

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. 117
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* AWARD NO. 117
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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 procedures.

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. Dean Robert Moore, hereinafter the Claimant, originally entered the Carrier's service as a Section Laborer on May 24, 1971. The Claimant was subsequently promoted to the position of Section Foreman, and he was occupying that position when he was restricted indefinitely from Foreman positions which require the supervision of on-track equipment, other than hy-rail inspection and hy-rail maintenance vehicles effective January 7, 1992.

The Claimant was restricted as a result of an investigation which was held on December 10, 1991 in the Trainmaster's Office in Brookfield, Missouri. At the investigation the Claimant was represented by the Organization. The Carrier restricted the Claimant based upon its findings that he had violated Safety Rules 550, 564 and 567 by his alleged failure to ensure that BNX 5400160 was operated in a safe and efficient manner on November 30, 1991.

Findings of the Board

Roadmaster E.R. Miller testified that on Saturday, November 30, 1991 the Claimant was the Foreman of SCU Gang No. 34 and responsible for machine BNX 5400160 among other pieces of equipment. Roadmaster Miller testified that he received a telephone call, on that date, at home, from the Claimant, and that the Claimant told him that he was riding on machine BNX 5400160, a piece of on-track equipment, and that the machine had "hit the

crossing". Roadmaster Miller testified that examination of the machine indicated that a significant amount of damage had been done and that an original estimate of \$4,000 had been made for repairs. Subsequently, the Carrier received an estimate of \$12,000 for repairs to the equipment.

Roadmaster Miller testified that in his opinion the accident had been caused because the jack assembly was not in an upright/raised position and locked into that position. Roadmaster Miller testified that had the "operator raised the jack frame up and locked it in" and had "the foreman checked to make sure he did do that" then the accident and resulting damage would not have occurred. Roadmaster Miller testified that when he first question the Claimant and the operator regarding the reason the crossing had been hit that it was "first said I just didn't raise the jack frame up, forgot about it and I asked Dean [the Claimant] if he was riding with it and he 'said it was'". Roadmaster Miller testified that in his opinion the Claimant was responsible, as the Foreman, to "see that this equipment is operating and set up in a proper manner in order to surface and line track".

In response to questions by the Organization Representative, Roadmaster Miller conceded that "things mechanically can fail".

Mr. J.D. Watson, a Traveling Mechanic headquartered at Brookfield, Missouri, testified that he examined the damaged equipment and believed that the crew on November 30, 1991 had, apparently, failed to raise the jack frame and lock it in a proper position in order to avoid striking the crossing.

In response to questions by the Organization Representative, Mr. Watson testified regarding certain damage to the machine which had been caused by the "wear and tear of everyday usage".

The Claimant testified, candidly, at page 22 of the transcript, in response to questions from the Conducting Officer as follows:

- Q. Did you personally check to see that all safety devices were pinned and locked on this machine before you proceeded to clear in Callao, Missouri?
- A. No, I did not, sir.
- Q. Did you have knowledge that the jack assembly and liner assembly was still down on the rail when you began to travel?
- A. No, I did not.
- Q. And when you struck the crossing, was that your first knowledge that the jack assembly had been left down on the rail?
- A. Yes, sir, it was.

Q. After you struck the crossing at 81.60 near Callao, were you able to get the jack assembly and liner assembly to raise up and lock away safely?

A. Yes, sir.

Again, at pages 24 and 26 of the transcript the Claimant "admitted" that he had not been sufficiently diligent in ensuring that the jack assembly had been locked into the proper position before machine BNX 5400160 was moved; and that his failure was the cause of the accident.

Although the Claimant denied that he violated any of the Carrier's safety rules, the evidence in the record is substantial and convincing in establishing that the Claimant failed to take proper precaution in order to ensure that the accident did not occur. Accordingly, the claim will be denied.

By way of dicta, the Board would observe that the Claimant was honest and forthright during the investigation, and would suggest, based upon his candor, that the Carrier give consideration, at some time in the future, to reviewing the "indefinite" term of the Claimant's restriction.

Award: The claim is denied. This Award was signed this 30th day of June, 1992.

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