

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 53

AWARD NO. 53

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. Donald L. Hiatt, hereinafter the Claimant, entered the Carrier's service as a Laborer on May 21, 1979. He was subsequently promoted to the position of Welder, and he was occupying that position when an entry of censure was placed on his personal record by the Carrier by letter dated April 20, 1988.

The Claimant was censured as a result of an investigation which was held on March 31, 1988 in McCook, Nebraska. At the investigation the Claimant was represented by the Organization. The Carrier issued the entry of censure to the Claimant based upon its findings that he had violated General Rule E of the Rules of the Maintenance of Way Department by allegedly failing to provide a slow order on the west switch at Amherst, Colorado from Wednesday, March 2 until Thursday, March 3, 1988 having ground or hollowed out an approximate 5-inch spot behind the point of the frog, while assigned as Welder at Grant, Nebraska.

Findings and Opinion

The Claimant, who was in charge of a Grinder Operator, Mr. C.J. Bays, on the dates that the incident occurred, had been assigned by Roadmaster T.A. Leicester to repair the west switch at Amherst, Colorado. The record appears to reflect that the need for repair of the switch was discerned by Track Inspector E.M. Ferguson.

The Claimant and Grinder Bays began working on the switch on Wednesday, March 2, 1988. Operator Bays was able to grind out the defective frog. However, the Claimant was not able to complete a substantial portion of the weld because his welding machine became inoperative. During the remainder of day in question the Claimant exercised diligent efforts to have his welder repaired. He was unsuccessful.

After the Claimant marked off at the conclusion of his assignment on Wednesday, March 2, 1988, a local freight and an empty coal car ran over the west switch at Amherst, Colorado without incident.

In the early morning of March 3, 1988, when the Claimant was back on duty and when he discovered that his welding machine was still inoperative, the Claimant conferred with Track Inspector Ferguson to determine whether in his view, Ferguson's, a "slow order" should be placed on the switch. As a result of Track Inspector Ferguson's opinion in the affirmative, the Claimant undertook to have one mile of track placed under a slow order. Normal operating speed over the west switch at Amherst is 49 miles per hour.

The issue in this case is whether the Claimant, by failing to place a slow order on the switch area in question on Wednesday, March 2, 1988, violated General Rule E of the Rules of the Maintenance of Way Department.

Much of this case involves questions of "opinion"; that is, the extent to which different participants in the incident with different levels of training and expertise, concluded that a slow order was necessary for purposes of ensuring safety, and that the slow order should have been placed sometime during the course of the March 2, 1988 work day. Both Roadmaster Leicester and Track Inspector Ferguson, men of considerable experience and training regarding the placement of slow orders, agreed that a slow order should have been placed on March 2, 1988; albeit they disagreed as to the speed of the slow order (25 mph as opposed to 20 mph). Grinder Bays, an employee with no experience or training regarding the placement of slow orders, thought it may have been appropriate to place a slow order on March 2, 1988.

The Claimant was of the opinion, on March 2, 1988, that it was not necessary to place a slow order. He was of this opinion because in the past while grinding out and re-welding switches he had had occasion to stop welding on a switch and frog while a train passed over the uncompleted switch without being subject to a slow order. It was the Claimant's opinion, apparently, that if the switch could be repaired within a reasonable period of time, and if the switch was not subject to a substantial amount of train traffic, that a slow order would not be necessary.

When the Claimant discovered on the morning of March 3, 1988 that his welding machine was still inoperable, and when he concluded, apparently, that he would not be able to complete repair of the switch in a reasonable time, he conferred with higher, qualified authority to determine what course of action he should take.

While one may argue that the Claimant would have been more diligent had he immediately had a slow order placed on the switch area in question on March 2, 1988, and while the Carrier has apparently subscribed to that argument, this Board finds insufficient evidence to conclude that the Claimant was guilty of a Rules violation.

In the introductory paragraphs of this Award, the Board has noted that the parties agreed that in determining whether discipline assessed should be upheld the Board must conclude that "substantial evidence was adduced by the investigation to prove the charges made".

In this Board's opinion the Carrier has fallen somewhat short of presenting "substantial" evidence regarding the Claimant's alleged dereliction. First, there is no reason to conclude that the Claimant was not truthful when he testified to the effect that he had received no training regarding how and when slow orders were to be placed. There is no evidence in the record to contradict the Claimant's claim of non-training. In fact, when the Claimant did place the slow order he "took out" approximately one mile of track, rather than limiting the slow order to the west switch area. This indicates a cause to believe that the Claimant had no instruction or training the placement of slow orders. Secondly, there is no contradiction to the Claimant's testimony that in his past experience trains had run over switch areas that he was welding prior to completion of his work. While this Board does not intend to imply that an individual in the Claimant's position should not place a slow order in circumstances similar to those encountered by the Claimant on March 2, 1988, nevertheless we find, based upon the particular facts in this case, that the Carrier has failed to present substantial evidence justifying "second guessing" of the Claimant's judgment; since the

Claimant's judgment was based upon his limited knowledge and training regarding when and how slow orders should be placed.

Accordingly, this Board has concluded that the claim should be sustained.

Award: The claim is sustained. The Carrier is directed to remove the entry of censure from the Claimant's Personal Record. This Award was signed this 15th day of July 1988 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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