

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 156

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 156

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. Gary E. Mahlen, hereinafter the Claimant, entered the Carrier's service as a Track Laborer on April 12, 1971. 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 ten days commencing on February 24, 1993.

The Claimant was suspended as a result of an investigation which was held on February 16, 1993 in Havre, Montana. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rule Nos. 1, 286c, 338, 346 and 567 for his "collision with a power pole while driving BNX 240320 front end loader at approximately 1430 hours on February 3, 1993".

Findings and Opinion

Mr. Brian Olson, Roadmaster at Havre, Montana, testified that he was notified on the afternoon of February 3, 1993 that there had been an incident involving front end loader BNX 24030 which involved the Claimant; that he "met up" with the Claimant at Northern Montana Hospital and asked him "What happened?"; that the Claimant "told me that he struck a power pole" on the north road near the Work Equipment Shop while carrying a 15-foot piece of guardrail in his clam bucket of his front end loader; and that there was substantial damage to the power pole, which had to be replaced, and the guardrail.

The Claimant testified that he had been operating a front end loader since 1979; that while transporting guardrail in the front end loader on February 3, 1993 he struck a utility pole; that he has carried/transported guardrail in his front end loader from Havre center to Havre west, the route involved on February 3, 1993, many times in the past; that he travels "this area often"; that he was not distracted at the time of the accident; and "there [was] room to get by the pole with [his] front end loader . . . without striking the pole".

In spite of the Organization's attempt to create a defense by alleging that the failure to provide a "flag person" contributed to or was the sole cause of the accident, the Claimant's candid admissions establish that he was responsible for the accident and the resulting damage.

Accordingly, this Board finds that the Carrier had substantial evidence to support its conclusion that the Claimant should be disciplined for the violation of the cited safety rules. Therefore, the claim will be denied.

Award: The claim is denied. 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