

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 67

AWARD NO. 67

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. John M. Lawrence, hereinafter the Claimant, initially entered the Carrier's service as a Sectionman on June 9, 1970 and resigned on September 11, 1970. On May 3, 1976 he reentered the Carrier's service as a Section Laborer and he was occupying that position when he was issued a ten (10) day suspension by the Carrier on May 18, 1989, said suspension commencing on May 22, 1989 and ending on June 2, 1989.

The Claimant was issued the ten (10) day suspension as a result of an investigation which was held on April 19, 1989 in Minneapolis, Minnesota. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Burlington Northern Safety Rule 574, Maintenance of Way General Rule A and B, and Rules 530 and 530(A) when he failed to provide factual reporting on his personal injury report relating to his alleged injury on March 7, 1989 while working on the division maintenance gang at Sioux Falls, South Dakota.

Findings and Opinion

On March 7, 1989 the Claimant was working with a combined crew of approximately twelve (12) men assigned to relay certain sections of track in the Sioux Falls yard limits. On that day the Claimant was peddling spikes and bolts with the Knowland push cart. At approximately 11:15 a.m. the Claimant advised Gang Foreman F.C. Trueblood that he had hurt his back. Gang Foreman Trueblood drove the Claimant to Roadmaster Tom Nesser. The Claimant then advised Roadmaster Nesser that he had injured his back.

Roadmaster Nesser testified that he asked the Claimant if a specific incident had caused his injury and/or if he knew when he had hurt his back. Roadmaster Nesser testified that the Claimant stated that there had been no specific incident and that he did not know exactly when he had injured his back. The Claimant also informed Roadmaster Nesser that he had previously suffered injuries to his back and that he had filed F-27s for these earlier problems. The Claimant asked Roadmaster Nesser if he should file another F-27 for this injury. Roadmaster Nesser directed the Claimant to go to the office of Claims Representative William Renney and to follow Renney's instructions regarding the filing of an F-27 report.

The Claimant was taken to Mr. Renney's office where he informed Mr. Renney that he had a history of back problems and that he was presently experiencing serious back pain. Claims Representative Renney testified that he questioned the Claimant several times as to whether a specific incident had triggered his current pain and that the Claimant advised Mr. Renney that there had been no specific incident on this date. Mr. Renney testified that he informed the Claimant that since there had been no specific incident he did not have to file an F-27 and that he would still be covered under his old injuries.

On March 8, 1989 the Claimant filed a Personal Injury and F-27 Report stating that he had injured his back on March 7, 1989 when he "was helping Jay Arvidson pull the bolt machine over a joint [and] the wheels became canted and stuck [and] I felt pain in mid back as I pulled". On that report the Claimant listed Foreman Trueblood and Bolt Machine Operator Arvidson as witnesses to the incident that had caused his injury.

Upon learning that the Claimant had filed an F-27 report, Claims Representative Renney began an investigation on March 9, 1989. Mr. Renney conducted tape recorded interviews with Foreman J.M. Dise and Bolt Machine Operator J.R. Arvidson.

Foreman Dise stated at the taped interview with Mr. Renney and

testified at the April 19, 1989 investigation that he had been working alongside the Claimant on March 7, 1989 between the hours of approximately 10:00 a.m. and 11:30 a.m., and that he had not observed the Claimant either pulling or pushing the bolt machine.

Bolt Machine Operator J.R. Arvidson stated at the taped interview with Mr. Renney and testified at the April 19, 1989 investigation that the Claimant did not help him with the bolt machine on March 7, 1989 nor did he recall the bolt machine becoming stuck on a joint on that day.

Claims Representative Renney also interviewed Foreman Trueblood on March 9, 1989, regarding his knowledge of the Claimant's injury. Foreman Trueblood advised Mr. Renney and also testified at the investigation that on March 7, 1989 he was working on track in front of the Claimant and that he had not personally observed any incident which may have caused the Claimant's injury to his back. Foreman Trueblood testified that when the Claimant advised him that he had hurt his back that he, Trueblood, did not question the Claimant as to how the injury may have occurred but that he drove the Claimant to see Roadmaster Nesser.

