

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 140

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Case/Award No. 140

On May 13, 1983 the Brotherhood of Maintenance of Way Employes (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. Joseph C. Noel, hereinafter the Claimant, entered the Carrier's service as a Sectionman on May 5, 1981. He was subsequently promoted to the position of Machine Operator, and he was occupying that position when he was suspended from the Carrier's service for five days effective October 5, 1992. The Claimant was suspended as a result of an investigation which was held on September 11, 1992 in the Manager Production Project's office in Seattle, Washington. At the investigation the Claimant was represented by the Organization.

The Carrier suspended the Claimant based upon its findings that he had violated Rules 2, 568 and 576 in connection with his alleged failure to wear proper required personal protective

equipment, while assigned as a Group 3 Machine Operator on Tuesday, August 11, 1992.

Findings and Opinion

On July 22, 1992 the General Manager of the Pacific Division issued and posted Notice No. 41 which established, apparently, more stringent requirements for all employees regarding the necessity to wear certain protective equipment. It also appears that in order to ensure compliance with the Notice, the Carrier instituted on-site inspections by safety personnel.

Mr. W.J. Thompson, Manager of Safety, testified that on August 11, 1992 he was part of a safety audit team that observed part of Gang RC03 at Goldbar, Washington; that he observed the Claimant for approximately four to five minutes working "on a Pettibone [a speed swing used for laying rail] and [he] did not have proper eye protection on, he didn't have any safety glasses on while he was working around that machine"; that he approached and spoke with the Claimant and told him that he had been observed working without safety glasses; that he instructed the Claimant that he was required to wear eye protection; and that the Claimant retrieved eye glasses with side shields and put them on.

Mr. Thompson, in response to questions from the Organization Representative, testified that he was not involved in or familiar with the policy of the Pacific Division General Manager regarding, allegedly, mandatory five day suspensions for employees who failed to wear safety equipment. Mr. Thompson and the Organization Representative also engaged in a colloquy regarding the question of whether the Claimant who was "working on equipment" was guilty of violating the General Manager's Notice which required the wearing of safety eye protection while "working around equipment".

Roadmaster J.D. Owen testified regarding the incident which was reported to him and to the fact that the General Manager's Notice regarding the wearing of safety equipment is posted "in the dining car" and at "stations designated in the Timetable". In response to a question from the Organization Representative, Roadmaster Owen testified that he had no problems with the Claimant as an employee and that he had no choice but to arrange for an investigation in the instant case.

The Claimant testified that he was not wearing his safety glasses when he was observed and approached by Safety Manager

Thompson; that he had been instructed regarding the use of safety glasses; that "I don't make it a habit not wearing safety glasses"; and, that at the time of the incident his safety glasses were "dirty and I didn't get around to cleaning them to put on another pair . . . [and] I normally wear them religiously". The Claimant testified that on the day of the incident his "main concern was to get my machine fully operational" and that is why he was working under the machine on an hydraulic line without his safety glasses.

The salient facts are undisputed. The Organization claims that the notice of investigation was not sufficiently specific and failed to give the Claimant adequate notice of the charges against him. While the notice did not mention "safety glasses" per se, it did advise the Claimant of the date, time and place of the alleged infraction and it did advise the Claimant that his alleged failure to wear safety equipment was the cause of the investigation. The investigation transcript also discloses that the Claimant was fully knowledgeable regarding the facts of the incident and was able to explain the reasons that he was not wearing his safety glasses on the day in question.

Back to the facts; the Claimant candidly admitted that he was working on and around equipment [and there is no rational basis to support the Organization's contention that working "on" equipment/machines is not violative of the notice which requires an employee to wear safety protection while working "around" equipment/machines], and that he was familiar with the instructions regarding the requirement to wear eye glass safety protection. Those candid admissions by the Claimant mandate this Board to conclude that the Carrier had cause to impose discipline.

The only question for the Board is whether the discipline was appropriate in the circumstances. The Carrier has a justifiable concern regarding the safety of its employees and the need to ensure that all reasonable steps are taken to reduce the plethora of accidents and injuries which occur when Maintenance of Way employees are engaged in their normal duties. The Carrier has the right to establish procedures for the strict enforcement of such safety related rules. It appears that the Carrier has adopted a policy of issuing a five day suspension without pay for an employee's first offense; irrespective of that employee's length of service and previous safety record and irrespective of whether that offense occurred shortly after the publication of the new, more stringent rules regarding the wearing of safety protection. For a seasonal employee, such as Maintenance of Way employees, the loss of five days pay is an extremely substantial monetary loss.

Good labor relations and employee relations, which the Chairman of this Board has observed in many other settings, would suggest that a short grace period be established during which safety audit teams would issue "first warnings" to employees not in compliance with the rule regarding the wearing of safety protection, advising those employees at that time that any future violations of the notice would likely result in more severe discipline.

However, this Board is not in the business of educating either the Carrier or the Organization regarding "good employee relations". If the Carrier believes that a five day suspension is the first step in a disciplinary system for employees who fail to observe the standards regarding the wearing of safety equipment, then this Board will not interfere with such assessment even if the Board believed, as it does, that a more enlightened approach to discipline should have been taken.

Accordingly, based upon the foregoing facts and findings, the claim will be denied.

Award: The claim is denied. This Award was signed
this 20th day of April, 1993.


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