

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 925

<u>BURLINGTON NORTHERN RAILROAD COMPANY</u>	*
	*
-and-	* CASE NO. 2
	* AWARD NO. 2
<u>BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES</u>	*

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 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 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 and 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.

Under paragraph 5 of the May 13, 1983 agreement the Referee must agree, as a condition of the assignment, to render an award in each dispute submitted within sixty (60) days of the date the documents specified above are received. The sixty (60) day period may be extended when funding of the dispute resolution procedures under Section 3 of the Railway Labor Act are suspended.

Mr. James P. O'Brien, the Claimant, was dismissed from service on September 23, 1983 as the result of an investigation held on September 6, 1983. The documents of record including a 90 page transcript were received by the referee on October 31, 1983, and this Award was rendered on December 12, 1983.

Findings and Award

The Claimant was charged for his failure to clear train #135 by 10 minutes, which resulted in the collision between motorcar BN2145 and train #135, Extra 3031 West, at approximately 12:35 P.M. on August 27, 1983 near Atwater, Illinois. At the time of this head on collision the Claimant was responsible for the operation of the motorcar as he was assigned to inspect track in the vicinity.

The record below establishes without doubt that Train Extra 3031 West was on the main line with the right of way. The Claimant had received adequate information to reasonably alert him that this train would be at or near the vicinity of the Atwater milepost where the collision occurred. Although there are some innuendos in the transcript regarding the possibility that the train crew was operating at a speed in excess of the authorized speed due to the fact that the ambient

temperature was in excess of 85 degrees Fahrenheit at the time in question, there is no substantial evidence to show that the temperature was in fact at that level at the time in question. More importantly, there is no showing that the Claimant had any reason to believe that the train would not be operating at its normal authorized speed at the time in question.

There is also an innuendo in the record regarding the Claimant's belief that Train No. 135 had departed Jacksonville at 11:38 A.M. and therefore he was not of the belief that the train would be in the vicinity of Atwater, milepost 51.6 or 52, at 12:35 P.M. However, there is no clear showing that the Claimant had any justifiable reason to believe that Train No. 135 did not depart Jacksonville at 11:30 A.M. as scheduled or reported.

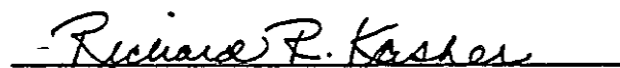
The totality of the evidence in the record shows that the Claimant did not take sufficient precaution and assure himself of the location of the train, which had the right to the main line, and therefore he bore some responsibility for the collision which occurred on August 27, 1983 causing damage to the head end engine, and fortunately did not result in any casualties or personal injuries.

In these circumstances, this Board finds that the Carrier had just cause to discipline the Claimant.

In the circumstances of the instant case and in reviewing the Claimant's prior disciplinary record, we believe that the discipline of permanent dismissal is overly severe. Accordingly, we will convert the discharge to a disciplinary suspension and direct that the Claimant be restored to service with seniority unimpaired within ten days of the receipt of these findings.

AWARD: Claim denied in accordance with the above findings.

Signed this 12th day of December, 1983 in Bryn Mawr, Pennsylvania.


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