

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award Nos. 167 and 168

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award Nos. 167 and 168

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 choose 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. Kenneth G. Bleeker, hereinafter Claimant Bleeker, and Mr. Harvey N. Moore, hereinafter Claimant Moore, entered the Carrier's service as Sectionmen respectively on September 4, 1959 and February 22, 1971. The Claimants were subsequently promoted, respectively, to the positions of Track Maintainer and Welding Foreman, and they were occupying those positions when they were suspended for thirty days from the Carrier's service effective July 3, 1993 for their alleged violation of Rules 62 and 79.

The Claimants were suspended as a result of an investigation which was held on June 8, 1993 in the Maintenance of Way Conference Room in Parkwater, Washington. At the investigation the Claimants were represented by the Organization. The Carrier suspended the Claimants based upon its findings that they had violated Rules 62 and 79 because of their responsibility "in connection with a collision of a Loram Rail Grinder and a BN Boom Truck".

Findings and Opinion

The evidence of record establishes that on June 1, 1993 both Claimants were assigned to assist a group of contractor employees who were operating a leased Rail Grinder. Claimant Bleeker was assigned the responsibility of obtaining a "track and time permit", and by the testimony of Trainmaster Duane Wilkerson Claimant Bleeker properly fulfilled that part of his assignment. Trainmaster Wilkerson testified that Claimant Bleeker was also to serve as the "pilot" on the Loram Rail Grinder SPM-6. Claimant Moore, who was also assigned to ride in the cab of the Rail Grinder, was responsible for observing the work being done by the contractor employees in order to ensure that that work was performed in accordance with Carrier standards.

Three other individuals, employees of the contractor, were assigned to the Loram Rail Grinder. They were Mr. Brian Hunter, who was the superintendent assigned to the machine, a Mr. Calvin Hankinson, who was the operator of the Rail Grinder, and a Mr. Aaron Young, who was the laborer assigned to the Rail Grinder.

As the Rail Grinder was moving westward, and as it rounded a curve, the operator was unable to stop the Rail Grinder in time before it collided with BN Boom Truck 10197. The collision resulted in injuries to two BN employees assigned to the Boom Truck. No employees on the Rail Grinder suffered injury.

The Board could, if it so desired, analyze this case in minute detail. However, that exercise is unnecessary in view of the following relevant and controlling facts:

1. Neither Claimant was qualified to operate the Rail Grinder.
2. Neither Claimant was positioned in the cab so that he had a better view of the track than did the operator, so that if Claimant Bleeker was, in fact, to serve as the pilot he was not assigned the proper seat.
3. Superintendent Hunter, who was in a better position to warn the operator regarding the discerned presence of the Boom Truck, testified that he was familiar with the terrain being traversed.
4. There is no reason to believe that the operator did not apply the brakes of the Rail Grinder as soon as he observed the Boom Truck fouling the track.

5. Subsequent examination of the track where the Rail Grinder began its braking action revealed that the track had been recently greased.

6. Superintendent Hunter testified that both he and his operator "knew the area . . . that [they] were working on", and they both assumed that they were "running [at] a safe speed".

7. Urinalysis testing of the Claimants proved negative as it did for Superintendent Hunter, while there was an unverified urinalysis result attributable to one of the other two contractor employees.

8. There is no evidence in the record to establish that either Claimant had been trained regarding the operation of the Loram Rail Grinder, nor is there any reason to conclude, from the record, that either Claimant knew the braking/stopping distance which would be needed in the case of an emergency.

9. The record evidence is devoid of any substantial testimony which would lead to the conclusion that the Loram Rail Grinder was moving at an excessive speed.

10. The operator of the Rail Grinder, Mr. Calvin Hankinson, was not made available at the investigation for purposes of testifying regarding his experience or his actions on the day in question.

It should also be observed that between them the Claimants had accumulated approximately 55 years of service with the Carrier, and their combined disciplinary records were unblemished. That fact only contributes to the outrageous conduct by the Carrier in assessing discipline against the Claimants in the circumstances of this case.

The Chairman of this Board has reviewed numerous cases involving railroad employees, in many crafts and classes, where the carrier has sought to assess responsibility for an on-track or off-track accident. Never in this Chairman's experience has a carrier failed to present for examination the individual who was operating the vehicle or the engine or the caboose or the car which collided with a structure or another vehicle. The failure to produce Operator Hankinson instantaneously, in this Board's opinion, nullified the Carrier's ability to conduct a fair and impartial investigation and to assess responsibility, in any degree, for the collision.

Presumably, the Carrier blames the Claimants because they did not caution the operator to slow down or did not shout out soon enough to convince the operator that some braking action was needed. Superintendent Hunter's testimony completely undermines these speculative charges by the Carrier. It is inconceivable that the Carrier official(s) who reviewed this transcript, and, presumably, considered the evidence and the well-articulated arguments of the Organization, could have concluded that the Claimants bore responsibility for the accident to the extent of imposing thirty day disciplinary suspensions.

The Carrier has pitifully failed to present sufficient evidence for this Board to conclude that discipline was justified.

Accordingly, the claims will be sustained.

Award: The claims are sustained. The Carrier is directed to make the Claimants whole for all lost time and benefits and to physically expunge any reference to these disciplines from their Personal Records. This Award was signed this 10th day of March, 1994.

Richard R. Kasher

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