

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 172

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 172

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. James D. Bradford, hereinafter the Claimant, entered the Carrier's service as a Laborer on July 6, 1977. The Claimant was subsequently promoted to the position of Truck Driver and he was occupying that position when he was censured by the Carrier for his alleged violation of General Rules A and 1 because of his alleged responsibility regarding an accident with a Carrier vehicle at Lupfer, Montana on June 22, 1993.

The Claimant was censured as a result of an investigation which was held on July 13, 1993 in the Trainmaster's Conference Room, Whitefish Depot, Whitefish, Montana. At the investigation the Claimant was represented by the Organization. The Carrier censured the Claimant based upon its findings that he had violated General Rules A and 1.

Findings and Opinion

The facts in this case are relatively simple, straightforward and undisputed. At approximately 11:00 a.m. on June 22, 1993 the Claimant spoke with Section Foreman Russell Pettinato regarding the manner in which they would perform work that day.

Foreman Pettinato advised the Claimant that he, Pettinato, "was going to drive the truck around to the job site, which was a couple of miles from where [the Claimant and Mr. Pettinato] were at at the time".

The Claimant testified that he anticipated that Foreman Pettinato would be making a "forward movement" with the truck; that he, the Claimant, was wearing hearing protection at the time; that the beeper on the truck, which sounds when the truck is in a reverse movement, was not operative; that he crossed some thirty-five to forty feet behind the truck after looking over his shoulder to verify the position of the truck; and that as he "was walking" he "got ran over by the truck, that was backing out".

While evidence was submitted regarding the extent to which the Claimant realized he had suffered injuries and whether he should have reported the incident more timely, there are no issues regarding those matters pending before this Board.

The only question is whether the Claimant was careless or negligent. There is insufficient evidence, in this Board's opinion, to establish that the Claimant did not take sufficient care in crossing where he did, or that he did not "check" to see if he was in danger when he began walking.

Accordingly, the Board finds that the Carrier has failed to establish by substantial and convincing evidence that the Claimant was careless or contributorily negligent and thus in violation of the cited rules. Therefore the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to physically expunge any reference to this discipline from the Claimant's Personal Record. This Award was signed this 20th day of March, 1994.



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