

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 147

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Case/Award No. 147

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. Martin J. Burditt, hereinafter the Claimant, entered the Carrier's service as a Small Machine Operator, on June 2, 1971. The Claimant was subsequently promoted to the position of Machine Operator and he was occupying that position when he was suspended by the Carrier for a period of five days commencing on October 17, 1992.

The Claimant was suspended as a result of an investigation which was held on September 16, 1992 in the 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 Rules 336E and 336L in connection with a backing incident on August 11, 1992 at Union Yard, Minneapolis, Minnesota.

Findings and Opinion

There is no question but that the Mower apparatus attached to the back end of the tractor being operated by the Claimant struck and did minimal damage to a truck parked behind the tractor as the Claimant was backing the tractor in the process of helping a section crew lay rail.

The testimony of Assistant Roadmaster F.L. Proudfoot, essentially confirmed by the Claimant's testimony, establishes that on the afternoon of August 11, 1992 the incident which gave rise to the discipline occurred. Mr. Proudfoot testified that he investigated the incident, which occurred when a section crew was engaged in placing ties on the Bridal Veil lead track. Mr. Proudfoot testified as follows:

Marty [the Claimant] was lifting in and out rail for them. He was on the south side of the track and there is a hill that goes up to the road. He was setting in and digging out rail for them to place the ties. When he tried to back up the hill he had to rev the engine and backed into the section truck which was parked on the road behind him. He was moving up a grade from where the track is up onto the road.

Mr. Proudfoot testified that in the vicinity where the incident occurred "There is sufficient room to work, but it is a steep grade for the tractor to go up and down"; that the damage to the side door of the section truck was approximately \$200; that the hill is composed of "packed, sand-ballast-cinder"; that there was no damage to the mower or the wheel of the mower; that he has known the Claimant since 1974, and that in his opinion, the Claimant has performed his work safely; that the Claimant was subjected to urinalysis testing and that the results of the test were negative; and that he was somewhat familiar with other motor vehicle/moving equipment incidents/accidents which did not involve investigations and, presumably, discipline.

The Conducting Officer asked Assistant Roadmaster Proudfoot, Section Foreman Brueberg and the Claimant a number of hypothetical questions, such as whether the accident could have been avoided if (1) the Claimant used the tractor to remove and replace rail from the north side of the track as opposed to the south side of the track and (2) the truck had been moved further than it had been away from the vicinity of the track.

On Monday morning all of us are capable of restrategizing the critical plays of our favorite team, and winning the game that was lost. There is insufficient showing on this record that

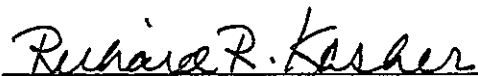
the Claimant did anything out of the ordinary or that he did not take sufficient precautions to avoid the incident/accident. If the terrain was composed of different material, that is, if it was not sand-ballast-cinder, then it is likely that the wheels would not have "spun out" and no accident would have occurred. If some other member of the gang, responsible for operating the truck, or if a supervisor with general safety responsibility had moved the truck then it is likely that the accident would not have occurred. There is no showing that the Claimant improperly "revved" the engine in order to achieve some minimal backing so that he could lay the rail for the section crew.

In this Board's opinion, the Carrier has failed to provide substantial and convincing evidence that the Claimant was careless. It is arguable that he might have taken some additional precautions; that he might have anticipated that while he was in a backing move the steepness of the grade and the composition of the hill might have contributed to a "lurch" of his vehicle as he "revved" the engine in order to effect a reverse ascent. However, it is this Board's opinion that in this case those arguments cannot be equated with "substantial and convincing" evidence of negligence, carelessness or dereliction of safe responsibility by the Claimant.

Accordingly, the claim will be sustained.

Award: The claim is sustained in accordance with the above findings. The Carrier is directed to physically expunge any reference to the above discipline from the Claimant's Personal Record and to make the Claimant whole for all lost wages and benefits.

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



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