

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 925

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BURLINGTON NORTHERN RAILROAD COMPANY

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CASE NO. 68

- and -

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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AWARD NO. 68

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On May 13, 1983 the Brotherhood of Maintenance of Way Employes (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. Anthony J. Terrones, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on April 5, 1976. The Claimant was subsequently promoted to the position of Machine Operator and he was occupying that position when his Group 1 and Group 2 Machine Operator's rights were removed by the Carrier on June 1, 1989. The Carrier further restricted the Claimant from regaining or establishing Group 1,2,3 or 4 Machine Operator rights.

The Claimant's Machine Operator rights were removed as a result of an investigation which was held on May 9, 1989 in the Carrier's depot at Aurora, Nebraska. At the investigation the Claimant was represented by the Organization. The Carrier revoked the Claimant's Machine Operator rights based upon its findings that he had failed to operate Galion Crane BNX 16-0047 in a safe manner which resulted in injury to Employee J.L. Hunt at approximately 12:01 p.m. on April 26, 1989.

Findings and Opinion

On April 26, 1989 the Claimant was assigned as the operator of the Gallion Crane BNX 16-0047 working with the Aurora section gang and the York DMG district maintenance gang. At approximately 12:00 p.m. the Claimant was instructed to use the Gallion Crane to pick up and relocate a rail heater tank.

Mr. D.C. Luther and Mr. J.L. Hunt were assigned to assist in the relocation of the rail heater and positioned themselves on top of the rail heater. Mr. Luther's job was to guide the 150 to 200 pound hook from the Gallion Crane, while Mr. Hunt was to run a chain through the eye bolt on the rail heater and then secure the chain to the hook on the crane.

The Claimant lowered the outriggers on the Gallion Crane to stabilize the crane prior to lifting the rail heater. He then swung the boom in order to align it over the top of the rail heater. The Claimant retracted and raised the boom and then, judging that he would not be centered over the rail heater, he extended or telescoped the boom on the crane. The rail tongs which had been connected to the single cable on the crane broke off and hit Mr. Hunt causing him to suffer a concussion and a badly bruised and sprained wrist. Mr. Luther, who saw the rail tongs falling and attempted to warn Mr. Hunt, was able to successfully move out of the way and escape injury.

Traveling Mechanic C.E. Johnson and Machine Operator E.A. Morava testified that the Gallion Crane BNX 16-0047 operated by the Claimant on April 26, 1989 has two (2) separate cables. One cable is a single part line that is normally used for handling lighter loads and the other is a four part line that is used for heavier loads. The rail tongs are attached to the single cable and the multi-line cable runs through a block and tackle system on the crane. An operator of the Gallion Crane must make certain that both cables are run out at the same time the boom is being telescoped out in order that there is enough slack in the cable lines to prevent the cables from becoming taut against the boom.

Machine Operator Morava, testifying as a witness for the Claimant, stated that it can be difficult for the operator of a Gallion Crane to see the single cable with the rail tongs as the block and tackle system that supports the multi-line cable is located in front of the rail tongs and can act to restrict the view of the operator. Mr. Morava further testified that in April 1983 when he was operating a Gallion Crane he had a similar accident in which the single cable broke and the rail tongs fell. No one was injured in that incident and Machine Operator Morava was not issued any discipline.

The Claimant testified that after the accident he noted that the single cable was frayed and broken. The Claimant further testified that when an operator of the Gallion Crane extends the boom both cable lines will go up and if there is not enough slack in the cables they will "eventually come up and hit the end of your boom". The Claimant testified that he presumed that is what happened on the day of the incident. The Claimant testified that Mr. Hunt received personal injuries due to his, the Claimant's, actions in the operation of the Gallion Crane.

The Organization has argued that the Claimant has operated both Gallion Cranes and other Carrier machinery for a number of years without causing injury to other Carrier employees. The Organization also asserts that similar incidents have occurred where the rail tongs have broken loose and fallen from Gallion Cranes and that the Carrier has not assessed discipline. The Organization has further argued that the location of the block and tackle system on the Gallion Crane makes it very difficult for the operator of the machine to see where the rail tongs are when he is extending the boom.

The evidence before the Board establishes, without question, that the Claimant was guilty of an operating error when he failed to ensure that the single line cable, to which the rail tongs were attached, had sufficient "give" so that it would not become taut and/or swing back and hit the boom when the boom was being telescoped into position. Both the testimony of the Claimant and Crane Operator Morava establishes that Gallion Crane operators understand the need to provide for sufficient slack in crane cables when they engage in operations similar to the one the Claimant was responsible for on April 26, 1989.

There is no evidence to support a conclusion that the cable broke due to age and/or metal fatigue, or that the frayed condition of the cable, testified to by the Claimant and others, was not caused by the break or was not the result of normal wear and tear. The reliable evidence in the record establishes that the cable broke because the Claimant was not sufficiently diligent as an operator.

Having concluded that the Claimant was guilty of operating negligence, the Board must now determine whether discipline was appropriate and, if so, whether the measure of discipline was arbitrary in the circumstances.

The Organization has argued that discipline was not appropriate as another operator, Mr. Morava, allegedly guilty of the same offense, was not disciplined by the Carrier. On its face this argument of disparate treatment by the Organization appears to have some merit. However, in this Board's opinion, in order that a

defense of disparate treatment is to be sustained it should be shown that the Carrier regularly condoned or overlooked certain behavior and that the Claimant knew or could have reasonably known that such behavior would be excused. In the instant case, we have one prior incident which occurred six (6) years in the past and which the Organization contends constitutes evidence of disparate treatment. This Board disagrees with that contention. There is no showing that the Carrier regularly condoned crane operators' failure to properly handle the Gallion Crane in terms of leaving sufficient slack in the cables. The fact that Mr. Morava, the operator in the only other cited instance, did not receive discipline is not proof that the Claimant could reasonably assume that he could operate the crane with disciplinary impunity.

In conclusion, the Board finds that the Claimant committed a disciplinary offense and that the Carrier was justified in determining, after review of the Claimant's Personal Record which included several prior disciplines for failing to operate machines consistent with operating rules, that the Claimant should be permanently demoted.

Award: The claim is denied. This Award was signed this 1st day of August 1989 in Bryn Mawr, Pennsylvania.

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