

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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CASE NO. 58

AWARD NO. 58

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. Thomas R. Eads, hereinafter the Claimant, entered the Carrier's service as a B & B Helper on September 20, 1978. 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 and Rules 78, 62 and 65 of the BN Maintenance of Way Department by failure to operate hy-rail vehicle #8646 at a safe speed and distance to avoid an accident and failure to post a lookout ahead of his backup move at approximately 12:10 p.m., 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 operative facts in this case were addressed and discussed by the Board in our decision in Case No. 55 issued contemporaneously this date.

The Claimant here and his Foreman were both subject to the same investigation held on June 1, 1988 in the Yard Office in Ottumwa, Iowa. Each Claimant had his own Representative at the investigation.

Aside from certain similar defenses raised in the Claimant's behalf as defenses raised on behalf of his Foreman [Mr. Gabel], the Claimant's Representative asked the Claimant the following relevant and significant questions:

"Q. Mr. Eads, could you explain to us how you became the operator of this truck or the driver of this truck?

A. I was the only one in the gang with a chauffeur's license.

Q. Prior to the date in question, were you ever tested by Supervisor Fielding on the operation or qualification of driving a hy-rail boom truck?

A. No, sir.

Q. Were you ever aware that in order to operate hy-rail equipment that you needed to be trained and qualified to do so?

A. I believe I read that somewhere.

Q. But you weren't instructed to operate the hy-rail equipment anyway; is that correct?

A. Yes." (Tr. pages 51-52)

Then in making his closing statement the Claimant's Representative read into the transcript Rule 88 of the Maintenance of Way Department, Designated Operators, which states, relevantly, that only employees, who have been examined and qualified by a designated supervisor "on the operation and maintenance of hy-rail vehicles will be permitted to operate them". The Organization further pointed out that the Claimant was functioning to the best of his ability, under

direction from his Supervisor, and that he had been placed in a precarious position simply because he had a chauffeur's license.

It is this Board's opinion that while the Claimant could have, possibly, been more diligent in the manner in which he operated the hy-rail vehicle on May 16, 1988 near milepost 308A, the evidence of record contains sufficient mitigating circumstances to require that the Claimant's discipline be reversed. As we held in Case/Award No. 55 contributory derelictions by the Carrier as well as, possibly, the Osmose Gang require that the Claimant's discipline be overturned.

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