

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 72

Carrier File No. 1MWB 92-07-01B

Organization File No. S-P-472-W

STATEMENT OF CLAIM

1. The dismissal of Laborer J. T. Dillard for alleged violation of ". . . Rules 2, 568, 570 and 576 of the Safety Rules and General Rules . . ." was arbitrary, on the basis of unproven charges and in violation of the Agreement.

2. The Claimant shall be reinstated to service with seniority and all other rights unimpaired. His record shall be cleared of the charges leveled against him and he shall be compensated for all wage loss suffered, including health and welfare benefits, vacation and personal leave qualification.

FINDINGS

The Carrier sent notice by certified mail to the Claimant to attend an investigation on December 20, 1991 under the following charge:

. . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with instructions from proper authority at about 7:30 a.m. on Tuesday, December 10, 1991, and your absence from duty without proper authority on Tuesday, December 10, 1991 when

Roadmaster Mesford instructed you to take a company physical on Tuesday, December 10, 1991 at The Dalles, Oregon and then to come to work on Tuesday, December 10, 1991 and you refused while assigned as a laborer on Steel Gang 3.

The notice was sent in timely fashion to the Claimant's address of record. The Claimant, however, failed to appear at the hearing. The hearing officer nevertheless proceeded to conduct the hearing in the Claimant's absence. Following the hearing, the Claimant was dismissed from service.

As indicated by testimony provided at the hearing, the Claimant had returned from a 32-day absence on December 10. He was directed by the Roadmaster to undertake a physical examination, but he refused to do so. The testimony also indicated that, rather than take the test, he would leave work -- despite being advised he was not authorized to do so.

The Organization argues that the Claimant was being subject to an unusual procedure -- that of a physical examination after a 32-day absence and without other supporting reason. While this may or may not have been the case, it is obvious that it was the Claimant's responsibility to comply with the Roadmaster's directive and to initiate a complaint or grievance thereafter if he believed his rights to have been abridged. There is no doubt that the Claimant's obvious insubordination was a serious offense.

The Carrier notes that the Claimant had been placed on medical leave of absence twice in the previous two years for failure to pass a physical examination. The Carrier also supports its dismissal action by reference to a letter of censure and a

disciplinary suspension for failure to report to work in the period immediately prior to his reporting on December 10, 1990. These disciplinary actions were obviously not made effective prior to the dismissal here under review and thus could not be seen to have any "corrective" effect on the Claimant.

The Claimant's insubordination cannot be excused, even under the circumstances of a possibly unusual physical examination requirement. The Board is persuaded, however, that permanent dismissal from service is unduly harsh. The Award will modify the penalty to provide that the Claimant shall be offered reinstatement with seniority unimpaired but without back pay or retroactive benefits and with the following conditions:

1. The Claimant must report for work within 30 days of Carrier's notification.
2. The Claimant must successfully pass a complete physical examination upon his recall to duty,
3. The Claimant shall enter and comply with directives of the Carrier's Employee Assistant Program.

The Carrier's dismissal action will remain in effect in the event of non-compliance with any of these conditions.

A W A R D

Claim sustained to the extent provided in the Findings. The Carrier is directed to make this Award effective within 30 days of the date of this Award.



HERBERT L. MARX, Jr, Chairman and Neutral Member



MARK J. SCHAPPAUGH, Employee Member



D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED: September 12, 1994