

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 925

\*\*\*\*\*

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

\*\*\*\*\*

\*  
\*  
\*  
\*  
\*  
\*

CASE NO. 55

AWARD NO. 55

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. Mitchell L. Gabel, hereinafter the Claimant, entered the Carrier's service as a Laborer on June 1, 1967. He was subsequently promoted to the position of B & B Foreman, and he was occupying that position when he was issued a thirty (30) day suspension from service by the Carrier on June 24, 1988.

The Claimant was suspended as a result of an investigation which was held on June 1, 1988 in Ottumwa, Iowa. At the investigation the Claimant was represented by the Organization. The Carrier issued a thirty (30) day suspension to the Claimant based upon its findings that he had violated General Rules A, I, and Rules 78, 62, 65 and 550 of the BN Maintenance of Way Department by failure to be alert and attentive, failure to ensure that hy-rail vehicle #8646 was operated at a safe speed in backup movement, and failure to post a lookout on May 16, 1988 which resulted in a collision between hy-rail vehicle #8646 and Osmose push cart and personal injuries to Osmose crew.

### Findings and Opinion

The Claimant was the Foreman of a gang assigned to do bridge work on May 16, 1988 in the vicinity of Mileposts 307.44 and 308.12.

The gang consisted of four (4) employees including the Claimant, and the hy-rail vehicle which the gang was using was being operated by B & B Helper Tom R. Eads.

The Claimant had obtained a Track and Time Limits authorization from the Dispatcher, and the record reflects that neither he nor the members of his crew were aware that a contractor's crew operating under the direction of a Carrier Foreman, Mr. J.D. Ellis was also authorized to be working on the track within the track and time limits authorization. The contractor's crew, referred to as the Osmose Gang, was engaged in applying chemical preservatives to the ties in the track area in question.

Sometime shortly after noon on the day in question, as Mr. Eads was backing the hy-rail vehicle around a curve in the track, and while the Claimant and the other two (2) members of the crew were sitting in the "buddy cab", the hy-rail vehicle collided with the vehicles being operated by the Osmose Gang, resulting in damage to those vehicles and non-serious injuries to two (2) of the gang members. As a result of this accident, the Carrier found that the Claimant was guilty of violating a number of safety rules, including the failure to post a look out while the hy-rail was being operated, the failure to "approach at safe speed", the failure to maintain a "safe breaking distance", and his failure as a foreman to properly use the equipment for which he was responsible.

There is no dispute in fact that the failure of the hy-rail crew to be aware of the presence of the Osmose Gang was responsible for the accident and the resulting damage and injuries. There is nothing in the record to indicate that the Osmose Gang was in any way contributorily negligent.

Accordingly, the only question is whether the Claimant, as the Foreman of the hy-rail crew, was responsible for the accident to the extent that he should be subjected to discipline as a result.

The Claimant, through his Organization Representative, protested the fairness of the investigation on the basis that the notice of the investigation (1) was imprecise, and that the Claimant was "tried on one offense and disciplined on another", (2) was defective, since the Carrier did not list certain witnesses on the notice who appeared at the investigation, and (3) was untimely as it did not give five (5) days advance notice of the investigation.

Additionally, in the Claimant's defense, the Organization points out that there was no operative radio in the hy-rail vehicle, a fact which the Organization submits was within the Carrier's knowledge, and that the hy-rail crew, even if it had an operative radio, could not have known that the Osmose Gang was working on the same area of track (as the radios provided to the Osmose Gang operated on a different frequency). The Organization further points out that Rule 91 of the Rules of the Maintenance of Way Department provide that hy-rail vehicles must have their radios turned on and operating when the vehicle is moving on the rail. These facts, in the Organization's opinion, support a finding that the Claimant should not have been disciplined in the circumstances.

Finally, the Organization points out that Maintenance of Way Rule 351 provides that when track and time limits are granted to protect maintenance or repair work, that trains or other employees must not be granted track and time limits within the same limits unless an understanding has been reached between such trains or other employees and the foremen in charge of the work as to conditions and movements to be made. The Organization submits that the dispatcher's failure to ensure that the Claimant was aware of the presence of the Osmose Gang was a violation of this rule, which violation was the underlying cause of the accident.

The Organization has made a number of compelling arguments in this case; however, its procedural objections are found to be lacking in merit. The contention that the Claimant and the Organization were given insufficient time to prepare for the investigation, in the context of the five (5) day advance notice requirement prior to the scheduling of investigation, must be rejected in view of the fact that a postponement of the investigation, at the Organization's request, was granted so that the investigation was not held for at least five (5) days after the notice of the investigation was received. Additionally, the Board finds that the notice of investigation was extremely precise in advising the Claimant and his Organization of the nature of the charge and the specifics of the incident which gave rise to the charge. The fact that the Carrier did not include specific enumerated rules in the notice of investigation and failed to list the witnesses who would appear at said investigation did not prejudice the Claimant's right to a full and fair hearing. The record reflects that both the Claimant and his Organization Representative were fully prepared to address the issues raised at the investigation and to examine the witnesses who testified.

There is good reason to conclude that the Claimant was guilty, at least, of violation of the lookout rule, which provides that

"When operating on-track equipment, a sharp lookout must be maintained to the front, side and rear" and that where forces permit "an employee shall be assigned to maintain a lookout to the rear". While the Board recognizes that the Claimant was not the physical "operator" of the hy-rail vehicle, nevertheless he was responsible for the overall operation of the crew.

Having concluded that the Claimant had some guilt for the cause of the accident, we still must determine whether his guilt, in light of the other circumstances, warranted the imposition of discipline. For several reasons the Board concludes that the Claimant should not have been disciplined.

First, it is uncontradicted that crews are not regularly required to post lookouts; and while this fact standing alone would not, ordinarily, excuse the Claimant's culpability, other factors in combination do.

Secondly, it is uncontroverted that the Claimant was in charge of a hy-rail vehicle that was improperly equipped [that is, it did not have an operative radio] and that the hy-rail operator, Mr. Eads, was not trained or qualified by the Carrier to operate this equipment [an issue that will be discussed in greater detail in Case No. 58].

Thirdly and most importantly, it is clear that Carrier supervision failed to coordinate the operation of the hy-rail crew and the Osmose Gang and to ensure that both of these crews and their foremen were aware of each other's presence and operation within the time and track limits concerned.

In view of these mitigating factors, this Board concludes that the Claimant should not have been disciplined for his part in the accident which occurred as the result of several derelictions including, possibly, those of the Osmose Gang. Therefore, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to remove the discipline from the Claimant's Personal Record and to reimburse the Claimant for all time lost.

This Award was signed this 22nd day of September 1988 in Bryn Mawr, Pennsylvania.

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