NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	
- and -	CASE NO. 76
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	AWARD NO. 76

On May 13, 1983 the Brotherhood of Maintenance of Way Employes (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. Karl P. Knutsen, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on September 6, 1973. The Claimant was subsequently promoted to the position of Machine Operator on July 25, 1975, and he was occupying that position when he was suspended by the Carrier for a period of five (5) days effective September 29, 1989.

The Claimant was suspended as a result of an investigation which was held on September 8, 1989 in the Trainmaster's Office, Northtown General Office Building, in Minneapolis, Minnesota. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant for five (5) days based upon its findings that he had violated Rules K, 50 and 935 of the Maintenance of Way Department based upon the alleged manner in which he operated car mover X160052 which operation resulted in the striking and damage of a building owned by Hawley Co-Op Elevator Company.

Findings and Opinion

Roadmaster Ray Romano, stationed at Staples, Minnesota, testified that on August 21, 1989 at approximately 3:00 p.m., he was notified of an incident involving the striking of a building owned by Hawley Co-Op Elevator Company by a Carrier on-track vehicle, identified as car mover X160052.

Roadmaster Romano's investigation established that the Claimant was the operator of the car mover, and that the on-track vehicle was moving east to west with its boom in a forward position, and that the boom, positioned at a thirty degree angle to the right, or north, struck the side of the building and caused approximately $4,000 worth of damage.

The transcript of investigation includes the testimony of Roadmaster Romano, the Claimant who was in charge of operating the car mover and Mr. T.J. Zilka, who was a Group II Machine Operator on the day in question, and who was working with the Claimant and positioned "on the west end of an air dump on the south side of the track".

Mr. Zilka testified that he was stationed on the west end of this car for the purpose of "Flagging for cars and pedestrians at railroad crossings" and that from his position on the west end of the car he was not able to "see the position of the crane boom".

Both the Claimant and Mr. Zilka testified that they were not aware of the fact that the boom was in a position to make contact with the building until they heard the "tin ripping".

There is significant evidence in the record regarding the manner in which the Claimant operated the car mover, and the Claimant has testified at length as to the reasons why he did not have the boom in a "trailing" position.

The Rules of the Carrier, particularly Rule 395, clearly establish, in this Board's opinion, that the Claimant would have acted prudently and consistently with the rules had he ensured that the boom was "properly secured" and, "when practical", placed in a "trailing position".

In spite of the evidence presented by the Organization which shows that the curve of the track over which the Claimant was operating caused the equipment to come relatively close to the side of the building, and in spite of the evidence which shows that the Claimant's view, at some period of time during the move, was totally or partially obstructed, this Board is, nevertheless, satisfied that the Claimant did not operate car mover X160052 with the proper degree of care and caution.

In this Board's opinion, the Carrier had reason to conclude that the Claimant did not act with proper diligence.

Having made that finding, however, does not dispose of the matter, since the Organization has raised two (2) procedural objections which must be addressed.

First, the Organization argues that the Carrier's notice of investigation does not meet the requirements of Schedule Rule 40, since its does not advise the Claimant, with sufficient specificity, of the rules which he allegedly violated on August 21, 1989.

This Board has held many times that when a notice of investigation advises a principal of the time, the place and the nature of the incident which is the cause of the investigation, absent some showing that the principal could not properly prepare for the investigation, the notice will be considered sufficient. In the instant case, the Claimant and his Organization were more than fully prepared to respond to the facts submitted during the testimony of Messrs. Romano and Zilka. In fact, the Organization was so well prepared that it presented the Carrier and now the Board with numerous exhibits demonstrating, among other things, the Claimant's obstructed view and the unusual curvature of the track in the vicinity of the accident. The Claimant himself was fully cognizant of the rules cited during the investigation by the Conducting Officer, and, in fact, appeared at times to be more familiar with the rules than was the Conducting Officer. Accordingly, the Board finds no merit in the Organization's contention that the notice was deficient and/or that the Claimant was deprived of any rights to procedural due process because of the notice.

The Organization's second procedural objection concerns the argument that the Claimant was deprived of a fair and impartial investigation, since the Carrier, by only charging him and not his fellow worker, Mr. Zilka, prejudged the incident by concluding that if there was responsibility for the incident/accident it was the Claimant's alone.

This Board finds substantial merit in that argument. The evidence of record establishes, without doubt, that the Claimant and Mr. Zilka were operating, for all practical purposes, as a "crew". While ultimate testimony may have proven that Mr. Zilka was only responsible to "look out for traffic, pedestrians and/or other obstructions at railroad crossings", the fact remains that prior to the investigation the Carrier could not know whether there had been an arrangement between the Claimant and Machine Operator Zilka whereby Zilka would also be responsible for keeping the Claimant

advised during "blind" times of the move of other types of obstructions close to the track. The Organization is correct when it states that both members of the crew should have been named as principals. If the Carrier concluded that Mr. Zilka bore no responsibility in his position as "point man" or "look out" for the incident with the boom, Mr. Zilka could have been found not to have been in violation of any of the Carrier's safety rules.

The Board agrees with the Organization that there was prejudgment in this case. There can be no dispute that the damage done to the building was caused by the negligence of a Carrier employee or employees; the building did not move. The negligence falls within the concept of res ipsa loquitor. Therefore, both parties knew that someone in the Carrier's employ would be responsible for the cause of the accident. Once the Claimant was named as principal, he and he alone was the only employee who could have been found guilty; and, Mr. Zilka's participation, no matter how contributorily negligent it may have been, was not going to be an issue.

The Board does not imply that Mr. Zilka was responsible, in whole or in part, for the incident on August 21, 1989. The Board does find, because the Claimant alone was charged for an incident in which he was not the only crew person responsible for the move, that the Claimant was deprived of a fair and impartial hearing.

Accordingly, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to physically remove the entry of a suspension on the Claimant's personal record, and to make the Claimant whole for all lost wages and other benefits he suffered as a result of the five (5) day suspension.

This Award was signed this 10th day of March 1990.

Richard R. Kasher

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