NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY -and- BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	CASE NO. 15 AWARD NO. 15

On May 13, 1983 the Brotherhood of Maintenance of Way Employes (herinafter 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 Section 3 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 is limited to disciplinary disputes involving employees dismissed from service. 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 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 are dismissed from the Carrier's service may choose to appeal their their dismissals to this Board, and they have a sixty (60) day period from the date of their dismissals to elect to handle their appeals through the usual appeal channels, under Schedule Rule 40, or to submit their appeals directly to this Board in anticipation of receiving expedited decisions. The employee who is dismissed may elect either option, but upon such election that employee waives any rights to the other appeal procedure.

The agreement further establishes that within thirty (30) days after a dismissed employee's written notification of his/her desire for expedited handling of his/her appeal is received by the Carrier Member of the Board, that said Member shall arrange to transmit one copy of the notice of investigation, the transcript of investigation, the notice of dismissal, and the dismissed 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 had the option to request the parties to furnish additional data regarding the appeal, in terms of argument, evidence, and awards, prior to rendering a final binding decision in the instant case. 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 excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

Mr. Michael Craig Okler, the Claimant, who entered the Carrier's service on August 10, 1978 as a Laborer, was dismissed from the service of the Carrier effective July 12, 1984 as the result of two investigations which were held consectively on June 14, 1984 in the Roadmaster's Office, Whitefish, Montana. At the time of his discharge, the Claimant was assigned as a Machine Operator working at or near Olney, Montana.

Findings and Opinion

The Claimant was properly served with two notices of investigation. One indicated that the Carrier desired to determine his responsibility, if any, for allegedly possessing a firearm on Company property located in Bunk Car BN951782 (this notice of investigation was dated May 23, 1984). The second notice of investigation which the Claimant received indicated that the Carrier wished to determine the Claimant's responsibility in connection with alleged violation of Safety Rules 565 and 566 regarding a collision involving a spike cleaner and a spike puller, identified by Carrier car numbers. This notice of investigation was dated May 29, 1984. Investigations were scheduled for June 6, 1984 but were postponed at the request of the Claimant and were rescheduled for June 14, 1984.

Both notices of investigation advised the Claimant that he should arrange for the presence of a representative of the Organization and/or witnesses, if he so desired. The Claimant acknowledged receipt of both notices of investigation and appeared for said investigations on June 14, 1984.

The Claimant indicated in both investigations that he was prepared to proceed although he did raise a question, at the conclusion of the second investigation involving the collision of the two Burlington Northern track vehicles, regarding the lack of fairness in the investigation because he did not have a representative of the Organization available to represent him.

This Board will first address that question. It is clear from the record that the Claimant was fully and properly advised of his rights to have an Organization representative at the investigation to represent him. The Claimant indicated, during the course of both investigations, that he had been unable to obtain the presence of an Organization representative. The record also establishes that the Claimant did not request further postponement of the investigations in order that he might effect the presence of an Organization representative nor did he object to the investigations proceeding. It was only at the end of the second investigation when the Claimant felt that the Carrier was attempting to raise issues other than those specified in the notices of investigation that he claimed some prejudice as the result of the unavailability of an Organization representative.

This Board is satisfied that the Carrier complied with Rule 40 of the collective bargaining agreement between the Organization and the Carrier and afforded the Claimant all of his rights to procedural due process under the discipline and investigation rules. The Claimant was afforded a full and complete opportunity to raise all points and contentions in support of his position; he was afforded more than adequate opportunity to call witnesses and have an Organization representative available at the hearing; and he was given full rights to examine and cross-examine witnesses during the course of the investigation. Accordingly, we find there is no procedural defect in the investigations and we will turn our attention to the merits of the charges against the Claimant.

