

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

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*****
BURLINGTON NORTHERN RAILROAD COMPANY          *
- and -                                         *
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES    *
*****                                         *
                                           CASE NO. 66
                                           AWARD NO. 66
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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. Keith D. Rasmussen, hereinafter the Claimant, entered the Carrier's service as a Machine Operator on May 3, 1976 and he was occupying that position when he was suspended from the Carrier's service for a period of fifteen (15) days commencing on January 9, 1989.

The Claimant was issued a fifteen (15) day suspension as a result of an investigation which was held on November 30, 1988 at the Cambridge Depot in Cambridge, Minnesota. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated General Rules A & B, Rules 51, 74, 104A and 104C of the Rules of the Maintenance of Way for his failure to restore the east industry switch located at MP 130.9 in Andover, Minnesota to normal position on October 28, 1988 which resulted in Soo Line Train 76's failure to stop for improperly lined switch at approximately 2032 hours on October 28, 1988.

Findings and Opinion

At approximately 8:30 p.m. on Friday, October 28, 1988 westbound Soo Line Train 76 had a track warrant for a siding at Andover, Minnesota. The train was moving onto this siding when the engineer observed that the east industry switch located at MP 130.9 was improperly lined. The engineer immediately put the train into an emergency stop and Soo Line brakeman R.E. Murray then lined the east industry switch for the siding and locked it.

Trainmaster Dennis Hilleren received a call from the dispatcher's office in Minneapolis, Minnesota advising him that engineer of Soo Line Train 76 had to put the train into emergency in order to avoid going on to a spur track at Andover. The dispatcher further advised Trainmaster Hilleren that the switch had been improperly lined towards the spur track and was not in the normal position for the siding. Trainmaster Hilleren was also informed that the Soo Line Train had avoided hitting Maintenance of Way equipment that was sitting on the spur track.

Trainmaster Hilleren then contacted Roadmaster W.G. Lonngren to notify him of the incident. On Saturday, October 29, 1988 Trainmaster Hilleren inspected the site to verify what Maintenance of Way equipment was on the spur track. He observed that the burro crane was the last piece of equipment to enter the spur track.

On November 2, 1988 Special Agent R.D. Borries interviewed the Claimant who had been the Burro Crane Operator on October 28, 1988. Special Agent Borries issued a report stating that the Claimant had advised him that at approximately 3:15 p.m. on October 28, 1988 he, the Claimant, had lined the switch for the spur track, backed the Burro Crane and one car onto the spur, and then, after securing his equipment, he had relined and locked the switch.

Special Agent Borries further reported that he had inspected the switch for evidence of defect, damage or vandalism and that no problems with the east industry switch had been found.

The Claimant testified that at approximately 3:15 p.m. on October 28, 1988 he had opened the lock on the east industry switch and then threw the switch so that he could back the Burro Crane and a car loaded with scrap that was to be picked by the Hinckly Local onto the industry spur. He then shut off the crane, started to bleed the air off from the main tanks, tied the handbrake on the gondola and then locked the switch and got his keys before continuing to lock up the rest of the crane.

The Organization has raised the issue of possible vandalism to the east industry switch. Roadmaster Lonngren testified that on Monday, October 31, 1988 it was discovered that the tie gang

equipment that had also been parked on the Andover industry spur had been vandalized. The vandalism to this equipment included the turning on of ignition switches which caused the batteries to run down. Roadmaster Lonngren testified that such acts of vandalism, which apparently are fairly frequent in this locale, did not require the use of keys.

The Claimant testified that in order to either open or lock the east industry switch at Andover a key had to be used. He further testified that the key could only be removed from the lock when the switch was either locked or perfectly opened.

While it is unrefuted in the record of the investigation that vandalism occurred to certain equipment that was parked on the industry spur at Andover, it is equally unrefuted that Special Agent Borries inspected the lock for vandalism and found none. This Board cannot speculate that a vandal may have had a key for the east industry switch and was thus responsible for the incorrect lining of the switch. Therefore the Board must reject the Organization's contention of either probable or possible vandalism.

The Carrier has acted upon certain facts it had before it; i.e., the east industry switch at MP 130.9 was incorrectly lined towards the industry spur, Soo Line Train 76 was forced into an emergency stop because of this incorrect lining of the switch, and the Claimant was the last known employee of the Carrier to unlock and turn that switch so that he could place his equipment onto the industry spur. The Claimant testified that he had operated the switch approximately five hours prior to the incident and the Carrier has no reason to infer that any other employee had cause to re-line the switch after the Claimant had completed his work. While most of the evidence in the record is circumstantial in nature, that fact alone does not detract from the justification the Carrier had to conclude that the Claimant was responsible for leaving the switch in an improperly lined position.

Based upon the foregoing reasoning, this Board finds that the Carrier had just cause to issue the discipline of a fifteen (15) day suspension to the Claimant.

Award: The claim is denied. This Award was signed this
23rd day of February, 1989 in Bryn Mawr,
Pennsylvania.



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