NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4370

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 58
Case No. 58

STATEMENT OF CLAIM

Claim in behalf of G. G. Escalante, Social Security Number 467-84-3853, that his suspension from service on September 28, 1994 for alleged violation of Rule 26 is arbitrary, capricious, and on the basis of unproven and disproved charges and in violation of Rule 26 of the Agreement. It is respectfully requested that the claimant be returned to service with all seniority and other rights unimpaired and compensated for all wage loss suffered.

F I N D I N G S

The Claimant was subject to an investigative hearing to determine his responsibility, if any, in connection with:

> . . . your alleged unsafe act while working with Pettibone, at about 10 a.m. CDT, August 26, 1944, on the South Plains Subdivision, near Milepost 332, resulting in a personal injury; and your alleged proneness to injury, as evidenced by your personal record during your history with Burlington Northern Railroad.

Following the hearing, the Claimant was notified of a suspension and the following entry on his record:

September 28, 1994 - SUSPENDED from service of Burlington Northern Railroad Company for a period of 20 days, without pay, commencing October 3, 1994 through and including October 22, 1994, for violation of rule 1.1.2 of M.O.W. Operating Rules and Safety Rule 26.

M.O.W. Rule 1.1.2 refers to the necessity of being "alert and attentive" to avoid injury. Safety Rule 26 reads as follows:

> When equipment or material is being handled by crane, magnet, rope, cable, or other tackle, keep out from under the load and at a safe distance to avoid recoil and disintegration of material in case of breakage.

The incident occurred when an employee was operating a Pettibone speed swing, which is equipped with tongs to pick up and move rail. The Claimant was assisting him on the ground, attaching tongs to rails which were being moved from one side of a track to the other side. In one of the movements, a joint bar broke, which released a rail. As it moved, it struck the Claimant, causing an ankle injury.

It is the Carrier's position that this is one more in a long line of injuries involving the Claimant and that he could have taken the necessary precaution to avoid being hit by the rail by standing well out of the way in accordance with M.O.W. Rule 1.1.2. There is, however, little or no support in the investigative hearing transcript to justify the conclusion that the Claimant acted improperly.

The Assistant Foreman arrived on the scene shortly after the accident. He suggested the Claimant should have used the Pettibone machine "as a shield". There then followed this exchange:

Q Far as--were they working as you expected them to? Were they working in an unsafe manner, a safe manner to your knowledge?

A Well, in--to my knowledge, I thought they were working in a safe manner.

Both the Roadmaster and the Track Supervisor stated that they did not "take exception to the way the work was being performed at the site". The Claimant testified that "I felt I was moving out of the way and he [the Pettibone operator] just happened to move the machine a little quicker than usual." On the other hand, the Pettibone operator testified that he gave the Claimant "sufficient time to get in the clear before [he] moved the rail", and he saw the Claimant "cross to the north side of the rail" before he moved the rail. The Pettibone operator stated he believed the Claimant "was working in a safe manner". Thus, the question of whether the Claimant was in motion moving to a safe position as the Pettibone started its movement remains uncertain. There remains no proof that the Claimant was simply remaining stationary in an unsafe position.

There is no doubt that the Claimant had an unusually poor history as to work accidents. He had previously been involved in 14 accidents. The most recent was four months earlier, at which time, according to the Carrier, he had been warned of the consequences of any further such occurrences. The Board well understands the Carrier's concern as to an "accident prone" employee. In this instance, however, as noted by the Union, there

was mention of this in the hearing charge but none in the resulting penalty.

As discussed above, there was no testimony which clearly put the Claimant at fault. There was testimony from a number of Carrier witnesses that they had no reason to believe the Claimant was working in an unsafe manner. Whether the Pettibone operator moved his crane too quickly remains an open question. This is another in a long series of injuries, but without being able to assess clear responsibility on the Claimant, the resulting discipline simply has no justification.

A W A R D

Claim sustained. The Carrier is directed to make this Award effective within 30 days of the date of this Award.

Herbert L. Marx

HERBERT L. MARX, Jr., Neutral Referee

NEW YORK, NY

DATED: October 18, 1995