NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4370

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 43
Case No. 43

STATEMENT OF CLAIM

1.   The Carrier's decision to dismiss Mr. J. P. Jennings was in violation of the current Agreement. Said action being unduly harsh and in abuse of discretion.

2.   The Carrier will now be required to reinstate Claimant to his former position with seniority and all rights restored unimpaired with compensation for all wage loss suffered.

FINDINGS

Following an investigative hearing, the Claimant was dismissed from service on September 24, 1990 under the charge of "absences without authority on August 16, 17, 20, 21 and 22, 1990, while operating a spike puller on Rail Gang 2". The dismissal letter also noted that the Claimant's "personal record was taken into account while issuing this discipline".

The Organization initiated a claim on October 24, 1990 concerning the dismissal. On January 10, 1991 the Organization

sought to have the claim sustained under Rule 27 (a) because of allegedly not having received a reply from the Carrier to the October 24, 1989 claim. The Carrier thereupon produced what it claimed to be a copy of a timely denial letter from the General Manager dated November 21, 1990.

This contention is similar to that reviewed in Award No. 37. The Referee cannot resolve with certainty whether or not a letter dated November 21, 1989 was in fact mailed to the General Chairman. Such uncertainty makes it inappropriate to determine that the Carrier failed in its responsibility.

Review of the record indicates that the Claimant was guilty of the charge, with the possible exception of the first date. The severity of the resulting penalty is properly based on a review of the Claimant's record, which shows numerous disciplinary actions for similar offenses, including a 45-day suspension in the year previous to the dismissal action.

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HERBERT L. MARX, Jr., Neutral Referee

NEW YORK, NY

DATED: JUL 27 1992

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