

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 59

Carrier File No. 7MWA91-12-2

Organization File No. C-92-D070-5

STATEMENT OF CLAIM

1. The dismissal of Machine Operator S. Joyce for alleged violation of Rule 412 and General Rule I in connection with his alleged ". . . failure to properly handle the operation of leased Gradall in TWC territory resulting in collision and derailment of Train 593; Engine 6913, at about 9:45 A.M. on July 25th, 1991 at the west siding switch, Douglas, Wyoming", was arbitrary, on the basis of unproven charges and in violation of the Agreement.

2. The Claimant shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered.

F I N D I N G S

Following an investigative hearing, the Claimant was dismissed from service with the following entry on his personal record:

August 28, 1991 -- Dismissal and entry of censure for violation of Rule 412 and General Rule I . . . for failure to properly handle the operation of leased Gradall in TWC territory resulting in collision and derailment of Train 593; Engine 6913, at about 9:45 a.m. on July 25th, 1991 at the west siding switch, Douglas, Wyoming.

The Claimant had received a track warrant to occupy the main line in connection with his assigned duty. The warrant included the direction not to enter the main line ahead of Train 6913, specifically , "Do not foul limits ahead of 6913." The Claimant nevertheless entered the main track prior to the arrival of Train 6913. Upon the approach of the train, the Claimant attempted to get his equipment clear, but a collision occurred between the train and the equipment, causing substantial damage. At the investigative hearing, the Claimant testified, "I thought that train had gone by. I thought that train was clear of the limits."

The Organization and the Carrier disagree sharply as to the conditions under which the Claimant was operating the Gradall. The Organization contends this was the first time the Claimant had operated the equipment following previous disqualification for Class 1 Machine Operator positions; that he was unfamiliar with track warrants; and that he should have been accompanied by another employee who had been assigned to train him. The Carrier contends the Claimant was properly assigned to the machine; that the Claimant had provided assurances as to familiarity with track warrants; and that he was properly operating the equipment without the presence of another employee.

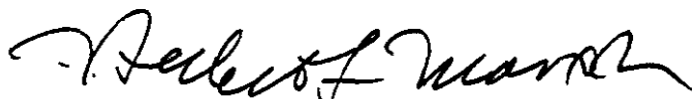
There can be no doubt that the Claimant was responsible to some major degree in his failure to follow the requirement of the track warrant. The Claimant does, however, have 15 years' service, with an apparently clean employment record. Given this background and all the related circumstances, dismissal becomes an unduly

harsh penalty. The Award will direct his reinstatement with seniority unimpaired but without back pay or retroactive benefits and with the remaining time out of service as a disciplinary suspension on his record. The Carrier, of course, retains the right to determine the Claimant's qualification for Machine Operator positions.

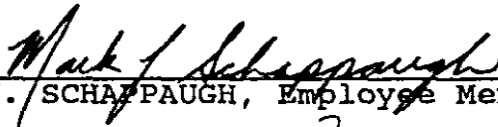
The Organization contended that the investigative hearing was faulty, because other participants were not called as witnesses or principals. Given the Claimant's admission as to his action in moving on to the main track, the Board concludes that he received a fair hearing.

A W A R D

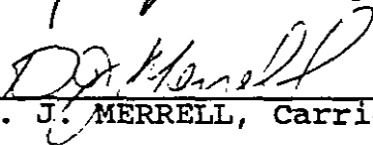
Claim sustained to the extent provided in the Findings. The Carrier is directed to place this Award into effect within 30 days of the date of this Award.



HERBERT L. MARX, Jr, Chairman and Neutral Member



MARK J. SCHAPPAUGH, Employee Member



D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED: 12/16/92