

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. 79

AWARD NO. 79

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. Harold B. Larcome, hereinafter the Claimant, entered the Carrier's service as an Extra Gangman on September 23, 1974. The Claimant was subsequently promoted to the position of Section Foreman and he was occupying that position when he was issued a mark of censure by the Carrier on November 27, 1989.

The Claimant was issued a mark of censure as a result of an investigation which was held on November 10, 1989 in the Conference Room at the Wishram Depot in Wishram, Washington. At the investigation the Claimant was represented by the Organization. The Carrier censured the Claimant based upon its findings that he had violated Safety Rule 585 for his alleged failure to properly and promptly report a personal injury.

Findings and Opinion

The Claimant's immediate supervisor, Roadmaster David L. Simmons, testified that the Claimant took a medical leave of absence on August 18, 1989 in order to have an operation on his foot. Roadmaster Simmons testified that on October 27, 1989, while the Claimant was still on this medical leave of absence, he, Simmons, received an injury report from the Claimant. This report indicated that the Claimant had a bruised right hand.

Roadmaster Simmons testified that the Claimant had not previously reported this injury to him, nor had the Claimant indicated on the October 26, 1989 injury report a specific time or place that this injury to his hand had occurred.

The Claimant testified that over a period of time he noticed that the extension on his right hand had lessened and that he visited his doctor on October 26, 1989, to have this condition examined. The Claimant testified that his doctor advised him that the bruising on his right hand had developed over a period time and that it was caused or aggravated by work using a pry bar and similar tools. The Claimant testified that he immediately completed a Carrier personal injury report and mailed it to his supervisor, Roadmaster Simmons.

Rule 585 provides that "All accidents, incidents must be reported to immediate supervisor as soon as possible by first available means of communication". The Rule goes on to state that "F27 [the injury report] to follow to immediate supervisor, division superintendent and/or terminal or shop superintendent".

The question for the Board is whether the Claimant complied with the Rule. The fact that the Claimant, over his fifteen plus years with the Carrier, has reported nine (9) prior injuries is not, as the Organization Representative correctly points out, the issue before us. If the Carrier intended to charge the Claimant for being "injury prone", then the notice of investigation should have specified such charge and put the Claimant on notice as to the particular incidents which would be subject to investigation.

The F27, the injury report, is ordinarily filed immediately upon an employee suffering an on-the-job injury when there is some discernible trauma as the result of an accident or incident. If there was such an accident or incident which resulted in immediately discernible trauma, and if an employee failed to bring that injury to the Carrier's attention "as soon as possible by first available means of communication", then that employee would be properly subject to being charged with violation of Rule 585.

However, in the instant case, the record supports a finding that the Claimant's injury was, apparently, not caused by a single incident of trauma, but, rather, developed over a protracted period of time.

The physician who examined the Claimant concluded, inter alia, that the injury was "felt to be caused by or aggravated by work using pry bar and similar tools", and that the injury symptoms included a "painful nodular swelling palmar aspect right (dominant) hand". These medical findings fail to demonstrate, with sufficient probity, that the Claimant's alleged injury was caused as the result of a single incident which occurred on Carrier property and therefore could be properly placed in time. Rather, the evidence of record leads the Board to conclude that the injury was one that developed over a period of time to the point of it becoming necessary for the Claimant to seek medical attention.

In these circumstances, the Board concludes that the Carrier has failed to establish that the Claimant did not report his injury "as soon as possible by first available means of communication". Accordingly, the Board finds that the Carrier improperly entered a censure on the Claimant's personal record.

This finding by the Board does not address the question of whether the Claimant's injury was due to work-related activities and/or aggravated by non-work-related activities when he used his dominant hand, the right hand, to perform certain operations. This Board's finding does not prejudice any defense of the Carrier regarding the nature of the Claimant's alleged injury.

Award: The claim is sustained. The Carrier is directed to physically expunge the censure from the Claimant's Personal Record.

This Award was signed this 10th day of March 1990.

Richard R. Kasher

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