The record establishes without contradiction that on May 23, 1984 the Claimant permitted Roadmaster Christensen, Manager of Regional Gangs Hestermann and Special Agent Bjorsness to inspect his bunk and his duffle bag which were in bunk car BN941782. The record also establishes, without contradiction, that Carrier supervision found a short shotgun, approximately 26 inches long, of Italian make in the Claimant's duffle bag. The Claimant acknowledged that the weapon belonged to him and further testified at the

investigation that the search of his duffle bag, bunk and locker was conducted with his permission.

The evidence proves clearly that the Claimant violated Safety Rule 572 which prohibits employees from having loaded or unloaded firearms in their possession while on duty or off duty on Company property, except where such employees are authorized to do so in the performance of their duties or have been given special permission to have such firearms by the superintendent.

On page 7 of the transcript the Claimant acknowledged that he had violated Safety Rule 572 on May 23, 1984.

Accordingly, this tribunal finds that the Carrier had just and sufficient cause to impose discipline upon the Claimant as a result of this violation.

The second investigation which convened on June 14, 1984 immediately subsequent to the first investigation contains evidence in the record that shows without contradiction that two track machines were traveling in a eastward direction on May 29, 1984. A spike cleaner being operated by a Mr. Peterson was in the lead. The Claimant was operating a spike puller and was trailing Mr. Peterson's machine by approximately 2,000 feet. The evidence of record indicates without contradiction, that the spike puller collided with the rear end of the spike cleaner. The cause of this accident was due in part to the fact that the Claimant was traveling for some time without paying attention to what was taking place in front of him. The Claimant was, for some substantial period of time, attempting to obtain a cigarette from his jacket pocket which was behind him and was not watching the track. Accordingly, he did not observe the spike cleaner slow down significantly as the result of other activities on the track. By the time the Claimant looked up, after obtaining the cigarette from his jacket pocket, he was too close to the spike cleaner to apply brakes and to avoid a rear end collision. The collision occurred and a reasonable amount of damage to the machinery also occurred.

The Claimant at no time denied that he was not attentive to the track in front of him while he was attempting to obtain a cigarette from his jacket pocket. The essence of the Claimant's defense is "accidents will happen." The following colloquy between the Conducting Officer and the

Claimant is significant:

"204.Q. You say, nothing out of the ordinary happened?

A. I didn't say that. I said I didn't do anything out of the ordinary. Everything I was doing up until the time that I hit the machine was ordinary. I was following in the same way, the whole bit, you know I mean it was not out of the ordinary for me to smoke a cigarette going into the hole after work. I did it everyday for a month and a half. That's the whole thing that caused the whole machine accident right there. I'm willing to fess up to that. I know what caused it. I'm not saying it wasn't my fault, because it was.

205.Q. It was your fault?

A. It was definitely my fault that I wrecked the machine. You know, that's not the point that I'm making. I'm saying that it was an accident. Accidents happen."

Carrier Safety Rules 600 and 602 provide that Machine Operators must be concerned about safety and the safety of men working with or near their machines and that an operator in charge of a machine must cooperate to see that proper methods are used in performing work with that machine and that such machines must be operated in a safe manner. Rule 600 further provides that a Machine Operator will be held responsible for any negligence on his part.

The record is abundantly clear that Claimant Okler was guilty of violating both of the above stated rules. The Claimant admitted his dereliction. It is true that "accidents will happen". If an accident was beyond the control of an employee or was caused by an "act" of God" then a Board such as this might find reason to excuse a charged employee with alleged violations. However, that is not the case here. The Claimant admitted his responsiblity for the accident and the evidence of record supports that admission.

Therefore, this Board finds that the Carrier had just and sufficient cause to impose discipline upon the Claimant.

A review of the Claimant's prior disciplinary record does not give this Board any reason to conclude that the Carrier was arbitrary or excessive when it dismissed the Claimant from service.

Accordingly, the claim will be denies.

Award: The claim is denied.

This Award was signed this 23rd day of January 1985 in Bryn Mawr, Pennsylvania.

Richard R. Kasher
Richard R. Kasher
Chairman and Neutral Member
SBA No. 925