

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 925

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BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES  
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CASE NO. 119

AWARD NO. 119

On May 13, 1983 the Brotherhood of Maintenance of Way Employees (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 procedures.

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. Randy J. Thilmony, hereinafter the Claimant, originally entered the Carrier's service as a Section Laborer on August 8, 1974. After resigning and then being reemployed, the Claimant was promoted to the position of Machine Operator, and he was occupying that position when he was suspended for a period of five (5) days by the Carrier effective February 1, 1992.

The Claimant was suspended as a result of an investigation which was held on January 2, 1992 in the Section Tool House in Baker, Montana. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Safety Rules 301 and 567 as the result of his alleged negligence in operating the Pettibone Speedswing on December 19, 1991, which act resulted in the injury to fellow employee R. Graham.

### Findings of the Board

Mr. John Jeffries, Roadmaster at Hettinger, North Dakota, and the Claimant's ultimate supervisor at the time of the incident, testified that on December 19, 1991 the Claimant was the operator of a speedswing and was lifting and moving rail when the "tongs slipped on the rail, causing the rail to hit Mr. Graham in the foot". Mr. Jeffries testified in response to the question "What caused the tongs to slip, or did the tongs slip as the result of something

else?", that "Through my investigation, it appeared that the tongs slipped because of frosty rail". Mr. Jeffries further testified that the Claimant picked up the rail "maybe four or five feet from the end of it and stuck the end under his boom and against the boom, under and against it, and then tightened up the tongs and then lifted the rail up". Mr. Jeffries testified that "As he swung it around toward the center of the track to load on a couple of push cars, the rail slipped and as he was swinging it around the rail kept moving toward Mr. Graham, who was standing on the north side of the tracks". Mr. Jeffries completed his description of the incident and testified that "The end [of the rail] that was next to the machine came off the machine and then the far end fell down, and hit Mr. Graham".

Mr. Jeffries testified that the moving of rail with the speedswing is "a fairly routine maneuver"; and that there is no rule which prohibits picking up rail when it is "frosted".

The Claimant's testimony and the testimony of Mr. Rocky Graham, the employee who suffered a lacerated foot when the rail fell on it, regarding the facts surrounding the incident do not vary, materially, from Roadmaster Jeffries' testimony. Mr. Graham and Mr. M.R. Hauck, a fellow employee on the Gang on the day in question, both testified that the Claimant was not, in their opinion, "running this machine in any unsafe manner the day the incident happened".

The evidence in this record is not sufficiently substantial and convincing to persuade the Board that any action by the Claimant was responsible for what appears to be properly characterized as "an act of God"; that is, the evidence appears to establish that the Claimant operated the speedswing properly and consistent with existing instructions and rules, and that it was the "frosted" condition of the rail which caused the tongs to slip and resulted in the injury to Mr. Graham. If the Carrier had a rule which required speedswing operators to refrain from lifting frosted rail or which required that members of the maintenance gang "stand clear" when frosted rail was being moved, then there might be some basis to conclude that the Claimant was responsible for the accident/incident. It is this Board's opinion, based upon the foregoing analysis, that the Carrier has failed to prove that the Claimant violated rules with which he was charged. Accordingly, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to make the Claimant whole for any lost wages and benefits and to expunge any reference to the incident/discipline from the Claimant's Personal Record. This Award was signed this 30th day of June, 1992.

Richard R. Kasher

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