

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 145

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 145

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 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. Eugene Edward Pugh, hereinafter the Claimant, entered the Carrier's service as a Track Laborer on June 4, 1969. 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 a period of five days commencing on October 3, 1992.

The Claimant was suspended as a result of an investigation which was held on September 4, 1992 in the Carrier's Northtown Hump Tower in Minneapolis, Minnesota. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated certain rules regarding the safe operation of motor vehicles.

Findings and Opinion

Assistant Roadmaster F.L. Proudfoot testified that he was notified by the Claimant, at approximately 4:45 p.m. on August 6, 1992 and then again at approximately 5:10 p.m. on that same day, that he, the Claimant, had "backed in and hit a signal"; and that he went to the site of the incident and "discovered [that] his [the Claimant's] truck had backed into a dwarf signal governing movement over a crossover... ." Mr. Proudfoot testified that he estimated that there was approximately \$100 of damage to the truck and approximately \$575 damage to the signal; that he considered the damage "minor"; and, in response to questions from the Organization Representative, that he was familiar with other incidents/accidents involving damage to vehicles and equipment in which, to his knowledge, the Carrier had not conducted disciplinary investigations.

The Claimant who was driving the truck was accompanied by Mr. Leigh Hernandez, a Grinder Operator, who was sitting in the passenger seat and providing guidance to the Claimant as he backed his truck through tight quarters in the area of the incident. As the Claimant was backing the truck, at a speed of approximately two to three miles an hour, he struck a "dwarf signal", causing the signal to bend and require repair by signal maintenance forces. The repair required approximately two hours of work.

Mr. Hernandez, who was also a principal in the investigation, testified that the "backing" move of the truck was particularly difficult because of the necessity to clear hopper cars; that as "We were backing up and we had those hopper cars on one side and I was in the truck as we were backing, and I was looking out the window to make sure we had cleared the hopper cars side"; that "I saw the way to be clear, as we backed up"; that "We were backing very slowly, in fact slow enough probably, you know, any more slower the truck probably would have stalled"; that he "heard a thump" and was instructed by the Claimant to exit the truck to determine the cause; that he observed that the "tailgate had struck the dwarf signal"; that the Claimant exited the truck and observed the dwarf signal; and "That's where Gene decided to call and report it... and he called twice to report it".

The testimony of the Claimant and that of Mr. Hernandez are essentially corroborative. The record reflects that the Claimant was engaged in a very difficult "backing" move with his truck,

that he was particularly cautious and circumspect as he weaved the truck through difficult terrain, and that he struck the dwarf signal because "I never saw it".

The Claimant and the Organization Representatives raise substantial contentions regarding, what they characterize as the haphazard manner in which the Carrier determines to conduct investigations when there are "minor" incidents or accidents involving employees operating the Carrier's motor vehicles or equipment. While their contentions are appealing and persuasive, to some extent, this Board is not in a position to determine when and under what circumstances it is appropriate for the Carrier to issue investigation notices. The fact that the Carrier may not, in the past, have issued an investigation notice for each and every incident/accident which involved damage to a truck or a piece of equipment does not, in this Board's opinion, rise to the level of disparate treatment. It cannot be convincingly argued that employees understood that they would be free from any potential discipline if they damaged Carrier equipment through carelessness or neglect; even if such carelessness or neglect was "minor" and did not involve "gross" negligence.

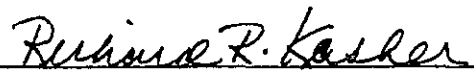
The Claimant has presented himself as a conscientious, safety-conscious twenty-three year employee with an unblemished disciplinary record. He believes, and many would agree with him, that based upon (1) the minor nature of the incident, (2) his long meritorious service and unblemished safety and disciplinary record, (3) the fact that other incidents of a similar nature or some where more extensive damage occurred went uninvestigated and (4) the fact that he immediately reported the incident and did not attempt to hide the fact of his responsibility, should all have contributed to an enlightened decision by the Carrier, after his urinalysis test proved negative, to forego any investigation and not to impose any discipline.

This Board, while it agrees with many of the statements made by the Claimant and the Organization Representatives at the close of the hearing, does not find it appropriate to establish, for the Carrier, guidelines regarding what types of accidents/incidents should result in disciplinary investigations. While the logistics of the "backing" move were particularly difficult and while the Claimant took many precautions to ensure that the move was made safely, the fact remains that his truck struck a signal that was in reasonably plain sight. The evidence the Carrier relies upon in determining that the Claimant was culpable is clear and convincing; and, accordingly, the Board is constrained to find that the Carrier justifiably disciplined the Claimant.

However, an unblemished safety and disciplinary record of some twenty-three years and the fact that the Claimant was cautious in the manner in which he was attempting to traverse difficult terrain and the fact that the Claimant was absolutely forthright in admitting responsibility, persuades this Board that a five day disciplinary suspension was an overly severe penalty. Accordingly, the Carrier is directed to modify the discipline by converting the five day disciplinary suspension to a notation of negligence on the Claimant's Personal Record and by making the Claimant whole for any lost wages suffered as a result of the suspension.

Award: The claim is sustained in part and denied in part. The Carrier is directed to convert the "suspension" entry in the Claimant's Personal Record to a notation of negligence/censure, and to make the Claimant whole for any lost wages and benefits resulting from the suspension.

This Award was signed this 20th day of April, 1993.



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