

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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CASE NO. 52

AWARD NO. 52

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. Bernard L. Jackson, hereinafter the Claimant, entered the Carrier's service as a B & B Carpenter on August 27, 1973. He was subsequently promoted to the position of B & B Foreman and he was occupying that position when he was demoted for a period of sixty (60) months by the Carrier effective April 4, 1988.

The Claimant was demoted as a result of an investigation which was held on March 28, 1988 in Malta, Montana. At the investigation the Claimant was represented by the Organization. The Carrier issued the sixty (60) month demotion to the Claimant based upon its findings that he had violated Rules 532 and 550 of the Rules of the Maintenance of Way Department by allegedly failing to be alert and attentive to the Company's service while on duty and for his alleged failure to properly supervise employees under his jurisdiction while working as a B & B Foreman on Mobile Crew 744-054 on March 14, 1988.

Findings and Opinion

On March 14, 1988 the Claimant was assigned as Foreman of a Mobile Crew that was assigned to work on Bridge 343.5 in the Malta area.

B & B Supervisor Robert D. Krause testified regarding his observations of the Claimant and the Claimant's crew on the day in question. Apparently, in order to refresh his recollection, Supervisor Krause used a log which he had compiled contemporaneously on the day in question. The log was entered into evidence by the Conducting Officer at the investigation over the objection of the Organization Representative.

This Board will first address the question of whether the log was properly admitted into evidence. While there may have been certain discrepancies in the log, the Organization Representative was given more than adequate opportunity to review the log and to challenge Supervisor Krause's recollection regarding what had occurred on March 14, 1988. In reviewing the evidence of record, this Board views Mr. Krause's direct testimony and his "cross-examination" by Organization Representative Knutson, which testimony was based upon Krause's eyewitness account, as the "best evidence" of what occurred, from Supervisor Krause's view, on March 14, 1988. The Conducting Officer did not err by admitting the log into evidence, since its weight, if any, will be determined by this Board. Therefore we find no merit to the Organization's contention that the Carrier failed to conduct a fair and impartial investigation by designating the log as an exhibit and attaching it to the transcript.

Supervisor Krause testified that he spent the entirety of March 14, 1988 observing Mobile Crew 744-054 for the purpose of conducting "efficiency tests".

Mobile Crew 744-054 was working a ten (10) hour day on March 14, 1988, and Supervisor Krause observed the Claimant and his crew between the hours of 7:00 a.m. until approximately 6:10 p.m.

We find it unnecessary to list and review each of Supervisor Krause's observations during the time period involved. He made numerous contemporaneous notes of what he observed and his direct recollection was summarized in response to a question from the Conducting Officer at page 4 of the transcript:

"Q. Could you, for the record, reflect what transpired during your observation of this mobile crew that Mr. Jackson was the foreman on on March 14, 1988?

A. I observed basically the whole day watching this crew in between the bridge 343.5 and the univans. This crew was not doing any work."

While the transcript does, in fact, establish that the Claimant and his crew placed twenty-two (22) ties, worked on "unfreezing" the brakes on the tie crane, and worked on making an hydraulic machine operative by removing water from its engine oil, the substantial and convincing evidence of record establishes that the Claimant and his crew performed little or no productive work during the course of a ten (10) hour work day.

The Claimant admitted, on several occasions during the investigation, that he did not assign members of his crew to do ordinary and customary maintenance of way work during "down times"; that is periods during which he had no track permits or track permits had been declined because there would have been insufficient time to work on the bridge.

It is also clear in reviewing the totality of the record that the Claimant did not issue appropriate instructions and directions to his crew to ensure that some productive work would be accomplished during their duty hours.

While the Claimant and members of his crew all testified regarding the difficulties they encountered in making the tie crane and hydraulic machine operable, it is inconceivable to this Board that a six (6) man crew assigned to a ten (10) hour day could perform as little work as this crew did.

Accordingly, we find that the Carrier had just cause to discipline the Claimant. However, in view of the fact that the Claimant has been a B & B Foreman for more than ten (10) years and since this is his first offense of this type, this Board considers a five (5) year demotion as an overly severe penalty for the offense. Therefore, we shall modify the discipline by reducing the demotion to one (1) full calendar year.

Award: The claim is denied. The Carrier properly demoted the Claimant. The Claimant shall be demoted for one (1) full calendar year, and he shall have his B & B Foreman's position and seniority restored on April 4, 1989, consistent with his ability to meet the physical and rules examination requirements which have been established by the Carrier.

This Award was signed this 14th day of July 1988 in
Bryn Mawr, Pennsylvania.

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