

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. 65

AWARD NO. 65

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. Kenneth G. Edwards, hereinafter the Claimant, entered the Carrier's service as a Cook on April 12, 1978. The Claimant was subsequently promoted to the position of Machine Operator and he occupying that position when he was suspended from the Carrier's service for thirty (30) days on December 11, 1988.

The Claimant was issued a thirty (30) day suspension as a result of an investigation which was held on November 11, 1988 at the Roadmaster's office in Tacoma, Washington. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rule 1 of the BN Safety Rules and General Rules by his failure to take the safe course while operating the Stork Crane BNX 880002 and thus damaging the stork by allowing it to hit Bridge #38 near Labam, Washington.

Findings and Opinion

On November 2, 1988 the Claimant was assigned as the Operator of BNX 880002 Stork Crane at Lebam, Washington. After completing the work of picking up scrap ties and brush along the right of way at Milepost 43, the Claimant and work crew were to travel approximately nine miles to Milepost 32. As the work train was in transit, the front right leg of the Stork Crane hit Bridge #38 which resulted in an estimated \$550 worth of damage to the Stork Crane.

The Organization has pointed out that the Claimant had begun his assignment as Operator of the Stork Crane on Tuesday, November 1, 1988 and that the accident occurred approximately a day and a half later. The Organization submits that the Claimant received no more than one hour of on-the-job training concerning the proper operation of the Stork Crane and that that instruction had been furnished by the previous operator of the machine, Laborer L.E. Miller. The Organization and the Claimant also contended that there was no special emphasis in the Claimant's training regarding retraction of the legs of the Stork Crane.

The Claimant testified that prior to the work train beginning to move, he had asked other members of the crew if the legs on the Stork Crane were in the correct position to clear any obstacles. He testified that he had "made a habit" of asking the other members of the work crew if the legs were correctly in position so that he could be certain that the crane would proceed safely. The Claimant stated that he did not give the order to move on the day in question, but that member of the work crew informed him that the legs of the crane were up and to go ahead and move.

The Claimant also testified that he did not know, at the time, that the legs had to be in the full, upright position prior to moving the Stork Crane. He testified that he knew that the legs had to up to clear any obstacles and he had already gone across one bridge and that the legs "had cleared fine".

The Carrier pointed out the person who is responsible for the operation of a machine is the machine operator. The Carrier maintained that the Claimant was in charge of the Stork Crane on November 2, 1988 and therefore he was responsible for the accident. The Carrier submits that the Claimant did not completely raise the four legs on the crane and thus he did not comply with proper and safe operating procedures.

This Board fully agrees, in principle, with the Carrier's position that the operator of equipment is responsible for the proper operation of that machinery. We, however, find that the Carrier has

a critical responsibility to ensure that the operator of equipment is properly trained.

The following question asked by Conducting Officer Dill and the Claimant's response clearly suggest that the Claimant did not receive adequate training:

"Q" Do you normally, before moving a machine several miles, draw the legs up in the full, up-right position? I guess what I'm, asking is how do you know that you've got a leg up far enough to clear any obstructions that may be along the tracks?

A Usually the train crew will tell me, (inaudible) tell me it was clear enough to go or Mr. Miller (inaudible) say they were clear enough to go."

This Board notes that the Claimant testified on two occasions that he either "had the habit" or that he "usually" relied upon either or both the work train crew and Laborer Miller to inform him when the Stork Crane could be safely moved. While the Carrier has contended that the Claimant, as the assigned operator of the crane, was solely in charge of that machine, it is clear that the person the Carrier assigned to train the Claimant in the operation of the Stork Crane as well as unnamed members of the work train crew shared the responsibility for the moving of the Crane. It is equally clear from the record [although the clarity of the record was severely compromised by at least forty two "inaudibles" contained in that record, some of which were found at critical junctures in the testimony] that the Claimant was not properly instructed regarding the mandatory nature of raising the legs of the crane to a full upright and locked position when certain types of movements were being made.

It is the Carrier's contention that the Claimant acted improperly by not independently ascertaining that all the legs on the Stork Crane were completely in the "up" position prior to his moving the Crane. The investigative hearing developed that the person assigned by the Carrier to train the Claimant did not unqualifiedly instruct the Claimant that this was solely his job responsibility. While it is certainly vitally important for the Carrier to have operators of its machinery perform their duties in a safe and workman-like manner, it is equally incumbent upon the Carrier to assure that its operator-employees are thoroughly and properly trained in the operation of, and related job responsibilities to, the machinery on which they have been assigned.

In this particular case, this Board finds that the Carrier did not provide adequate training to the Claimant and thus the Carrier must share in the responsibility for the accident that occurred on November 2, 1988. Accordingly, we find that there is no substantial and convincing evidence to justify imposition of discipline upon the Claimant.

Based upon the foregoing, the Board will sustain the claim. The Carrier will be directed to rescind the thirty (30) day suspension that was issued to the Claimant, to restore him to service, if he has not yet been reinstated, with seniority unimpaired and with all appropriate backpay and benefits. The Carrier will be further directed to delete all references to this discipline from the Claimant's Personal Record.

Award: The claim is sustained in accordance with the above findings. The Carrier is directed to expunge the discipline from the Claimant's Personal Record and to reinstate the Claimant with seniority unimpaired and with full back pay and benefits.

This Award was signed this 20th day of February 1988 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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