

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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CASE NO. 82

AWARD NO. 82

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. Steve W. Timmons, hereinafter the Claimant, entered the Carrier's service as a Laborer on September 4, 1974. The Claimant was occupying that position when he was suspended for thirty (30) days by the Carrier commencing on December 20, 1989.

The Claimant was suspended as a result of an investigation which was held on December 5, 1989 in the Carrier's Hastings Yard Office in Hastings, Nebraska. 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 574 when he allegedly failed to give the Carrier a factual report by withholding information regarding his October 24, 1989 personal injury.

Findings and Opinion

Roadmaster P.L. Rutledge testified that the Claimant was working as a Sectionman re-laying rail at Milepost 158 at Hastings, Nebraska on October 24, 1989 when he was allegedly injured while pulling spikes. Roadmaster Rutledge testified that it was his understanding, gathered from the Claimant's F-27 Injury Report Form, that the Claimant alleged he was injured when he was pulling spikes and the head of a spike broke off while the Claimant was using a claw bar; and that this action caused the Claimant to "jerk forward in a motion where he put some strain on his back or neck". Roadmaster Rutledge testified that as a result of this alleged injury the Claimant was not working through and until the date of the investigation, December 5, 1989.

Special Agent R.L. Anderson testified that he was contacted by the Carrier's Manager of Claims, and asked to investigate the Claimant's alleged personal injury which took place on October 24, 1989. Mr. Anderson testified that during his investigation he determined that the Claimant had been involved, off-duty, in a motor vehicle accident on September 8, 1989 at Juniata, Nebraska. Mr. Anderson testified that in investigating the September 8, 1989 motor vehicle accident he discovered that the Claimant had told the Adams County Sheriff's Department that he had left the scene of that accident due to "a neck and head injury". Mr. Anderson further testified that he then interviewed Carrier Claim Agent Pat Heather, and that he was informed by Ms. Heather that when she interviewed the Claimant regarding his alleged on-duty injury of October 24, 1989 the Claimant failed to disclose the injury he suffered to his head or neck as a result of the September 8, 1989 off-duty accident. Mr. Anderson testified that the Claimant told Claim Agent Heather, when he was asked whether he had sustained any other personal injuries between 1986 and 1989, that he had not and that "he was at 100% at the time of this October 24, 1989 injury". Mr. Anderson testified that in his interview with Claim Agent Heather "she advised me that Mr. Timmons had said no injuries, meaning no BN injuries and no off duty injuries or any other kind of injuries between 86 and this 89 incident".

The Claimant testified that he was the victim of a hit-and-run accident on September 8, 1989 and that "I pulled a muscle in the left side of my neck and I worked it out that weekend and that's all there was to it". The Claimant testified that he did not seek medical attention for this injury, but that he did not report to work the next scheduled work day, September 11, 1989, as he took "a personal day to go get my vehicle". When asked by the Conducting Officer why he did not advise Claim Agent Heather of the September 8, 1989 accident, the Claimant testified "I see nothing serious about a

pulled muscle", and that "we get them everyday out here and it is no big deal", "I worked it out in a day and there was no reason to even give her a statement". The Claimant testified that his vehicle was rear-ended by another car on September 8, 1989, that he was not wearing a safety belt at the time, that his vehicle ended up in a ditch, that when he was contacted by the local police he told them that he left the accident scene because of "head and neck injuries", and that he did not miss any work because of the injuries sustained in that accident. In responding to a questions from his Organization Representative regarding his interview with Claim Agent Heather, the Claimant testified as follows:

"Q. Getting back to your statement to the Claim Agent, do you recall being asked by Mrs. Heather if you had had any accidents between 1986 and 1989?

A. Yes.

Q. She asked you?

A. She asked me if I had had any personal injuries on the Burlington and I said no.

Q. On the Burlington?

A. Right.

Q. In answering that question, you construed to it to mean any personal injuries, on duty PI's?

A. Right.

Q. When you were asked if you were 100% prior to this PI?

A. Yes.

Q. What was your reply to that?

A. I was 100%."

On being recalled to testify, Special Agent Anderson stated that it was his understanding that Claim Agent Heather asked the Claimant during the November 17, 1989 interview whether he had had "any other injuries to the neck between 86 and 89" and that the Claimant had answered in the negative.

During the course of the investigation excerpts from the taped interview of the Claimant by Claim Agent Heather were placed in the record by the Conducting Officer. In discussing the October 24, 1989 alleged on-duty injury Claim Agent Heather asked the Claimant "Did you see a doctor then right away?" and the Claimant answered "Yes". Claim Agent Heather then asked the Claimant "When it happened? Have

you ever had any neck problems before?" and the Claimant answered "In 86". Claim Agent Heather then asked "And what was that?" and the Claimant answered "That's when a spike slipped on me and I did approximately the same thing". After listening to this tape, the Organization Representative asked the Claimant "When she questioned you about any injuries between 86 and 89, did you take this or construe this to mean any on duty personal injuries?" and the Claimant answered "Yes, on duty". The Claimant testified that during the course of the interview with Claim Agent Heather he construed all of her questions concerning injuries as pertaining to on-duty personal injuries.

The Carrier disciplined the Claimant based upon its conclusion that he had failed to give factual information as required by Rules 564 and 574.

The Organization contends that the Carrier has failed to prove justification for the imposition of discipline as the questions asked by Claim Agent Heather of the Claimant were not "clear and concise", and that the Claimant could reasonably assume that Ms. Heather was concerned about previous on-duty injuries. The Organization further contends that the record fails to establish any linkage between the Claimant's off-duty accident on September 8, 1989 and his on-duty injury sustained on October 24, 1989. The Organization submits that the Carrier has failed to prove that the Claimant willfully provided false information.

There is evidence in this record which leads this Board to suspicion that the Claimant, while he may have been "100%" prior to sustaining to the alleged on-duty injury on October 24, 1989, was not 100% truthful with the Carrier's claim department representative when he was interviewed regarding prior injuries. It also appears from the transcript of the investigation that the Claimant has some ability as an "artful dodger", and while the Board could not physically observe his demeanor, the Claimant's evasiveness is evident from his responses and non-responses to certain questions.

Nevertheless, in spite of the Board's strong suspicions and feelings that the Claimant falls short of an acceptable standard for truthfulness, the Carrier has failed to present sufficient evidence which establishes that the Claimant violated the rules with which he was charged. Special Board of Adjustment No. 925 obligates the Carrier to provide "substantial evidence" at the investigation to prove the charges. In this Board's opinion, the failure to have Claim Agent Heather testify and to rebut the Claimant's contention regarding how he construed specific questions and the totality of the Claim Agent's interview fatally flaws the evidence submitted by Carrier witnesses.

In these circumstances, the claim will be sustained.

Award: The claim is sustained. The Carrier has failed to present substantial evidence that the Claimant violated Rules 564 and 574. Accordingly, the Carrier is directed to physically expunge any reference to this discipline from the Claimant's Personal Record, and to reimburse him for any lost wages and benefits to which he may have been entitled, if, in fact, he was able to physical return to service during the period of his suspension.

This Award was signed this 26th day of March 1990.

Richard R. Kasher

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