NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	
- and -	CASE NO. 107
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	AWARD NO. 107

On May 13, 1983 the Brotherhood of Maintenance of Way Employes (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. Bruce V. Paulson, hereinafter the Claimant, entered the Carrier's service on May 6, 1974 as a Sectionman. The Claimant was subsequently promoted to the position of Machine Operator and he was occupying that position when he was suspended from the Carrier's service for five (5) days effective on August 12, 1991.

The Claimant was suspended as a result of an investigation which was held on July 12, 1991 in the Carrier's 28th Street Conference Room in Superior, Wisconsin. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that the Claimant had violated Rules 39, 49, 78, and General Rules A and B as the result of his allegedly failing to clear for train 131NN225 while operating ballast regulator X06-0288 on May 17, 1991 at approximately 11:30 a.m.

Findings and Opinion

The incident which led to the investigation occurred on May 17, 1991 at approximately 11:30 a.m. The incident occurred when a coal train, being operated by Locomotive Engineer Leroy L. Lahr and his conductor, and a ballast regulator, being operated by the Claimant, collided in the vicinity of the east switch in the Carrier's 28th Street Yard near the intersection of the "Coal Main" and the connecting track upon which the train was traveling.

Roadmaster Max F. Sanford, Jr., Trainmaster William R. O'Neill and Yardmaster Tom A. Higgins, Jr. testified regarding the incident/accident, although they were not eyewitnesses to the collision.

After reviewing their collective testimony and the testimony of Engineer Lahr, the Claimant and Tamper Operator Robert W. Gordon, Jr., the Carrier concluded that the Claimant was, apparently, not sufficiently observant to the approach of the the train, "fouled" the track with a "wing" of the ballast regulator and was therefore responsible for the minor collision which occurred on May 17, 1991. No injuries or property damage resulted from what some witnesses described as the "sideswipeing" of the train by the ballast regulator.

The Claimant and fellow Machine Operator Gordon were working in the 28th Street Yard on the morning in question with the permission and knowledge and under the authority of Roadmaster Sanford and Yardmaster Higgins. Because they were doing track work within the confines of a yard, the Claimant and Machine Operator Gordon were not required to have a "track warrant" for or to place protective warning devices (red flags) on the portions of the track upon which they were working.

The Claimant and Machine Operator Gordon were advised that a coal train would be coming through the yard in the vicinity of their work area at approximately 10:00 a.m. to 10:30 a.m. In fact, the train did not arrive until approximately between 11:15 a.m. and 11:30 a.m.

There is detailed testimony in the record which establishes that (1) on the day in question the weather was clear and windy, (2) the ballast regulator, while operating, was generating much noise and dust, (3) the operator of a ballast regulator is required to concentrate upon the task at hand, (4) views from the locations of he train and the ballast regulator, when the train passed the Corning Avenue curve and entered the connecting track, were unobstructed and (5) the Claimant did not see the train approaching his machine until it was too late to avoid the collision.

The record also establishes that the train, in order to be in compliance with applicable rules, should be traveling at a speed of five (5) miles per hour or less. Engineer Lahr testified that it was; Machine Operator Gordon testified that it was not.

Roadmaster Sanford and Trainmaster O'Neill interviewed the Claimant, who was the sole employee assigned to the ballast regulator, and the train crew after the incident. As a result of these interviews, the Claimant was required to submit to a body fluids test, in order to determine whether there was the presence of alcohol or controlled drug substances in his system. The train crew was not required to submit to any such testing. The Claimant was named as a principal in the investigation. Neither Engineer Lahr nor his conductor were named as principals in an investigation regarding the cause of the accident.

During examination by the Organization Representative, Roadmaster Sanford testified as follows:

> Q. Do you believe that the train that struck Mr. Paulson's regulator complied with this rule [Rule 105 regarding restricted speed and the ability to stop within one half of the range of vision]?
>
> A. I have no comment about the train. That is not my jurisdiction. It is the jurisdiction of the Maintenance of Way employees.
>
> Q. If the train had been traveling at a speed able to stop within one half of the range of vision, would it have struck the regulator?
>
> A. I have no comment on the train; it is not my jurisdiction.

At this point in the investigation, the Organization Representative lodged an objection claiming that the failure to cite all employees involved in the accident represented a denial of due process for the Claimant.

