

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 2746

BURLINGTON NORTHERN, INC.

-and-

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 3

AWARD NO. 3

Public Law Board No. 2746 was established pursuant to the provisions of Public Law 89-456. The parties, Burlington Northern, Inc. (hereinafter the Carrier) and the Brotherhood of Maintenance of Way Employees (hereinafter the Organization) are duly designated carrier and organization representatives as those terms are defined in Sections 1 and 3 of the Railway Labor Act.

After hearing and upon the record, this Board finds that it has jurisdiction to resolve the following claim:

"The Agreement was violated January 9, 1979, when restricting the seniority of Machine Operator, J. G. Palma to service as sectionman only without just and sufficient cause and wholly disproportionate to the alleged offense.

Claimant J. G. Palma now be paid for all lost wages, his seniority be restored as Group 3 Machine Operator and Truck Driver and any other seniority he held be restored. Also he is to be returned as operator of ballast regulator X-06-0007."

Prior to the events leading to this claim the Claimant was employed as a Group Three Machine Operator assigned to a Ballast Regulator at Pasco, Washington. On November 9, 1978, he worked his regular assignment near Kennewick, Washington. Claimant's Assistant Foreman reported that on that date the Claimant

operated his ballast regulator in an unsafe manner. More specifically, the Claimant was alleged to have operated the machine at an excessive rate of speed resulting in damage to signal equipment and a motor car setoff. It is also alleged that he disregarded red flags and wye orders and refused to follow instructions to slow down.

As a result of the incidents on November 9, 1978, the Claimant was timely notified to attend an investigation on November 21, 1978, "for the purpose of ascertaining the facts and determining your responsibility in connection with your failure to operate safely and in compliance with instructions of Foreman, while performing duty about 9:00 a.m., November 9, 1978, as operator of Regulator X06-007 at Kennewick, Washington." The hearing was postponed until December 13, 1978, at the Local Chairman's request. Based on facts developed at the investigation, the Carrier concluded that the Claimant violated General Rule A of the Rules of the Maintenance of Way Department and Safety Rules 661 and 667. Claimant was demoted to sectionman.

The Organization raised two procedural arguments. The first is that the Carrier's written notice of investigation failed to specify the charges against the Claimant. This Board disagrees. The notice informed the Claimant that the purpose of the investigation was to ascertain the facts and the Claimant's responsibility "in connection with (Claimant's) failure to operate

safely and in compliance with instructions...while performing duty about 9:00 a.m., November 8, 1978, as operator of Regulator X06-0007 at Kennewick, Washington." The notice specified the event and pointed out that the Claimant's responsibility for it would be determined (See Third Division Award No. 22663, BRS v. BN, Edgett). The notice was comprehensive and specific enough to inform the Claimant of the matter under investigation. The questions of who, when, where and why were presented. Claimant came to the investigation prepared and was not prejudiced by any alleged deficiency in the notice. This Board finds that the notice requirements were fulfilled.

The Organization also asserted that the Claimant was denied a fair and impartial hearing under Rule 40A because the Carrier failed to call all witnesses who had knowledge of the incidents. Again, the Board disagrees. The witnesses not called were signal maintainers and an employee assisting the Claimant. The testimony of these witnesses would only have been corroborative. There was no disagreement between the Carrier's witnesses and the Claimant regarding the relevant facts. Furthermore, the presence of these additional witnesses was not requested prior to the investigation or, at least, during the investigation. If the Organization believed that testimony from these witnesses was necessary, it could have requested a recess during the investigation in order that they might be called. But this was not done. The Organization has failed to demonstrate that the witnesses were necessary.

The Organization's argument on the merits is twofold. First, it is contended that the Carrier did not demonstrate that the Claimant operated in an unsafe manner. Second, it is argued that the Claimant operated his ballast regulator in the manner in which he was taught to operate it. Apparently, Claimant's instructor had operated the ballast regulator at a faster rate of speed than most ballast regulator operators. Neither argument refutes the fact that the Claimant operated his machine in a reckless manner and at excessive speed which resulted in damage to signal equipment and a motor car setoff. Nor do the arguments excuse the Claimant's disregard of red flags, wye orders and instructions to slow down.

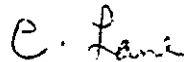
While the speed limits over the stretches of track involved are not set by any Rule or Regulation, reliable testimony established that the proper speed was 2 m.p.h. Claimant testified that he estimated his speed to be between 10 and 15 m.p.h. That's like driving a souped-up sports car on a residential street at Daytona Raceway speeds. And while Mario Andretti, like Claimant's instructor, might be able to do it without untoward consequences, a relatively inexperienced driver probably would not be so lucky; and, the Claimant wasn't. Despite prior warnings to slow down and to avoid damage, the Claimant operated the ballast regulator at an excessive speed. The demotion was not arbitrary and capricious in light of the circumstances. Accordingly the claim will be denied.

This Board wishes to emphasize that this award is based solely on testimony concerning the events occurring on November 9, 1978. Testimony regarding the dates of November 7, 1978, November 8, 1978 and November 10, 1978 were not considered and were scrupulously ignored in the formulation of this award.

AWARD: Claim denied.



F. H. Funk,
Organization Member



C. Lane,
Carrier Member



Richard R. Kasher, Chairman
and Neutral Member

July 6, 1981
Saint Paul, Minnesota