

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

CASE NO. 87

AWARD NO. 87

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. Danny Wayne Williams, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on October 17, 1975. The Claimant was subsequently promoted to the position of Welder Helper and he was occupying that position when he was suspended by the Carrier for ten (10) days on July 11, 1990.

The Claimant was issued a ten (10) day suspension as a result of an investigation which was held on June 12, 1990 in the Burlington Northern Yard Office in St. Joseph, Missouri. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant for ten (10) days based upon its findings that he had violated General Rule 1 of the Maintenance of Way Rules and Rule 567 of the Safety Rules when he failed to exercise care to prevent an injury to himself while lifting a welding shear from a welding truck at Waldron, Missouri on Wednesday, May 23, 1990.

Findings and Opinion

On Wednesday, May 23, 1990, the Claimant was assigned to work with Welder E. Thomas at the east switch in Waldron, Missouri. The Claimant and Mr. Thomas arrived at the work site at approximately 9:30 a.m. and the Claimant began unloading the truck. In the process of unloading a welding shear the Claimant pulled muscles in his arm. The Claimant advised Welder Thomas of his injury, and both men then drove to Supervisor Teahon who had the Claimant taken to a clinic.

The Carrier has charged that the Claimant did not exercise proper care and judgment when he unloaded the welding shear without assistance from a co-worker, and that if he had requested assistance he could have prevented this injury to himself.

Welding Supervisor J. Wiederholt testified that on April 25, 1990 he instructed all the welders and welder helpers under his supervision on the proper lifting and carry methods for their equipment. Supervisor Wiederholt testified that he instructed the employees not to handle any heavy or cumbersome objects, such as a welding shear, without the assistance of fellow crew members.

Welder Thomas testified that he was the foreman of the crew on Wednesday, May 23, 1990, and that the crew consisted of himself and the Claimant. Welder Thomas testified that upon their arrival at the work site, he left the truck to confer with members of another welding crew, and that the Claimant began unloading the truck by himself. Welder Thomas testified that the Claimant "was not told to do anything", and that the Claimant "just took it upon his own that we were going to get out here and start doing things here and start unloading".

Grinder R.L. Winroth, who had been assigned to Welder Thomas on May 23, 1990 but had been sent to another work site, testified that he had, in the past, worked with both the Claimant and Welder Thomas. Grinder Winroth testified that he had never been instructed not to lift the welding shear by himself. Mr. Winroth testified that Welder Thomas frequently left his "man" to unload the truck without him and that he, Winroth, had spoken to Supervisor Wiederholt regarding the difficulties of working with Welder Thomas.

The Claimant testified that on the way to the work site on the morning of May 23, 1990, Welder Thomas advised him that there was a great deal of work to be completed that day. The Claimant testified that he did not receive specific instructions from Welder Thomas to unload the truck but that he understood that, in order to accomplish the day's work, the truck needed to be unloaded. The Claimant testified that he had frequently unloaded the welding truck and that

he had unloaded the welding shear by himself on numerous occasions. The Claimant testified that he did not ask Welder Thomas for assistance because he "had already heard how he [Thomas] was acting, I didn't, I had been chewed out enough times. I wasn't, I was just going to get the work done and leave it at that". The Claimant also testified that he believed that if he had not started to unload the truck, he would have been insubordinate.

The facts surrounding the specific incident are clear; the Claimant, in the process of unloading a welding shear, pulled muscles in his arm.

However, according to the Carrier, the Claimant was instructed not to lift a welding shear without the assistance of a co-worker. The Claimant testified that he did not recall receiving such an instruction, and his co-worker, Grinder Winroth, testified that he never was issued that instruction. The Union has supplied this Board with Exhibit Nos. 1 through 5, which are written statements from other employees stating that they never received any order not to lift a welding shear by themselves.

Both the Claimant and Grinder Winroth testified that Welder Thomas routinely left the truck during the unloading process and relegated the unloading work to "his man". Welder Thomas, himself, testified that he did, in fact, walk away from the welding truck on the morning of May 23, 1990 and was approximately 100 to 200 feet away from the truck, talking to the other welding crew. Additionally, Welder Thomas testified that it was customary for the people who work for him to go ahead and do their job without being told, and that it was customary for his crew to begin unloading the truck as soon as they arrived at the work site.

The Union has argued that the Carrier has treated the Claimant disparately as other employees have received personal injuries when lifting a welding shear, and those employees have not been investigated nor charged with any rule violations.

Additionally, the Union argued that the Claimant was not being properly supervised when the incident occurred, and that the Claimant was only doing what he thought was expected of him. The Union contends that it is improper for the Carrier to penalize the Claimant on that basis.

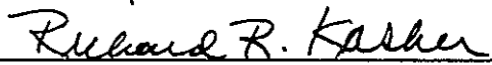
The Board finds a number of the Union's arguments compelling, however, we must note that in Trainmaster Hulstrom's letter of July 11, 1990, he advised the Claimant that the Carrier had reviewed "your personal record, which includes six (6) entries for personal injuries between May 5, 1988 and May 23, 1990". The Board would note that the

Carrier certainly has the right to expect its employees to behave in a prudent manner when they are at work. The Claimant, knowing that he had been injured, numerous times, on the work site, had a clear obligation to behave in such a way as to limit the possibility of being physically harmed. There was other equipment on the welding truck that the Claimant could have begun unloading, which would have presented no possible danger to him. Therefore, the Claimant could have been "doing what he thought was expected of him" without jeopardizing his physical safety.

The Board further finds no merit in the Union's argument of disparate treatment. There is no evidence in the record regarding the previous personal injuries suffered by those employees who injured themselves when lifting a welding shear. The Claimant was aware of his own particular propensity for physical injury, and, therefore, he must be held to a higher standard of behavior in terms of assuring his own physical well-being. It is the Claimant's responsibility to "work smart" and protect his health.

Accordingly, the Board will deny the claim.

Award: The Claim is denied. This Award was signed this 10th day of October 1990.



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