Trainmaster O'Neill testified that when he appeared on the scene he spoke to the train crew. He testified that he learned the following from the train crew:

> A. Well, the train crew said that they came through the Connection there. The head brakeman had gone ahead in a van, he had already lined the switch of the, on the New Connection for the Coal Main and the train had started to proceed through there. The engineer had seen the ballast regulator. He was moving and then he stopped. He figured the ballast regulator operator

had seen him and then all at once he noticed that the guy had started up again, coming toward the New Connection switch and then he put it, the train, into emergency.

The Organization Representative questioned Trainmaster O'Neill regarding his knowledge of the incident. He asked Trainmaster O'Neill how fast the train was traveling. Mr. O'Neill testified that he relied upon the statement from Engineer Lahr that the train was moving at five miles per hour or less, and that he did not "pull the tapes" from the locomotive to verify the train's speed.

Engineer Lahr testified that when he saw the ballast regulator sitting idle that he assumed that the operator was not working the machine; and that as he approached and saw the ballast regulator begin to move in the vicinity of the track that he sounded his whistle, but to no avail. Engineer Lahr testified that the Claimant was wearing "ear muffs", and presumably that is why he did not hear the train's approach or the whistle. The Claimant testified that he did not and does not wear ear protection, and that he was wearing a hard hat on the day in question.

The testimony of the Claimant as well as that of Machine Operator Gordon is to the effect that they did not anticipate the arrival of the train between 11:15 a.m. and 11:30 a.m. as that arrival time was contrary to the information they had received from Yardmaster Higgins when they began work that morning. In their testimony they also suggest that had the Carrier provided the operators with a "lookout" the accident likely would not have happened. In their testimony, they also suggest that they did not anticipate the arrival of the train because they were neither notified by the Yardmaster of its arrival, in spite of the fact that they had working radios, and they did not observe a train crew member line the switch to the coal main from the connecting track. As noted above, Mr. Gordon testified that in his opinion the train was traveling faster than five miles per hour. Specifically, Mr. Gordon testified that "he [Engineer Lahr] had to be doing over [five miles per hour], at least 10 or better".

This case presents the Board with an interesting dilemma. It should be noted that the Conducting Officer held an exemplary hearing. He afforded the Claimant and his Representative a full and thorough opportunity to present evidence and to examine witnesses and he created a transcript, aided by a most instructive diagram drawn by the Organization Representative, which allowed the reader to fully understand the nature of the yard, the relevant distances and the locations where certain significant occurrences took place.

The record also reflects that the Claimant is recognized to be a diligent and conscientious employee, and he has a long, unblemished record insofar as safety is concerned. In spite his record, this

Board believes that the Claimant likely was responsible, at least in part, for the accident. Nevertheless, the Board is constrained to sustain the claim.

The Board agrees with the Organization Representative's contention that the Carrier prejudged this case when it chose to conduct an investigation with the Claimant as the sole principal.

Except in the most unusual of circumstances, for example when an Act of God or some other such event is the cause of an accident, one or more of the participants in the accident is properly charged with some degree of negligence. In the instant case, as the weather was clear and the views were unobstructed, one or more of the employees physically involved in the accident was likely guilty of negligence or, at the least, contributory negligence.

When the Carrier chose to only cite the Claimant for a possible alleged infraction of safety and general rules and predetermined prior to a formal investigation that other participants bore no responsibility for the incident/accident then the Carrier, de facto, determined before the investigation that the Claimant was the only party who was possibly responsible.

Had the Carrier conducted an investigation in which it charged all of the potential violators and then concluded that but for the Claimant's alleged non-attention to train traffic that he should be disciplined and the others should be exonerated, this Board, likely, would have denied the instant claim. However, the Carrier did, by the nature in which it limited the investigation, deprive the Claimant of his rights to an unbiased hearing. That is not to say that there was any invidious prejudice or an attempt to slant the record by the Conducting Officer.

It is this Board's conclusion that based upon the Carrier's prejudgment that the Claimant was the responsible party, where there were clearly other employees who were possibly responsible, in whole or in part, for the accident, that the claim must be sustained.

Award: The claim is sustained. The Carrier is directed to physically expunge any reference to the instant discipline from the Claimant's Personal Record, and the Carrier is further directed to make the Claimant whole in terms of wages and benefits for any losses sustained as a result of the five (5) day suspension.

This Award was signed this 5th day of October, 1991.

Richard R. Kasher

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