

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 925

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BURLINGTON NORTHERN RAILROAD COMPANY          . *
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      - and -                                  *
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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES    *
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CASE NO. 44  
AWARD NO. 44

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. David Lester Guptill, hereinafter the Claimant, entered the Carrier's service as a Sectionman at Fromberg, Montana on September 23, 1974. He was subsequently promoted to the Machine Operator, Truck Driver and Foreman positions and he was occupying the position of Machine Operator when he was dismissed from the Carrier's service effective September 24, 1987. The Claimant was dismissed as a result of an investigation which was held on September 15, 1987 in Bozeman, Montana. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rules 102, 108, 530 and 532(B). Specifically the Claimant was dismissed for his alleged failure to properly protect track which resulted in the derailment of Train 01-GG5DN-31st and injuries to two of the Train Crew on September 1, 1987.

### Findings and Opinion

On September 1, 1987 at approximately 4:30 p.m. Train 01-GG5DN-31st derailed near MP 154 near Belgrade, Montana. The Claimant was responsible for the operation of a tamper which was being used to work on several sections of track, including a section at MP 154.

Trainmaster Kosanda testified that based upon his investigation at the scene of the derailment, he determined that the 26th car in the train derailed as the result of a track buckle. Trainmaster Kosanda was of the opinion that the derailment was caused because the Claimant had failed to issue a slow order over the section of track for which he was responsible.

During the course of his examination of a number of witnesses, Organization Representative T.O. Knutson attempted to establish that the Claimant should not have been charged with the responsibility of issuing a slow order on the day in question. Several questions were raised regarding the proper applicability of Carrier Operating Rules concerning the issuance of slow orders where either Spot Maintenance or Out of Face Maintenance was being performed.

This Board is sufficiently persuaded by the evidence of record, including most importantly the Claimant's admission that he forgot to place the slow order, which admission was made both at the investigation and to Roadmaster J.W. Jeffries, that the Carrier had reasonable cause to charge the Claimant with a failure to follow operating rules.

However, the Claimant's failure to issue the slow order, standing alone, does not per se establish that the Claimant's dereliction was the cause, in whole or in part, for the derailment.

A substantial number of questions have been raised which place in doubt the Carrier's conclusion that the failure to issue the slow order, i.e. "to properly protect track disturbed by you", was the cause of the derailment near MP 154.

First, the Organization presented Mrs. Tamra J. Jones, a non-employee witness, who testified that she observed wheels on the train starting to throw sparks, and as the train continued moving "the sparks started to get like 10 feet and it was throwing really long sparks and what I thought was a fire started under these wheels". She further testified that "All of a sudden, the wheels left this car". Secondly, Mr. F.G. Hanenburg, who was the Engineer in charge of the train, testified that he noticed "nothing unusual at all with the track", and that the engine rode "very smoothly" over

the track section in question. Thirdly, Track Inspector D.S. Coughlin testified that he discovered evidence of sliding wheels on sections of the track.

In order for the Carrier to sustain its burden of proof and to convince this Board that it had proper cause to discharge the Claimant, the Carrier is obligated to present substantial and convincing evidence that the Claimant's failure to issue the slow order was the cause of the derailment. It is insufficient to merely present evidence of a rule's violation, with virtually nothing more, and to then conclude by assumption that that rule's violation was the cause of a subsequent accident. Just as a motorist who is driving without a license is not assumed to be negligent merely because he/she is involved in an accident, so too, the Claimant's dereliction, his failure to issue the slow order, must be linked by evidence to establish proximate cause for the derailment.

The Organization through the testimony of Mrs. Jones, Engineer Hanenburg and Track Inspector Coughlin has presented significant evidence which leads this Board to conclude that factors other than the Claimant's failure to issue a slow order could have been the cause of the derailment. The Organization has raised a significant question as to whether a "stuck wheel" located somewhere in the vicinity of the 26th car on the train was the operative cause of the derailment which started at or about that point.

The transcript of the investigation leaves this Board in a position where we cannot be sure with any reasonable degree of certainty that the Claimant's failure to issue the slow order was the proximate cause of the derailment.

Therefore this Board must conclude that the Carrier has failed to establish, through the presentation of substantial and convincing evidence, that it had proper cause to discipline the Claimant for the derailment.

While the Claimant was guilty of failing to follow established rules by issuing a slow order, the Carrier did not charge him with such an infraction in the notice of investigation, although it had information, including the Claimant's admission, that he had failed to take such action.

Accordingly, this Board will not convert the Claimant's discharge, which we are going to overturn, into some lesser form of discipline because of his failure to issue the slow order.

In accordance with the above findings, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to restore the Claimant to service with seniority unimpaired and with full back pay for any wages lost including retroactive benefit protection within five (5) days of the receipt of this Award. The Carrier is further directed to expunge any discipline which issued from this incident from the Claimant's Personal Record.

This Award was signed this 26th day of January 1988 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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