The Claimant testified that he re-injured his back on March 7, 1989 when he assisted Mr. Arvidson in pulling the bolt machine over a joint. The Claimant testified that he simply pulled the machine without speaking to Mr. Arvidson and that the entire incident took approximately 20 to 30 seconds. The Claimant then returned to his own duties and shortly thereafter he felt a sharp pain in his back. The Claimant testified that he attempted to utilize the pain control management he had learned in the pain clinic but he began experiencing muscle spasms which he was unable to control. The Claimant testified that he then advised his Supervisor, Mr. F.C. Trueblood, of his back pain. Foreman Trueblood took the Claimant to Roadmaster Nesser. The Claimant testified that he asked Roadmaster Nesser if he should file an F-27 report and that Nesser advised him to discuss the situation with Claims Representative Renney. The Claimant testified that Mr. Renney advised him that he did not have to complete an F-27 since he was covered by his previous claim. The Claimant testified that he could not recall being questioned as to whether a specific incident had caused his current back problems. The Claimant testified that on the following day he contacted the Organization and advised his Representative that he was concerned that the injury he had incurred on March 7, 1989 might be different than the one that was currently being covered. The Claimant testified that his Representative suggested that he file a new F-27 report. The Claimant testified that he then completed and filed the Personal Injury Report and returned home to continue under his doctor's care.

The Carrier imposed the ten (10) day disciplinary suspension because of the Claimant's alleged "failure to provide factual reporting on [his] personal injury report".

The Organization, in defense of the Claimant, argued that the notice of investigation was not sufficiently precise and therefore failed to comply with Schedule Rule 40 of the parties' agreement. The Organization also argued that the evidence did not support a finding that the Claimant falsified the F-27 or intended to misrepresent the facts which led to his back injury on March 7, 1989.

The original notice of investigation and the two (2) postponement notices all advised the Claimant that he was to attend an investigation for the purpose of "ascertaining the facts and determining your responsibility in connection with your alleged injury at 11:15 a.m. on March 7, 1989, while working on Division Maintenance Gang in Sioux Falls, SD on the Lakes Division 22nd Subdivision, MP 69.5 - MP 66, Line Segment 2003".

Nothing in that notice advised the Claimant or his Organization Representative that the Carrier was concerned about the possibility that the Claimant had "failed to provide factual reporting" on the F-27 or the personal injury report.

This Board has, many times in the past, found no merit in the Organization's contention that a notice of investigation was not sufficiently precise. We have concluded in many cases that the claimant and the Organization had actual notice of what the charges entailed and that the claimant and the Organization were fully prepared to address those charges; so that the general identification of the incident and the time and place where it occurred sufficed for purposes of Schedule Rule 40C.

However, in the instant case this Board concludes that the Carrier's notice of investigation was sufficiently deficient in terms of giving the Claimant a full and fair notice of what charges he would be required to respond to at the investigation. Claims Representative Renney was of the opinion that the Claimant had invented an incident to justify his claim that he injured his back, and that he had recounted that incident on the personal injury report and the form F-27. In order to support this opinion and suspicion, Claims Representative Renney conducted interviews with several of the potential eyewitnesses. The Carrier was concerned that the Claimant misrepresented the cause of his injury on reports he filed. That was the reason the investigation was held. Yet, there is nothing in the notice of investigation that speaks to "falsification" or failing to properly complete a personal injury report.

Accordingly, the Board is constrained to sustain the claim on the basis that the Carrier failed to comply with Schedule Rule 40 which requires in paragraph C thereof that the "notice must specify the charges for which the investigation is being held".

Award: The claim is sustained. The Carrier failed to give the Claimant proper notice of investigation as required by Schedule Rule 40. The Carrier is directed to expunge the Claimant's Personal Record of any reference to the incident and to make the Claimant whole for all lost pay and benefits associated with the discipline imposed.

This Award was signed this 31st day of July 1989 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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