NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 4055

BURLINGTON NORTHERN RAILROAD COMPANY (Former Frisco) -and- BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	CASE NO. 8 AWARD NO. 8

On January 21, 1986, 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 Section 3, Second of the Railway Labor Act, Public Law 89-456. The Agreement was docketed by the National Mediation Board as Public Law Board No. 4055 (hereinafter the "Board").

This Agreement contains certain relatively unique provisions regarding the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction is limited to disciplinary disputes involving Carrier employees represented by the Organization. Although the Board consists of three members, a Carrier Member, an Employee Member and a Neutral Member, awards of the Board only contain the signature of the Neutral Member, and the parties have agreed that such awards will be final and binding in accordance with the provisions of Section 3 of the Railway Labor Act.

In accepting the assignment, the below-signed Neutral Member agreed to render awards in disputes submitted within thirty (30) days of the date required documentation was received from the parties.

In initiating a case before the Board, the parties have agreed that they will provide the Neutral Member, by mail, with the following documentation: the notice of investigation; the transcript of investigation; the letter assessing discipline; and, the correspondence exchanged on the property. The Board has the authority to require or permit the production of such additional written evidence as the Neutral Member may decide is appropriate for review. The above documentation shall constitute the record of proceedings before the Board. The parties have agreed that it is not necessary to have oral hearings in the cases presented to this Board.

The Board's review is limited to the documentation provided and any additional argument, evidence or awards which the Board might require after review of the initial submission of the dispute. In deciding whether the discipline assessed should be upheld, modified or set aside, the Neutral Member shall determine (1) whether there was compliance with the applicable provisions of Schedule Rule 91; (2) whether substantial evidence was adduced at the investigation to prove the charges made; and (3) if discipline is found to be appropriate, whether the discipline assessed was excessive.

Background Facts

Mr. Gary Wayne Davis (hereinafter the "Claimant") entered the Carrier's service as a Laborer on April 9, 1979. After a number of promotions he attained the position of Machine Operator, and he was holding that position on Gang No. 827 on the Tulsa Division when he was dismissed from the Carrier's service by B&B Foreman R.E. Lehenbauer on February 11, 1986. On February 12, 1986 the Organization requested an investigation alleging that the Claimant was unjustly dismissed. The Organization also requested that it be furnished with the precise charge in writing which formed the basis for the Carrier's determination to terminate the Claimant.

By letter dated February 19, 1986 the Carrier scheduled an investigation for February 27, 1986. This notice of investigation stated that the Claimant was dismissed from service "for his alleged insubordinate, dishonest, quarrelsome, vicious and disruptive actions".

An investigation was conducted on February 27, 1986 at the Carrier's office in Oklahoma City, Oklahoma. The Claimant attended

and was represented by the Organization. Both the Claimant and the Organization were afforded a full opportunity to present evidence and cross-examine the witnesses who were called to the investigation by the Carrier.

Findings and Opinion

When Foreman R.E. Lehenbauer dismissed the Claimant from service at the conclusion of his tour of duty on February 11, 1986 it represented, in this Board's opinion, the culmination of a festering dispute between the two men.

No purpose would be served by this Board's effort to "read between the lines" and to make a determination as to which of the two men was primarily responsible for their disagreement. However, we need not read between the lines in order to find that the record contains insufficient evidence to conclude that the Claimant was insubordinate, quarrelsome, vicious, dishonest and/or disruptive on February 11, 1986.

A review of the entirety of the record establishes that Foreman Lehenbauer and the Claimant had, apparently, a classic personality conflict. Obviously, neither man respected the other; and, apparently, for a period of time the Claimant failed to give his Foreman a proper measure of respect and cooperation.

However, the Carrier has not introduced one shred of evidence into the record which would, in any way, demonstrate that the Claimant was dishonest or vicious. Those charges were, obviously, included in the notice of hearing because the words "dishonest" and "vicious" appear in certain of the rules which the Carrier alleged were violated by the Claimant.

Neither is there any real evidence to show that the Claimant was insubordinate. The Carrier has neither alleged nor have any of the witnesses testified that the Claimant ever failed to follow instructions received from his supervisors.

The Carrier also charged the Claimant with being quarrelsome. Apparently, Foreman Lehenbauer overheard a part, "the tail end", of a conversation between the Claimant and B&B Helper C.V. Norris, which Foreman Lehenbauer construed as a "quarrelsome conversation". At best, this evidence of the Claimant's alleged violation of the rule is weak and insubstantial. The evidence in the record regarding this incident is limited to the direct testimony of Mr. Norris, who was called by the Carrier as a witness. Mr. Norris testified as follows:

"Q. How was he quarrelsome to yourself?

