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LABOR RELATIONS

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MS	✓	DK	
RL		EK	✓
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FW		RS	
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CEW		DLH	

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4370

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 28

Case No. 30

STATEMENT OF CLAIM

1. The Carrier violated the provisions of the current Agreement when on August 14, 1989, it removed Machine Operator Mr. Larry J. Rasco's name from the Machine Operator's seniority roster based on unproven charges and in abuse of discretion.

2. The Carrier further violated the Agreement when it failed to notify Claimant of the discipline assessed as provided for in Rule 26.

3. The Carrier shall now be required to restore Claimant's seniority in the appropriate Machine Operator's seniority classes and Claimant shall be compensated for any and all wage loss suffered.

F I N D I N G S

The Claimant was a Group III Machine Operator with seven years' experience in this position at the time of the incident here under review. On July 31, 1988 he was the operator of a ballast regulator machine. During the course of operation that day, the motor on the ballast regulator "blew", causing

extensive internal damage. The cause of the incident was attributed to lack of oil in the motor.

As a result, the Claimant was subject to an investigative hearing to determine his responsibility, if any, "in connection with your alleged failure to maintain Ballast/Regulator at Channing, Texas on July 31, 1988." Following the hearing, the Claimant was assessed the disciplinary penalty of loss of machine operator's rights and seniority.

In the Board's view, there was insufficient evidence to determine with a reasonable degree of certainty that the Claimant had failed to maintain oil in the ballast regulator. The Claimant admitted his responsibility as to certain maintenance functions, which included checking on oil level. He stated, however, that he had not failed to do this.

The Supervisor, Work Equipment testified to "ten" engines having "blown" within the year. In this instance, he stated: "I'm not saying that [the Claimant] did the damage to this engine. I'm saying it was out of oil." A Surfacing Gang Mechanic was asked if there was "any oil noticed on the ground in and around where [the machine] stopped". He replied, "There was . . . from the house track switch to where the . . . ballast regulator had stopped, there was a . . . small stream of oil from there in between the rails." This would

appear to suggest some other problem not attributable to the Claimant.

The Board finds the record does not provide convincing evidence of the Claimant's responsibility for the damage to the ballast regulator. The claim will be sustained. Reimbursement for back pay shall be limited to the difference, if any, between the Claimant's rate of pay as a Group III Machine Operator and that rate at which he was paid for the hours which he worked since his loss of machine operator rights. His machine operator rights and seniority shall be restored as if the discipline had not been applied.

As a procedural matter, the Organization claims that the Claimant was not served notice of the discipline and that the Carrier was therefore in violation of Rule 26 (a) which states in reference to disciplinary investigations as follows:

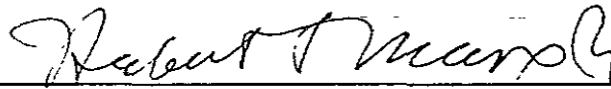
Decision will be rendered within thirty (30) days after the completion of the investigation.

The record shows that a letter was sent to the General Chairman, with copy indicated to the Claimant, on August 14, 1989, six days after the hearing date. Even if the Claimant did not receive such copy (or it was not sent), the Organ-

ization received the letter in ample time to initiate a claim on the Claimant's behalf. Clearly, the decision was "rendered" within 30 days, and the Claimant's apparent failure to receive a copy of the letter was without significant consequence.

A W A R D

Claim sustained to the extent provided in the Findings. The Carrier is directed to put this Award into effect within thirty (30) days of the date of this Award.



HERBERT L. MARX, JR., Neutral Referee

NEW YORK, N. Y.

DATED: July 3, 1991