

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 151

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 151

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. Don H. Mercer, hereinafter the Claimant, entered the Carrier's service as a Extra Gang Laborer on May 3, 1971. The Claimant was subsequently promoted to the position of Machine Operator and he was occupying that position when he was suspended by the Carrier for a period of five days commencing on January 4, 1993.

The Claimant was suspended as a result of an investigation which was held on November 24, 1992 at the Carrier's facility in Great Falls, Montana. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rule 62 by his alleged failure to operate on-track equipment at a safe speed and prepare to stop, which alleged violation resulted in a collision between BNX Truck Crane 150073 and BN Hi-rail 5384 on November 9, 1992.

Findings and Opinion

This is a "companion" case to the matter decided contemporaneously this date in Case No. 150 before this Board. The Claimant was the operator of Truck Crane BNX 150073 on November 9, 1992 when that vehicle collided with BN Hi-rail 534 at approximately 11:05 a.m. in the vicinity of milepost 207.5. The Hi-rail was being operated by Track Inspector J.F. Mayo, Track Inspector A.P. Ulsher was riding in the Hi-rail as a passenger, and J.E. Ahlin was riding on the front end of the truck crane as a "lookout" or "flagman".

The relevant evidence of record establishes that the truck crane, dragging a gondola with approximately eighty tons of scrap iron, was traveling west following a local freight; that the Hi-rail entered the track traveling east after the local freight had passed; that as the two vehicles came into each other's view around a curve in the vicinity of milepost 207, when they were approximately 300 feet apart, Mr. Mayo braked the Hi-rail and he and Mr. Ulsher jumped from the Hi-rail; that Mr. Ahlin began to signal to the Claimant to stop the truck crane; that the Claimant immediately began applying the air brakes; and that due to the wet condition of the track, caused by a rain/snow storm, the truck crane "slid" into the parked Hi-rail causing substantial damage to the Hi-rail but no damage to the truck crane.

There is no evidence in this record which would establish that the Claimant had any reason to know, as he was following the local freight, that a track inspector's hi-rail would be on the line. The evidence of record also establishes that when the Claimant began operating on the track the rails had been cleared by the local freight, and that as it began to rain/snow he reduced his speed to what, ordinarily, would be a slow safe speed. Due, unfortunately, to the wet condition of the track, and the unexpected "appearance" of the hi-rail, the Claimant was not, in spite of immediate braking action, able to avoid the "slide" of the truck crane into the hi-rail.

The evidence in this record is not sufficiently "substantial and convincing" to establish culpability on the part of the Claimant. He acted promptly and properly when he was notified by Mr. Ahlin that there was an "obstruction" on the track. He did all that he could do, he was not traveling at an excessive speed and therefore no discipline should have issued. The claim will be sustained.

Award: The claim is sustained. The Carrier is directed to physically expunge any record of the above discipline from the Claimant's Personal Record and to make him whole for any lost wages or benefits.

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

Richard R. Kasher

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