

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 925

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BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 69

AWARD NO. 69

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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. Albino V. Rodriguez, hereinafter the Claimant, entered the Carrier's service as a Sectionman on July 18, 1966. The Claimant was subsequently promoted to the position of Surfacing Crew Foreman and he was occupying that position when he was demoted from Foreman, Assistant Foreman and Track Inspector for a period of one (1) year beginning May 19, 1989 and ending on May 19, 1990.

The Claimant's rights as a foreman were suspended as a result of an investigation which was held on May 2, 1989 in the Carrier's yard office at Greybull, Wyoming. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant's rights as a foreman based upon its findings that he had failed to provide flag protection in both directions on the main track, protecting men and equipment working at Worland, Wyoming at 10:00 a.m. on April 18, 1989.

### Findings and Opinion

At approximately 9:45 a.m. on April 18, 1989 Roadmaster D.F. Ruddy was riding in a high-rail car. He was traveling east from Greybull, Wyoming towards Worland, Wyoming and following an eastbound local train. Roadmaster Ruddy passed through the area where the Claimant, who was assigned as Surfacing Crew Foreman on that date, was working with his crew. Roadmaster Ruddy observed that the Claimant had placed flags to protect his crew and equipment on the eastern side of his work site but had not placed any flags on the western side of this work site.

The Claimant testified that he reported to work at 6:00 a.m. on the morning of April 18, 1989 and that he and his crew began their workday raising track in a siding at Worland, Wyoming. At approximately 9:30 a.m. Foreman Bruce Kinsey contacted the Claimant and requested that he, the Claimant, move his crew and equipment to the crossing at Black Hills.

Referring to the train line-up he had received that morning, the Claimant noted that the first train expected in the area would be an eastbound local and he placed the appropriate flags to notify that train that his crew and equipment were on the tracks. He then advised his crew to move onto the track. The Claimant received a call from the eastbound local advising that they were approaching the limits of his flags and he informed them that they could proceed through the limits as his crew was in the clear at Black Hills. The Claimant remained at his location and spoke to the crew on the eastbound local in order to determine their route for the day.

The Claimant further testified that on April 17, 1989 Roadmaster Ruddy had informed him that the Road Surfacing Crew might be needed to perform some work at Basin on April 18, 1989. Roadmaster Ruddy had told the Claimant that he, Ruddy, would check the area at Basin on the morning of April 18, 1989 and then inform the Claimant if the Road Surfacing Crew should move to that location. The Claimant testified that, with this in mind, he waited at the eastern end of his work site to speak with Roadmaster Ruddy. The Claimant testified that Roadmaster Ruddy had, apparently, forgotten that conversation and went right through without speaking to him.

The Claimant testified that he was then on his way to place the flags on the western end of his job site when Roadmaster Ruddy contacted him regarding his, Ruddy's, observation that no flags had been placed at that location.

The Carrier demoted the Claimant from his foreman's position for a period of one (1) year because it found that he had not

properly protected his crew and equipment as he had not placed the appropriate red and yellow flags on the western end of his work site.

The Organization has argued that the Claimant, using the scheduled line-up of trains that was issued for the day in question, placed his flags on the eastern end of his work site first and was then on his way to place the flags at the western end. The Organization points out that the line-up indicated that the first train due from the west was not scheduled to arrive in the vicinity of the Claimant's work location until 1:00 p.m. and that the Claimant was in the process of setting his flags on the western end of his work site at approximately 9:45 a.m. The Organization argues that the Claimant acted appropriately by initially protecting the eastern side of his work site, as the daily line-up indicated the first train was arriving from the east, and then going to protect the western end of his work site.

The record before the Board is somewhat confusing as the Carrier has cited the Claimant for violation of a number of rules regarding flagging, specifically Maintenance of Way Rules 9(B), 9(C), 10(C), 10(F) and 40. The Claimant was also cited for violation of Rules 550 and 530 which are general safety rules charging employees with protecting the safety of themselves and others.

Although the Carrier's Interrogating Officer conducted the investigation in a most fair manner, nevertheless this Board finds that the investigation record leaves more questions open than answered. We have striven mightily to understand whether the Carrier is contending that the Claimant was obligated to set protective yellow and red flags on both the east and west ends of the track segment his crew was to be working upon prior to his moving his men and equipment onto the track. The record is not sufficiently clear for this Board to conclude that that is what is contemplated by the various flagging rules cited by the Carrier. If that was the nature of the charge, then the Claimant would be guilty.

However, there is sufficient doubt in the record as to whether the Claimant was negligent or irresponsible based upon what he had done on the day in question. It is clear that he had protected his men and equipment from any scheduled traffic coming from the east. There is no contradiction that he was in the process of protecting his men and equipment from any scheduled traffic coming from the west, and that the earliest scheduled traffic coming from the west would not arrive for approximately three (3) hours from the time that the Roadmaster observed the absence of flags on the western end of the track segment.

In these circumstances, while this Board believes that the

Claimant may have violated one of the various flagging rules cited by the Carrier, the evidence does not reach that level of "substantial and convincing" so that the Board might conclude with certainty that there is merit in the charge and justification for the discipline.

Accordingly, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to expunge, by physical erasure, any reference to this incident from the Claimant's Personal Record. The Carrier is further directed to reinstate the Claimant to his various foreman positions, and to make him whole for any lost wages which he may have suffered as a result of the demotion.

This Award was signed this 25th day of August 1989 in Bryn Mawr, Pennsylvania.

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