

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY *
and * CASE NO. 93
BROTHERHOOD OF MAINTENANCE *
OF WAY EMPLOYES * AWARD NO. 93

On May 13, 1983 the Brotherhood of Maintenance of Way Employees (hereinafter the "Carrier") 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 (3) 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 procedures.

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. Richard L. Wolfe, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on July 10, 1978. The Claimant was subsequently promoted to the position of Foreman and he was occupying that position when he was censured and restricted from bidding on a Rank "A" Foreman's position by the Carrier on December 3, 1990.

The Claimant was disciplined as a result of an investigation which was held on November 6, 1990 in the Carrier's conference room, in Denver, Colorado. At the investigation the Claimant was represented by the Organization. The Carrier disciplined the Claimant based upon its findings that he had failed to properly secure DRGW car 56006 which resulted in the derailment of that car and injury to the Claimant.

Findings of the Board

Trainmaster R.E. Newlun and Roadmaster G.R. Douthit testified regarding their investigation of an incident which occurred on October 25, 1988 at the 38th Street Section at Denver, Colorado. Their investigation disclosed that the Claimant, who was the Foreman of a work crew involved in repairing track, undertook the manipulation of the hand brake of DRGW car 56006; and that as a result of the manner in which

the Claimant tightened, released or failed to tighten the hand brake, the car rolled and derailed and the Claimant, in jumping from the car, sustained an injury.

The investigation of Messrs. Newlun and Douthit further disclosed that inspection by maintenance of equipment personnel subsequent to the derailment of car 56006 indicated that the hand brake was in working order.

Several of the Claimant's co-workers testified regarding the incident.

The Claimant testified that he did not recall requesting any of his co-workers to assist him in moving the car; that he was responsible for releasing the hand brake; and, that he could not explain the cause of the derailment.

The evidence before the Board establishes, to the Board's satisfaction, that the accident occurred due to the Claimant's failure to properly secure the hand brake. While the questions posed by the Organization Representative raise issues as to whether the Claimant was trained in the proper method for operating the hand brake and whether the Carrier witnesses knew exactly how the brake should have been turned (clockwise or counter clockwise), the fact remains that the Claimant was in sole and exclusive control of the car and the car derailed. It is also clear that the car and the braking mechanism were determined to be in good working order.

In these circumstances, the doctrine of res ipsa loquitur is applicable. That is, but for the actions of the Claimant the accident would not have occurred.

Therefore, the Board concludes that the Carrier has presented substantial and convincing evidence which establishes that the Claimant failed to comply with the cited safety rules. The Board further finds that the Carrier had cause to discipline the Claimant as the result of his failure to abide by those rules, particularly Rule 172(a) which provides, inter alia, that employees assigned to operate different types of hand brakes must be familiar with operating procedures and failing to have such knowledge are required to have supervision demonstrate the proper method for handling. Finally, the Board finds that the discipline was neither arbitrary nor overly severe.

Award: The claim is denied. This Award was signed this 5th day of February 1991.

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