

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 925

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*****
BURLINGTON NORTHERN RAILROAD COMPANY          *
- and -                                         *
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES    *
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                                           CASE NO. 74
                                           AWARD NO. 74
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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. Richard P. Hecker, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on May 5, 1971. The Claimant was subsequently promoted to the position of Machine Operator and he was occupying that position when he was censured by the Carrier on October 3, 1989.

The Claimant was censured as a result of an investigation which was held on September 11, 1989 in the Burlington Northern Depot in Miles City, Montana. At the investigation the Claimant was represented by the Organization. The Carrier censured the Claimant based upon its findings that he had violated Rule 40 by his failure to clear Train 141-RC07-21 ten (10) minutes in advance at approximately 1220 hours on August 22, 1989 resulting in a close call scare by Locomotive Engineer T.R. Gress.

### Findings and Opinion

On August 22, 1989 Locomotive Engineer T.R. Gress reported to Mr. Lantrip, the trainmaster at Forsyth, that he had a close call with a bulldozer that was being operated in the vicinity of milepost 84.6. Locomotive Engineer Gress reported that the blades of this machine were too close to the track and that he had been prepared to make an emergency stop of his train.

Trainmaster Lantrip then informed Roadmaster M.A. Carpenter about the close call.

Machine Operators D.W. Porter, D.E. Wivholm and the Claimant were operating machines in the vicinity of milepost 84.6 at the time and on the date in question. They and the Claimant received a notice of investigation dated August 24, 1989, which advised them that they were to attend an investigation which was being conducted to ascertain facts and determine "your responsibility in connection with your alleged failure to protect men and equipment as reported by Train 141-RC007-21 at MP 84.6 on the Dakota 3rd Sub at approximately 1220 hours, on Tuesday, August 22, 1989".

At the investigation Locomotive Engineer Gress and Head Brakeman M.A. Nellerhoe testified regarding their sighting of a piece of Maintenance of Way equipment which they considered to have been "too close to the track" as they operated Train No. 141-RC007-21 past milepost 84.6 on August 22, 1989.

Ordinarily, this Board would recite and discuss a number of factual elements raised in the transcript which would give the readers of this decision some sense as to what occurred during the course of the incident which gave rise to the Carrier's ultimate determination to impose discipline. We will not burden this Opinion or the ultimate readers of this decision with such a factual rendition; because the investigation transcript is filled with irrelevant and unnecessary testimony and colloquies between the Conducting Officer and the Organization Representatives.

In fact, the notice of investigation and the subsequent issuance of the censure clearly manifest the confused nature of the investigation from beginning to end.

During the investigation itself the Conducting Officer cited at least a half a dozen rules, which the Claimant allegedly violated. None of those rules were cited in the initial notice of investigation and several of those rules had absolutely no relevance to the clear and obvious facts at hand. For example, the Conducting Officer cited Rule 43, which is specifically concerned with obtaining line ups and clearing the main track by at least ten minutes for regular trains

where "on-track equipment" may be involved; yet, the record is absolutely clear that the Claimant and his fellow employees were engaged in the operation of off-track equipment. The Conducting Officer also cited rules regarding the "fouling" of track; yet there was absolutely no evidence in the record that the track had been fouled by the equipment the Claimant was operating or by the equipment being operated by the other two principals, Messrs. Porter or Wivholm.

Simply stated, this Board is of the opinion that the Carrier, having received a reported "close call" from the train crew of Train No. 141-RC007-21, issued an imprecise notice of investigation, cited three potential principals, when clearly only one of the machine operators, the Claimant, was possibly responsible for his piece of equipment being in violation of safety rules, and then used a "shotgun approach" at the investigation by citing any and every conceivable rule which might apply to the safe operation of off-track as well as on-track Maintenance of Way equipment.

The Organization Representatives did not help the Board in properly assessing the evidence in the record. It is conceivable that the Organization was as distracted as the Board was by the Conducting Officer's continual citing of non-applicable rules and hypothetical circumstances. Illustrative of the lack of direction of the parties in developing a full and complete record is the following inane, but somewhat humorous, questioning of one of the machine operators:

"Q Mr. Porter, if your job -- is your job dangerous if done -- is your job dangerous?

A. Very dangerous.

Q. Do you have to use all your skills and your knowledge to perform it in a safe manner?

A. Yes, you do.

Q. If you would allow your mind to deviate from your job, if you were to start thinking of other things, is it possible that you could injure others as well as yourself or equipment of the Burlington Northern?

A. Very easy. Just a split second and you could be over the bank.

Q. In other words, apparently we have people who are not familiar with your type of equipment trying to tell us how you can run it safe and how not to run it safe. But, it is a known fact that people do get hurt running your machines; is that true?

A. That is very true.

- Q. I want to just remind us of the fact that you have to be constantly on your own (inaudible) all the time to properly perform your work?
- A. That is correct.
- Q. You do not dare think about girls, or trains, or anything else. You have to concentrate on your machine and its function and its purpose in order to do it properly. Is that not true?
- A. [no answer received]
- Q. If you were to start deviating from this and let your mind wander, is it possible that you could make a mistake?
- A. Very possible to make a mistake. Very possible to get killed.
- Q. You could also damage Company property, couldn't you?
- A. Definitely, you could damage Company property.
- Q. You could also probably injure somebody else?
- A. You could run over somebody.
- Q. You wouldn't do this intentionally, would you?
- A. No, never."

What have we learned from this dialogue. Apparently, Mr. Porter, although he did not answer the question, does not think about girls or trains while he is operating his equipment. He obviously, recognizes that "safety is of the first importance"; no double entendre intended. Mr. Porter also would "never" "intentionally" run over a fellow employee, whether he was a co-worker or a member of management; for to do so, might violate several of the Carrier's safety rules.

Becoming serious, only for a moment, certainly the Carrier has a right to be concerned about Maintenance of Way employees strictly observing operating and safety rules, when they are handling on-track or off-track equipment and when trains are operating in the vicinity of that equipment. However, the Carrier is obligated in accordance with Schedule Rule 40 to precisely identify rules that a suspected principal has possibly violated when it issues a notice of investigation. The Carrier failed to do that in the instant case.

The transcript of this investigation journeyed into areas of irrelevancy and humor because the notice of investigation was


deficient, as it failed to precisely identify the piece of machinery that allegedly violated either the eight foot rule (Rule 730) and/or the ten minute rules (Rules 40 and 43). In fact, the notice of censure combines, in the initial paragraph, a violation by the Claimant for failing to clear the main line "further than 8' ten minutes in advance of Train 141-RC007-21", while the specific citation in the notice of censure references a violation of "Rule 40" for the failure to clear the train by ten minutes.

In assessing the totality of the investigative record and the materials presented to this Board, we are compelled to conclude that the Carrier failed to abide by the requirements in Schedule Rule 40 as its notice of investigation was imprecise and confusing; and that this violation of Schedule Rule 40 was compounded by an investigation transcript that did nothing to focus the issues or remedy the confusion.

Based upon the foregoing findings, this Board concludes that the claim should be sustained and that the censure must be removed from the Claimant's record.

Award: The claim is sustained. The Carrier is directed to remove, by physical erasure, the censure in the Claimant's Personal Record.

This Award was signed this 12th day of November 1989 in Bryn Mawr, Pennsylvania.

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