

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 176

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 176

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. Ronald A. Morris, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on August 7, 1978. The Claimant was subsequently promoted to the position of Machine Operator and he was occupying that position when he was suspended for five days from the Carrier's service for his alleged violation of Rules 564 and 567 because of his failing to work safely while working as a machine operator on October 4, 1993.

The Claimant was suspended as a result of an investigation which was held on October 18, 1993 in the Carrier's Conference Room in Grand Forks, North Dakota. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rules 564 and 567 for allegedly failing to work safely, which alleged failure resulted in a personal injury.

Findings and Opinion

On October 4, 1993 the Claimant was working with fellow employee Terrance Olmstead "shoveling rock" to clear switches. Apparently, sometime during the course of his work, the Claimant either aggravated an old back injury or sustained a new injury to his back.

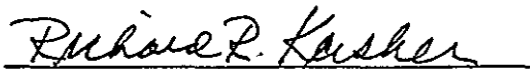
The Claimant advised Assistant Foreman Olmstead that he had hurt his back and Mr. Olmstead told the Claimant that he should report same to Roadmaster Michael Heille; which the Claimant did. Proper injury reports were submitted, and Roadmaster Heille, after reviewing the Claimant's Personal Record which reflected other reports regarding the Claimant's prior back injuries that had resulted in the Claimant missing numerous days of work, instigated the present investigation.

In spite of 53 pages of transcript and several exhibits and the unnecessary histrionics by the Organization Representative, this is a very simple case.

There is not one scintilla of evidence, direct or circumstantial, which could lead any reasonable person to conclude that the Claimant acted in an unsafe manner on October 4, 1993 while shoveling rock. There is no showing that he did not use proper shoveling or lifting methods or did not follow the training with which he had been provided. No one observed him do anything out of the ordinary or negligently in the manner in which he performed his responsibilities on the date in question.

People performing strenuous work, on occasion through no fault of their own, injure parts of their body. In this case the Carrier has presented no evidence of negligence or carelessness. The Carrier has fallen far short of establishing by substantial and convincing evidence, the standard which this Board has established that must be met in order to justify discipline, that it had cause to suspend the Claimant. Accordingly, 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