A. Well, he was out -- late that evening -- we was out one framing timber and we had on two short timbers to be framed, we'd done framed them and we was drilling the last run. We had one laying on left and one laying on the right side and Mr. Lehenbauer said, 'We got to get that other stringers up there and drill it.' He said, 'No wait, make sure that's the right one.' Gary (the Claimant) said, 'Yeh, it's got to be the right one,' something to that effect 'cause, we ain't had but two and anybody that's stupid will know that.' I said, 'Well, Gary, I said, he's just the man with the white hat and if he wants in on the rail, we got to drill it.' And he spoke up and said something to this effect, 'Yeh, you asked right, you kinda suck up to him anyhow.' I said, 'Hey man, if you've got something to say, just go ahead and say it to me.' And he said, 'No, I don't -- what I got to say, I ain't going to say it on company time.' I said, 'Well, I be out there after company if you've got anything to say to me.' And, that's when Lehenbauer walked up and said, 'Cool it, you two.' And, that was it."

The colloquy between the Claimant and Mr. Norris appears, to this Board, to be no more than an exchange of ill-chosen words. There is no showing that the Claimant was responsible for a quarrel or that his actions and/or words were sufficiently provocative so that they might be considered a violation of the cited rule. If anything, it was Mr. Norris who "invited" the Claimant to continue their discussion after working hours. Thus, if the Carrier felt that this short exchange of words justified discipline, it is clear that the Carrier chose to charge the Claimant with responsibility and to excuse Mr. Norris, for no apparent reason. Repeating our previous conclusion regarding this incident, the Carrier has not proven that the Claimant's brief exchange of words with Mr. Norris constituted quarrelsome behavior deserving of discipline.

Finally, in addressing the elements of the Carrier's charges, we find insufficient evidence to conclude that the Claimant's activities on February 11, 1986 were "disruptive" or adversely affected the Gang's productivity. Apparently, Foreman Lehenbauer was disturbed because the Claimant had allegedly interrupted his reading of certain safety rules to the Gang on the day previous to the discharge. However, Foreman Lehenbauer's testimony, which is the

only testimony offered in support of the charge of "disruptive behavior", falls short of proving that the Claimant was disruptive. The record appears to support a conclusion that the Claimant made certain comments regarding the rules and that he and Foreman Lehenbauer had intended to discuss the matter following the reading of the rules. Again, although we might conclude that the Claimant was less than fully cooperative and was guilty of poor manners, the evidence does not support the imposition of discipline resulting in the Claimant's termination.

We have addressed the merits of this claim first, because the Board feels it is important to point out that the Carrier lacked sufficient cause to terminate the Claimant.

We should also address the Organization's claim that the Carrier failed to provide the Claimant with precise charges regarding his termination. We agree with the Organization's contention. Obviously, the Carrier did not list the precise charges in the Notice of Investigation because there were no precise charges, as had been demonstrated in the Board's discussion of the alleged bases for the termination.

Accordingly, the Board concludes that the Carrier lacked just cause to discipline the Claimant by terminating his employment on February 11, 1986.

The Board is going to make a final observation in this case. Hopefully, the Claimant will consider this observation as important as the decision which restores him to service and makes him whole for lost pay and benefits. The record reflects that the Claimant was, apparently, a capable and good worker. His testimony and his writing indicate that he is, apparently, an articulate and reasonably intelligent employee. Yet, his fellow employees, whose testimony contributed substantially to our finding that the Claimant should be restored to service because he had not committed the alleged infractions, all testified that the attitude and working environment on the Gang had improved substantially subsequent to the Claimant's dismissal. Some of this improvement was obviously due to the changed attitude of the involved foreman. However, the Claimant must consider the fact that the removal of his personality from the work place contributed substantially to the improved morale and good feelings of his fellow employees. It is strongly suggested that the Claimant, rather than considering this Award a "victory", look upon his restoration to service as an opportunity to emphasize his better qualities for the benefit of himself, his fellow employees, his supervisors and the Carrier.

Award The claim is sustained. The Carrier is directed, within fifteen (15) days of the receipt of this Award, to restore the Claimant to service with back pay for all time lost and with benefits and seniority unimpaired. The Carrier is also directed to expunge any reference to this discipline from the Claimant's Personal Record.

This Award was signed this 20th day of December 1986 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

Richard R. Kasher, Neutral Member
Public Law Board No. 4055