

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 45

AWARD NO. 45

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 choose 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. Roy Matheu King, hereinafter the Claimant, entered the Carrier's service as a Tie Gang Laborer on July 8, 1970. He was subsequently promoted to the position of Section Foreman and he was occupying that position when he was issued a five (5) day suspension from service effective November 18, 1987. The Claimant was suspended as a result of an investigation which was held on October 22, 1987 in the Trainmaster's Office in Staples, Minnesota. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rules 9E and 908. Specifically the Claimant was suspended for his alleged responsibility in the derailment of and the damage to Undercutter BNX 80-0015, a push car, Tie Crane BNX 60-0116 and STM Tamper BNX 56-0156 on the House Track at Hawley, Minnesota on September 28, 1987.

Findings and Opinion

On Tuesday morning, September 29, 1987, Trainmaster W.J. Thompson was notified that a tamper, a tie crane, a push car and an undercutter had been found damaged on the House Track in Hawley, Minnesota. He investigated the incident and found that the equipment, which had been derailed and smashed together, had been shoved west by approximately 113 feet. He also found two (2) red flags on the tracks in flattened down and bent over condition.

On the previous evening, the Claimant was the Foreman in charge of a gang of machine operators. Mr. K.R. Bertram, was in charge of operating the undercutter, Mr. J.R. Varholdt, a Sectionman, was in charge of the tie crane, Mr. J.L. Aiton was in charge of operating a diesel electric crane and Mr. M.D. Maloney was in charge of operating the tamper.

Trainmaster Thompson obtained the following written statement from the Claimant:

Finished undercutting eastbound track at 19:20, went to crossover switch at Hawley at 19:30, waited for Train #4 to go by on westward track. Got in the yard at 19:40, J. Aiton switched diesel electric crane around to east end of machines. Picked up flags west end of main line while J. Varholdt put up red flag on west end of machines and J. Aiton put up red flag at east end of machines. All flags put up and machines turned off at 20:10. Taken tamper operator N. Maloney to Lake Park. Left Lake Park at 20:25 and went to Hawley. Parked truck, got out, passed person walking by track, said Hi. He said how's it going. I said fine, done with undercutting going home. Put keys in depot and left about 20:40 or 20:45. Got to SA Gas Station to fill up car and called Fargo Com. to take track out of service at Hawley about House Track at 20:55."

The Claimant's testimony at the investigation, while it contained more details than the above-quoted written statement, was confirmatory regarding the tie-down and red-flagging procedures he and his gang performed on the evening of September 28, 1987. Gang members J. Varholdt and N. Maloney testified that after tying down their equipment on the House Track at Hawley that they set red flags on the west and east ends of the maintenance of way equipment.

Based upon the examination of the Claimant, and other witnesses

in the investigation (including the train crew of Local 31615, whose train arrived at Hawley at approximately 8:06 p.m. to do local switching, and whose members acknowledged that they "made a joint" with or "coupled into" the crane on the House Track), it appears that the Carrier does not find the Claimant guilty of any rules infractions regarding the red-flagging and tie-down procedures which he and his crew performed on the evening in question.

The Carrier cited the Claimant for violation of Rule 9(E), which requires obtaining a copy of the train order, track bulletin or track warrant when a track is being taken out of service. The Claimant conceded that when he sent the wire requesting that the involved track be taken out of service, he did not ask the Dispatcher for a copy of the track bulletin or track warrant, nor did he wait to receive such warrant or bulletin if one was going to be sent. The Claimant testified that at Hawley, supervision did not require Maintenance of Way foremen to obtain such documentation.

The Claimant was also cited for violation of Rule 908, which provides that "Occupied outfit cars and on-track equipment, when set out, should be protected by a train order or by spiking the switch of track involved". The Claimant acknowledged that he did not have the switch spiked, and stated that he did not do so because of the possibility that "a local would come in sometime during the night to switch".

In defense of these apparent derelictions, the Claimant testified as follows in response to questions from Conducting Officer G.D. Anderson:

Q. How long have you been working as a Foreman on the Minnesota 1st Subdivision?

A. On and off probably two years to two and one-half years.

Q. During that time did you have occasion to tie up track machinery and track equipment on tracks other than a siding or a main track?

A. Yes.

Q. Each time you tied up track machines, did you spike the switch?

A. At Hawley there or other places?

Q. Other places?

A. At times if we can yes, most places we do, but at Hawley we don't.

- Q. At other places and other times did you ask for track warrants, train order or track bulletins on the machines?
- A. No I never have." (Transcript pg. 22)

While the Claimant's defenses that he did not await the receipt of a train order, train bulletin or track warrant taking the track out of service and he did not spike the switch at the west end of the track because such procedures were not required at Hawley appeared to be without foundation, at least through the first 135 pages of the transcript, those defenses gained some measure of credibility as a result of the following colloquy between Organization Representative B.G. Glover and Roadmaster Ray Romano:

- Q. Mr. Glover, do you have anyone you wish to question at this time?
- A. Yes, I would like to call Roadmaster Ray Romano.
- Q. Mr. Romano you have been present today at this investigation and you have heard the manner in which the Maintenance of Way employees protected the on-track equipment at Hawley, Minnesota. Would protection for that equipment been consistent with your understanding for the protection necessary for on-track equipment at Hawley, Minnesota?
- A. Yes.
- Q. Would you have advised that crew to spike those switches?
- A. No." (transcript pg. 136)

There was no further testimony elicited from Roadmaster Romano regarding the spiking of switches or any other procedures regarding how tracks were to be taken out of service at Hawley, Minnesota.

Accordingly, this Board is left with significant doubt as to whether the Claimant was, in fact, derelict in terms of how he secured the House Track at Hawley on the evening in question.

Because of this doubt, we must conclude that the Carrier has failed to present substantial and convincing evidence to support imposing discipline upon the Claimant. Therefore, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to expunge the suspension from the Claimant's Personal Record, and to make him whole for any lost wages or benefits he suffered. This Award was signed this 30th day of January 1988 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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