 1980 the Claimant suffered a strained back which resulted in a one day disability. Thereafter the Claimant's Personal Record discloses that he suffered at least nine on-duty injuries which resulted in pain or strain in his lower back. Those injuries occurred on or about August 17, 1982, May 18, and September 26, 1983, July 14, 1988, August 3, 1989, March 19 and August 14, 1990, October 10 and December 3, 1991 and March 24, 1992. Why the Claimant failed to report pain and strain to his lower back which was severe enough to cause him to restrict his work on July 1, 1992 is not clear or justifiable.

The Carrier had just and proper cause to discipline the Claimant because he failed to promptly report a personal injury in violation of established rules. Accordingly, the claim will be denied.

Award: The claim is denied. This Award was signed this 15th day of December, 1992.

Richard R. Kasher

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

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E.L. TORSKE