

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. 88

AWARD NO. 88

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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. Augustin G. Lucero, hereinafter the Claimant, began his employment with the Carrier as a Section Laborer and has a service date of November 5, 1972. The Claimant was subsequently promoted and was occupying the position of Section Foreman when he was suspended from the Carrier's service for thirty (30) days and his rights as a track inspector, foreman and assistant foreman were permanently revoked on August 29, 1990.

The Claimant was suspended from the Carrier's service and had his rights as a track inspector, foreman and assistant foreman permanently revoked as a result of an investigation which was held on August 3, 1990 in the Burlington Northern old office building. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant for thirty (30) days and revoked his rights as a track inspector, foreman and assistant foreman based upon its findings that he had violated Rules 30, 35, 550 and 530A by his failure to provide protection to men and equipment on the Dakota 22nd Subdivision at approximately 9:30 a.m. and 10:50 a.m. on July 4, 1990.

### Findings and Opinion

The Claimant was working as a Section Foreman at Hysham, Montana on July 4, 1990. Part of the Claimant's duties on that day was to provide protection from train traffic to various pieces of maintenance of way equipment and to protect the crew operating that equipment.

Train Dispatcher Duane R. Buckley testified that the Claimant had requested and been granted permits to work on the main track in the 3rd Subdivision on July 4, 1990, and that the CTC permits he issued to the Claimant protected him and his crew from train traffic while they worked on the 3rd Subdivision. Train Dispatcher Buckley testified that the Claimant had not requested permits when he twice moved his crew onto the 22nd Subdivision on that same date. Train Dispatcher Buckley testified that he spoke with Roadmaster M.A. Carpenter on July 5, 1990 concerning the Claimant's failure to request protection from trains on the 22nd Subdivision on July 4, 1990.

Roadmaster M.A. Carpenter testified that he received a telephone call from Train Dispatcher Buckley on July 5, 1990 regarding Buckley's concern about proper protection for the Claimant's crew. Roadmaster Carpenter testified that he then spoke to the Claimant, and that the Claimant advised him that he had placed an employee as a flagman on Subdivision 22 approximately one and a half miles in front of the equipment, but that he had not had anyone protecting the other end of the track equipment.

Welding Supervisor L.A. Olson testified that he was working with the Claimant on July 4, 1990, and that the Claimant was responsible for the protection of men and equipment on that date. Welding Supervisor Olson testified that he became aware of the fact that he and the crew did not have track permits while working on Subdivision 22 on July 4, 1990 when Roadmaster Carpenter came to the job site on July 5, 1990. Welding Supervisor Olson testified that he participated in the conversation between Roadmaster Carpenter and the Claimant; that he heard Roadmaster Carpenter ask the Claimant about protection; and that the Claimant told Roadmaster Carpenter that he "did not" have protection.

The Claimant testified that he was working with the switch grinder and fire suppression crew on July 4, 1990, and that he was responsible for the men and equipment on that date. The Claimant testified that he did not request protection from the dispatcher but that he did place flags to protect his crew and equipment.

The Claimant testified that he understood other crews had gone into controlled sidings without permission, and that he believed he was "being picked on" and there was a possibility that the Roadmaster was "being selective in who he called investigations on".

The Claimant further testified that Surfacing Crew Foreman Mr. L.D. Watson had a track warrant on the 22nd Subdivision on July 4, 1990, and, therefore, he believed that the switch grinder crew "was pretty safe". The Claimant testified that he had not obtained permission from Mr. Watson to work within his TWC.

Surfacing Crew Foreman L.D. Watson testified that he was working on the 22nd Subdivision on July 4, 1990. Surfacing Crew Foreman Watson testified that he contacted Train Dispatcher Buckley requesting a track warrant. Surfacing Crew Foreman Watson testified that he was not aware of the times when or locations where the Claimant was clearing onto the 22nd Subdivision, and that the Claimant was not protected under his, Watson's, TWC.

It is the opinion of the Board that the Claimant did not properly protect his crew and equipment on July 4, 1990. The Claimant admitted, during the investigation, that he did not provide proper protection as required by the Maintenance of Way rules. The testimony of both Roadmaster Carpenter and Welding Supervisor Olson establish that the Claimant, on July 5, 1990 the day immediately following the incidents, admitted that he had not provided proper protection to his crew and equipment.

The following question, by the Conducting Officer, and answer, by the Claimant, clearly prove that the Carrier had just cause to discipline the Claimant:

"Q. Then how could you plan your work to stop the train?

A. Just had to, just figured there wasn't anything up there."

The Carrier has promulgated numerous safety procedures and rules in order that a crew working on the tracks will be protected from train traffic and not be forced to rely upon an employee's individual capabilities to react to a potentially dangerous situation. The Carrier has the right to expect that its employees charged with the serious responsibility of protecting co-workers and equipment will abide by those rules and procedures. The Claimant, admittedly, did not.

There is insufficient evidence in the record for this Board to conclude that the Claimant was treated differently or more harshly than other employees who may have failed to protect their crews and equipment. Accordingly, the Board will deny the claim.

Award: The claim is denied. This Award was signed this 15 day of December 1990.

Richard R. Kasher

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