

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 153

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 153

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. Richard L. Ingamells, hereinafter the Claimant, entered the Carrier's service as a Extra Gang Laborer on July 19, 1973. The Claimant was subsequently promoted to the position of Track Inspector and he was occupying that position when he was censured by the Carrier on January 12, 1993.

The Claimant was censured as a result of an investigation which was held on December 15, 1992 at the Carrier's conference room in Grand Forks, North Dakota. At the investigation the Claimant was represented by the Organization. The Carrier censured the Claimant based upon its findings that he had violated Rule 63 by his alleged failure to properly protect crossing when passing over a public crossing resulting in an accident involving BN Hyrail No. 6337 and a private vehicle at about 9:00 a.m. on December 5, 1992.

Findings and Opinion

The voluminous transcript of investigation, the police report regarding the accident and the ten clear color photographs of the accident scene provide the Chairman of this Board with an opportunity to opine upon numerous issues associated with the accident which occurred at Road Crossing Behrami No. 7 on December 5, 1992 and the investigation which was held regarding that incident on December 15, 1992. Resisting the impulse to expound upon the numerous issues, most of which are irrelevant to the question of whether the Carrier had just cause to discipline the Claimant, the Board will briefly address the two most critical questions.

First, the relevant evidence of record establishes that the Claimant stopped at the highway crossing, looked both ways and proceeded cautiously as he went about his appointed tasks; that he was driving a "bright orange" pick-up Hyrail vehicle and that his beacon light was on; that a nineteen year old driver, who was, apparently, late for work, "rear-ended" the Hyrail shortly before the Claimant was able to clear the crossing, and was, apparently, the sole cause of the accident; that the police report regarding the incident noted that the driver of the private automobile "failed to see" the Claimant's vehicle; and that there is no rule, practice or notice on the territory applicable to Track Inspectors which requires them, prior to effecting a road crossing, to "flag" the intersection, or to place fusees in the intersection or to lower the crossing gate at the intersection. All of those additional "precautions", suggested in questioning by the Conducting Officer, were testified to by long-term employees and supervisors associated with the territory as not being required and not being followed as a matter of practice. Accordingly, this Board finds the record devoid of any evidence which would establish any culpability of the Claimant for the accident. The Carrier did not interview the police officer or the young driver, responsible for the accident, to determine how fast that individual was driving and why that driver did not see or could not avoid hitting the Claimant's vehicle.

Aside from finding that the Carrier did not have any justification for disciplining the Claimant, this Board would observe that the Conducting Officer showed minimal respect for his responsibility in terms of conducting a fair investigation. His failure to grant a postponement, in the peculiar and onerous circumstances of this case, and his participation in efforts to

persuade the Claimant, prior to the investigation, that the Claimant should accept a notice of discipline so that the "work" associated with conducting an investigation could be avoided, provides a second basis for this Board concluding that the discipline must be expunged from the Claimant's Personal Record.

Award: The claim is sustained. The Carrier is directed to physically expunge any reference to this discipline from the Claimant's record, and, in the event, the Claimant was not reimbursed for any period of time he was held out of service because the Carrier relied upon a "false positive" urinalysis, the Carrier is directed to make the Claimant whole.

This Award was signed this 24th day of April,
1993.

Richard R. Kasher

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