

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

CASE NOS. 97, 98 AND 99
AWARD NOS. 97, 98 AND 99

BURLINGTON NORTHERN RAILROAD COMPANY *
- and - *
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES *

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. Jack J. Gronewold, hereinafter Claimant Gronewold (Case No. 97), entered the Carrier's service as an Anchor Gang Member on August 23, 1978. Claimant Gronewold was subsequently promoted to the position of Group 2 Operator and he was occupying that position when he was suspended from the Carrier's service for a period of five (5) days commencing March 6, 1991.

Mr. Paul A. Galluzzio, hereinafter Claimant Galluzzio (Case No. 98), entered the Carrier's service as a B & B Helper on June 26, 1978. Claimant Galluzzio was subsequently promoted to the position of Foreman and he was occupying that position when he was suspended from the Carrier's service for a period of five (5) commencing March 6, 1991.

Mr. Daniel E. Broeg, hereinafter Claimant Broeg (Case No. 99), entered the Carrier's service as a Section Laborer on May 4, 1977. Claimant Broeg was subsequently promoted to the position of B & B Mechanic and he was occupying that position when he was suspended from the Carrier's service for a period of thirty (30) days commencing March 6, 1991.

The Claimants were suspended as a result of an investigation which was held on February 4, 1991 in the Roadmaster's Office, Beardstown, Illinois. At the investigation the Claimants were represented by the Organization. The Carrier suspended the Claimants based upon its findings that they had violated the Carrier's Safety Rules 1, 2, 287e and 287g, by their alleged disregard for safety, failure to exercise care to prevent injury and failure to be alert and attentive at all times, which failures resulted in a personal injury to Claimant Broeg at approximately 0900 hours, December 28, 1990, while they were assigned as crew members working near Beardstown, Illinois.

Findings and Opinion

The incident which gave rise to the investigation and the subsequent suspensions of the Claimants occurred on the morning of December 28, 1990.

The relevant evidence of record establishes that the Claimants were assigned to work in the vicinity of a culvert and to install liner in the area of the right of way, and that they were required to use an endloader to assist in moving pipe closer to the dragline.

The ground was frozen and in order for the crew to reach the area where they were to work they would have to either scale a frozen slippery bank or walk approximately a half mile to circumnavigate the bank and reach the work site.

Claimant Broeg and B & B Truck Driver Mike McConnell decided to ride in the bucket of the endloader being operated by Claimant Gronewold. When the endloader, while moving, struck a frozen or jagged piece of terrain, Mr. Broeg slipped and struck his head against the bucket, breaking his safety glasses and sustaining a cut under his eye.

This injury precipitated an investigation by B & B Supervisor W.R. Sims, who testified at the February 4, 1991 investigation that he interviewed the Claimants and Truck Driver McConnell. Mr. Sims testified that during his interviews he determined that Claimant Galluzzio was present at the job site and knew that the two crew members were riding in the bucket of the endloader; that Claimant Gronewold was aware that the crew members were riding in the bucket, and because "they had been doing it previously, he [Gronewold] figured it was o.k. to do so; that Truck Driver McConnell stated that he and Claimant Broeg rode in the bucket rather than walking because "it was just quicker and easier"; and that Claimant Broeg stated that no one had given him permission "exactly" to ride in the bucket, and that he and Mr. McConnell "just thought it was quicker and easier than walking all the way around".

The candid and forthright testimony of the Claimants as well as the testimony of Mr. McConnell substantially verifies the investigative account of the incident reported by Supervisor Sims.

The Claimants readily conceded, after their attention was drawn to the applicable Safety Rules, that they did not fully comply with those rules and act in the safest possible manner.

The rule of most significant import, in this Board's opinion, is Rule 287e, which provides that "Employees are prohibited from riding any machine except when specifically designed for that purpose". Not only is this a specific rule which must be followed, but it is also a rule of common sense for anyone operating, riding upon or supervising heavy moving equipment.

The Claimants acknowledged that riding in the bucket of the endloader, or operating the endloader while an employee was riding in the bucket or giving employees supervisory permission to ride in the bucket of an endloader would represent an unsafe practice.

The Claimants have defended their actions, to some minimal extent, by relying upon the fact that (1) the bad weather conditions, the snow and ice, made the terrain treacherous, (2) in the past some employees may have, on occasion, ridden in the buckets of machinery, and (3) the walk to the work site was an onerous trek of approximately one-half mile. Those defenses do not, in this Board's opinion, justify the Claimants' violating rules which are promulgated for their and their fellow employees' safety.

There is absolutely no question that Claimants Broeg and Gronewold actively and knowingly engaged in an unsafe practice, a practice prohibited by the rules and not shown to have been condoned by Carrier supervision. They have essentially admitted their guilt.

The case involving Claimant Galluzzio is somewhat closer, since there is a question whether he knew or should have known that members of his crew were engaging in unsafe activity. There is sufficiently substantial evidence in this record to establish that Foreman Galluzzio bore some responsibility for the activity of the other Claimants. The following colloquy supports this conclusion:

Q. Had they ridden in this bucket and come around previous to this?

A. One other time.

Q. And at the time, did you instruct them that it was not safe, correct procedure on the Burlington Northern Railroad?

A. No, I did not.

- Q. Did you feel that that was safe, correct procedure on the Burlington Northern Railroad?
A. No.

Based upon the substantial and convincing evidence in this record, the Board concludes that the Claimants, with no purposeful intent to engage in dangerous behavior, nevertheless violated Safety Rules because they were looking for a "quicker and easier" means of transportation to arrive at their designated work site; and that their Foreman was aware of the action or should have been aware of the action and did not prohibit them from jeopardizing their safety.

In these circumstances, the Board has no reason to sustain the claims. There is also no evidence in the record to establish that the discipline imposed was overly severe or arbitrary in view of the potentially tragic consequences which could have occurred had Claimant Broeg been thrown from the endloader and severely injured himself on the icy terrain or under the wheels of the machinery.

Accordingly, the claims will be denied.

Awards: The claims in Case Nos. 97, 98 and 99 are denied.
These awards were signed this 18th day of May, 1991.

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