

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 133

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 133

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. Clinton J. Cody, hereinafter the Claimant, entered the Carrier's service as a B&B Helper on September 17, 1979. He was subsequently promoted to the Position of B&B Mechanic and he was occupying that position when he was issued a five day suspension by the Carrier commencing on August 11, 1992.

The Claimant was suspended for five days as a result of an investigation which was held on July 9, 1992 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 1 and 530A by his alleged disregard of safety rules and his alleged failure to properly report a personal injury he sustained on June 17, 1992 while working in Cicero, Illinois.

Findings and Opinion

This is a companion case to Case/Award No. 131, decided contemporaneously this date, in which the Board concluded that the Claimant's Foreman Mr. J.C. Oros did not act unreasonably or in

violation of the Carrier's rules regarding safety and the reporting of injuries.

The relevant facts in the instant case were recited in Case/Award No. 131 and will be repeated, in part, here in order to place the instant claim in proper context.

On June 17, 1992 the Claimant, B&B Foreman J.C. Oros and Steamfitter R.A. Krzyzaniak, among others, were assigned to work at the Ceco Rip Track Building performing building repair and maintenance.

At approximately 11:00 a.m. the Claimant was walking out of the men's locker room on the second floor of that building. The Claimant testified that he slipped and injured his back as he was walking toward the truck. The Claimant testified that he was not sure whether he had slipped on any substance or material on the floor, and that he continued walking in the direction of the truck, two flights down. The Claimant testified that he felt pain but did not realize that he was injured; and at the time that he slipped he was approximately fifty to seventy-five feet away from the area in which his Foreman was working.

The Claimant testified that he did not think the pain in his back was serious and that he "decided to try to walk it off"; that he moved the truck which was his responsibility; and that as he was still feeling pain "I decided to lay down and hope it would go away". The Claimant testified that he was laying down for approximately fifteen minutes in the truck when an Employee Beeler opened the door and asked "What I was doing?"; that he told Mr. Beeler that he was "laying down for a bit" and that Mr. Beeler closed the door and approximately fifteen minutes later Mr. Krzyzaniak "came down"; that he told Mr. Krzyzaniak that "I slipped upstairs and I hurt my back, and I'd like for you to go upstairs and tell J.C. [Oros] this and ask him to come down here so I can talk to him"; that Mr. Krzyzaniak said "O.K., I'll do that" and that he left. The Claimant testified that when Mr. Krzyzaniak returned he told him that "J.C. said that if I wanted to talk to him, I could come to him", and that Foreman Oros did not come to the vicinity of the truck as he had requested.

The Claimant testified that when Foreman Oros did not come downstairs to the truck to check on his condition that he asked Mr. Krzyzaniak to drive him to the Clearing Clinic, where he was given a medical examination and treatment. The Claimant testified that during the trip to the clinic he was "in a lot of pain" and that he did not attempt to "use the radio" to notify any member of supervision regarding his condition.

The Claimant testified that while he was at the clinic a telephone call was made to the B&B Supervisor's office in order to obtain authorization for medical treatment/attention. The Claimant testified that as he was being transported back from the medical clinic he received a communication from B&B Supervisor R. D. Sutherland, who asked if he would return to the Ceko Building and "fill out the paperwork for the PI [personal injury]". The Claimant testified that he told Supervisor Sutherland that "I was in too much pain", and that they agreed that they would meet at the bunk cars where he would complete the required paperwork. The Claimant testified that he completed the paperwork for Supervisor Sutherland, and that other than the "filling out of the paperwork for Mr. Sutherland, Mr. Oros had not been contacted in any way as to [his] status and . . . condition".

The Conducting Officer asked the Claimant the following question:

Q. Mr. Cody, had not the clinic felt the necessity to call Mr. Sutherland's office for authority to treat you, would you have personally notified that office of your status and condition?

A. Yes, as soon as I got through at the doctor. I wanted to have somebody look at me first.

Apparently, the Claimant was charged with violation of Carrier Safety Rules because he did not walk the fifty to seventy-five feet on the second floor of the Ceko Rip Track Building and advise Foreman Oros that he had slipped and apparently injured his back; because he did not carefully examine the area where he slipped and determine the cause of the incident; and because, somehow, laying down in the truck and not immediately advising some member of supervision/management of his condition was violative of the "prompt reporting" of injuries requirement in the safety rules.

The evidence of record establishes that the Claimant, who had a previous back injury which had resulted, in the past, in his "missing time", did not believe that his injury was serious or going to cause any permanent or short-term disability. While hindsight might prove that the Claimant should have immediately stopped and reported his condition to Foreman Oros, his effort to "walk it off" cannot be considered unreasonable. When he found, after just a few minutes of trying that his condition was not going to improve, and, in fact, was worsening, he took appropriate action by immobilizing himself. When he was sought out by his Foreman, through Mr. Krzyzaniak, he took further appropriate action by requesting that he be immediately transported to a Carrier physician.

In fact, his condition was reported promptly to Supervisor Sutherland's clerk, "Brad", and that information was conveyed to supervision shortly after the incident; apparently within forty-five minutes of its occurrence. Supervisor Sutherland undertook to ensure that appropriate and required paperwork was promptly completed, and there is no showing that the short delay, caused by the Claimant's immobility, in reporting this situation resulted in any inability of the Carrier to promptly and adequately assess the nature and/or the cause of the accident/injury.

This Board concludes that it was not unreasonable for the Claimant, not experiencing immediate severe pain or incapacitation, to attempt to "walk off" the sprain or strain to his back. The Claimant might have been more circumspect had he stopped to closely examine the area where he slipped. His failure to do so, however, does not, in this Board's opinion, merit the imposition of discipline. Supervisor Sutherland could have questioned the Claimant as to the area in which the incident occurred, and he easily could have examined the area to determine if a dangerous condition existed.

Based on the totality of the evidence in this record, this Board is not persuaded that the Carrier has presented sufficient probative evidence to establish that the Claimant should have been disciplined for the incident which occurred on June 17, 1992. Accordingly, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to physically expunge any reference to this incident from the Claimant's Personal Record and to reinstate the Claimant with seniority unimpaired and with full back pay and benefits.

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