

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 925

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BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 49

AWARD NO. 49

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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. Frank C. Campbell, hereinafter the Claimant, entered the Carrier's service as a Laborer on May 5, 1975. The Claimant was subsequently promoted to the position of Head Welder and he was occupying that position when he was issued a five (5) day suspension from service by the Carrier on February 29, 1988.

The Claimant was suspended as a result of an investigation which was held on February 1, 1988 in Havre, Montana. At the investigation the Claimant was represented by the Organization. The Carrier issued a five (5) day suspension to the Claimant based upon its findings that he had failed to follow instructions from proper authority when he failed to properly grind switches at Buelow, Montana as instructed.

### Findings and Opinion

Welding Supervisor D.A. Pavlicek testified that on January 14, 1988 he inspected the switches at Buelow, Montana and found that they were not radiused or properly ground. Supervisor Pavlicek further testified that he had directed the Claimant to work on the switches at Buelow on January 5, 1988 and that he subsequently received a welding report from the Claimant on January 11, 1988 and on that date the Claimant, both verbally and in the report, indicated that he had, in fact, completed the work on the switches.

Welding Supervisor Pavlicek also testified, without refutation, that the Claimant had received a week's instruction on switch maintenance in October 1986 and that he, Pavlicek, had worked in the field with the Claimant and his crew in order to demonstrate proper switch grinding and maintenance.

The Claimant testified that although he had worked on the switches at Buelow on January 4, 1988, he had not completed the job and that he had so informed Welding Supervisor Pavlicek. He further testified that it was his understanding that Supervisor Pavlicek wanted him to use the Geismar MC3 switch grinder and then turn it over to the next crew as promptly as possible. He testified that he used the MC3 switch grinder as needed, that he made notes of other conditions that required additional work and that he notified Supervisor Pavlicek of his intention to return to Buelow and complete that work.

The Claimant also testified that Supervisor Pavlicek's instructions regarding the switches at Buelow was "just touch them up and get what was necessary on them". The Claimant testified that he followed those instructions. He stated that on his Weekly Welding Report he placed X's for the items that he inspected and decided "looked okay" and that he wrote in numbers for the items he had worked on.

The Organization presented arguments that Welding Supervisor Pavlicek changed instructions on switch grinding during the Claimant's vacation and never personally notified the Claimant of these changes. The Organization also contended that Welding Supervisor Pavlicek made statements to the effect that he "would like to get rid of" the Claimant. Finally, the Organization contended that Supervisor Pavlicek could not have inspected the switches on January 14, 1988 as the Claimant and his crew were working on the switches on that date and they did not see Pavlicek doing his inspection.

The Organization has presented several creative arguments in

its defense of the Claimant. This Board, however, does not find them persuasive.

The testimony of both Mr. J.C. Warren and Mr. R.L. Turner refuted the Organization's claim that Welding Supervisor Pavlicek wanted to "get rid of" the Claimant.

Additionally, although Supervisor Pavlicek may not have, in fact, directly informed the Claimant of his, Pavlicek's, changed instructions regarding the grinding of switches, the Claimant was advised of those changes by a member of his own crew.

The third contention by the Organization that Supervisor Pavlicek could not have checked the switches at Buelow on January 14, 1988 because the Claimant and his crew did not see him raises a question of credibility. As the Organization well knows, neutral referees sitting as "appellate judges" under Section 3 of the Railway Labor Act do not have the ability to make credibility determinations; and, therefore, if the Carrier has chosen to credit Welding Supervisor Pavlicek's testimony this Board will not disturb that conclusion. We should observe that we do not doubt the testimony of any of the principals to the incident, Pavlicek, the Claimant or Mr. Turner; they apparently did not see each other on January 14, 1988. However, this fact does not detract from the conclusion that Supervisor Pavlicek inspected the section of track in question, sometime subsequent to his receipt of the Claimant's weekly welding report, and determined that the switches had not been properly ground and radiused. Therefore, whether Supervisor Pavlicek and the Claimant saw each other on January 14, 1988 is irrelevant to the ultimate conclusion that the Claimant "failed to follow instructions from proper authority when he failed to properly grind switches at Buelow, Montana".

Based upon the foregoing opinion, the Board concludes that the Carrier had cause to discipline the Claimant, and the Board further concludes that a five (5) day suspension was neither arbitrary nor overly severe. Accordingly, the claim will be denied.

Award: The grievance is denied. This Award was signed this 22nd day of January 1988 in Bryn Mawr, Pennsylvania.

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