

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CASE NO. 61

AWARD NO. 61

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. John F. Roller, hereinafter the Claimant, entered the Carrier's service as a Extra Gang Laborer on May 13, 1974. He was subsequently promoted to the position of Section Foreman and he was occupying the position of Relief Track Inspector when he was suspended from the Carrier's service for fifteen (15) days effective September 1, 1988.

The Claimant was suspended as the result of an investigation which was held on August 8, 1988 in the Roadmaster's Office at Dickinson, North Dakota. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rule 104(b) of the Rules of the Maintenance of Way Department because of his alleged "failure to line and lock the East Switch at Lehigh, North Dakota, for Main Line movement at approximately 0945 hours on July 28, 1988".

Findings and Opinion

There are no relevant facts in dispute regarding the incident which led the Carrier to discipline the Claimant.

The Claimant was assigned on July 28, 1988 as a Relief Track Inspector, since the regularly assigned Track Inspector was on vacation that day. There is some evidence in the record that the Claimant had, occasionally in the past, worked as a Relief Track Inspector.

Roadmaster Lane Ross testified that he was advised of an incident where the East Switch at Lehigh, North Dakota had been "left against Main Line traffic" and that when he investigated the incident the Claimant informed him that he had worked on the switch at Lehigh, left the switch, had gone to inspect track at another location and then realized that he had left "the switch open because he had forgotten his keys in the switch at Lehigh".

In response to a question from the Conducting Officer as to whether he had lined the siding switch for the Main Line at Lehigh prior to his leaving to inspect track at the other location, the Claimant answered "I must not have. I noticed when I got towards Antelope that my keys were missing".

The Claimant also testified that he was a qualified Track Inspector, but that because he only functioned occasionally in this capacity he was not fully familiar with the routine performance of work required of Track Inspectors. The Claimant was normally assigned to a Truck Driver's position.

In his closing statement, the Claimant submitted that in his fourteen (14) years with the Carrier he had a "good record" with no disciplinary violations. The Claimant also alleged that a fellow employee with whom he had worked was given a five (5) day suspension for a violation similar to the one he allegedly committed on July 28, 1988.

The Organization argued that the Claimant was a dedicated, long-term employee with an unblemished service record, and submitted that the Claimant's general lack of familiarity with the responsibilities of the Track Inspector position should be taken into consideration by the Carrier.

The Organization also submitted documentation showing that another employee who admitted violation of Rule 104, the rule establishing how Main Line switches should be lined and locked when they are left, was given a five (5) day suspension for that offense. The Organization contended that if any discipline were to be assessed it should be similar to discipline imposed on other employees charged

with the same offense.

The Claimant does not deny that he violated the rule and operating practices regarding the lining of switches; nor does he deny that he was qualified to fill the position of Track Inspector.

Accordingly, there is no question but that the Carrier had the right to discipline the Claimant for the violation of this rule. The only question is whether a fifteen (15) day disciplinary suspension is arbitrary or overly severe. We think that it is for three reasons. First, based upon our review of other disciplinary penalties that have come before this Board, we find a fifteen (15) suspension from service to be rather lengthy. Secondly, the Claimant had a fourteen (14) year unblemished record, and in the context of our finding that fifteen (15) days for a first offense of this nature is per se a lengthy penalty, we are further persuaded that the Claimant, with a particularly good prior disciplinary record, should not have been removed from service for fifteen (15) days. Thirdly, the Organization has submitted evidence which would indicate that the Carrier has, in the past, assessed lesser discipline for a similar offense. That evidence is a prima facie showing that a claim of disparate treatment is supportable.

For all of the above reasons, the Board concludes that while discipline was appropriately imposed, the penalty of fifteen (15) days was arbitrary and overly severe. Therefore we will reduce the Claimant's discipline to a five (5) day suspension and direct the Carrier to reimburse him for any lost wages or benefits which were imposed beyond a five (5) day limit.

Award: The claim is denied. The Carrier had just cause to discipline the Claimant. However, it is found that the fifteen (15) day suspension imposed was arbitrary and overly severe. Therefore the Carrier is directed to convert the discipline to a five (5) day suspension and to make the Claimant whole for any losses suffered as the result of his being held out of service for the additional ten (10) days.

This Award was signed this 3rd day of November 1988
in Bryn Mawr, Pennsylvania.



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