

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 149

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Case/Award No. 149

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. Albino v. Rodriguez, hereinafter the Claimant, entered the Carrier's service as a Sectionman on July 16, 1966. The Claimant was subsequently promoted to the position of Foreman and he was occupying that position when he was censured by the Carrier on December 4, 1992.

The Claimant was censured as a result of an investigation which was held on November 5, 1992 at the Carrier's depot in Casper, Wyoming. At the investigation the Claimant was represented by the Organization. The Carrier censured the Claimant based upon its findings that he had violated Rule 402 by his alleged failure to clear his track warrant on September 21, 1992, which failure allegedly resulted in delays to several trains between the hours of 4:00 p.m. and 9:00 p.m. on that date.

Findings and Opinion

On September 21, 1992 the Claimant was the Foreman of a tie gang. As part of his duties he was in charge of overseeing the performance of on-track work which required the issuance and his obtaining of a track warrant. A track warrant was issued to the Claimant for work between milepost 291 and the east yard limit of Shobon on the Carrier's main track. The track warrant was issued at approximately 3:25 p.m.; and by the Claimant's testimony the work on the track and the equipment was cleared from the track approximately two hours after the "issuance" of the warrant.

The probative evidence of record, contained in the testimony of Roadmaster E.D. Fransen and the Claimant, establishes that the Claimant "forgot" to turn in his track warrant and release the track to traffic until approximately 9:27 p.m. on the evening of September 21, 1992. This failure resulted in a number of train delays and caused a number of crews to "die" under the terms of the Hours of Service law applicable to train service employees.

The Claimant testified that on the day in question the machines he was responsible for were in "really poor shape mechanically" and because of that condition and the fact that he was "short handed", he had numerous responsibilities which contributed to his failing to remember to turn in his track warrant when the track was clear of equipment and gang members. The Claimant admitted that after the conclusion of his shift and after he had finished dinner and was on his way home he "met Jesse Montanez, [and] he told me the dispatcher needed my track warrant back"; and, "That is when I realized I had forgotten to turn back my track warrant, I just simply forgot, I was working under a track warrant".

The Claimant's admission establishes that he knew what his responsibility was and that he failed to follow the applicable rule regarding return of a track warrant. The fact that the Carrier may not, in the past, have investigated and/or disciplined all employees who failed to timely turn in track warrants does not establish a claim for disparate treatment. The Claimant was not and should not have been under the impression that no discipline would flow for his ignoring of the rule regarding the return of a track warrant. The fact that the track warrant did not contain a specific time for return of the warrant does not excuse the Claimant's failure to return the warrant for a period of approximately four hours, during which time a number

of trains were delayed and the Carrier incurred unnecessary train service crew costs associated with the Hours of Service law.

The Claimant may have had more duties than usual, due to the alleged poor condition of his equipment, which needed his immediate attention. However, that fact alone does not excuse his dereliction regarding the untimely return of the track warrant.

The Board would observe that there was no dispute that the Claimant violated the applicable rule, and caused the Carrier to incur unnecessary expense and disruption of its train schedule which could have caused distress to Carrier customers. The discipline imposed was minimal; and there was no color of any meritorious defense which could have been conceivably raised in the Claimant's behalf. The Chairman of this Board has no idea why the Organization chose to progress this claim to arbitration, unless, unfortunately, it has become the policy of the BMW to appeal every discipline imposed.

Based upon the foregoing findings and opinion, the claim will be denied.

Award: The claim is denied.

This Award was signed this 24th day of April,
1993.



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