PUBLIC LAW BOARD NO. 5950

AWARD NO. 2
NMB CASE NO. 2
UNION CASE NO. S-P-525-W
COMPANY CASE NO. MWB 94-07-07AA

PARTIES TO THE DISPUTE:

BURLINGTON NORTHERN SANTA FE (Former
Burlington Northern Railroad Company)

- and -

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYEES

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The dismissal of Traveling Mechanic J. P. Morris for alleged violation of Maintenance of Way Rules A, I and 532(B) on February 17, 1994 was arbitrary, unwarranted and in violation of the Agreement (System File S-P-525-W/MWB 94-07-07AA BNR).

2. As a consequence of the violation referred to in Part (1) above, 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."

OPINION OF BOARD:

J. Morris (Claimant) entered Carrier's service as a sectionman in May 1979. Claimant was promoted to the position of Traveling Mechanic, and was working as such when this claim arose. Prior to the instant dispute, in September 1992, Claimant was dismissed for insubordination. The circumstances surrounding Claimant's earlier dismissal were nearly identical to those which led to the present dispute. Those circumstances are set forth in the following:

On June 24, 1992, Carrier issued General Manager Notice No. 37 which stated that:

RESPIRATOR USE - MAINTENANCE OF WAY

> Effective immediately all Maintenance of Way employees who may be exposed to silica dust and/or manganese dust and fumes will be subject to mandatory respirator use for selected operations. This is an interim control to be utilized until/unless engineering controls can be instituted to minimize exposure levels. The areas of work with the greatest potential for exposure include, but are not limited to the following:
>
> > Operating or working in the immediate vicinity [visible ballast dust cloud] of ballast regulators, tampers, track brooms, tie cribbers, ballast cleaners, undercutters, ballast dumping and yard cleaning operations; as well as grinding and welding operations with manganese/metal dust and fumes.
>
> Questionnaires to determine individual ability to wear respirators have been

> distributed to all employees. Pacific Division Maintenance of Way employees (with the exception of some B&B employees not immediately subject to exposure) will be fit-tested for appropriate respiratory protection during the months of June and July. Employees must be clean shaven at the time of fit-testing, and at any time respiratory protection is required on their position(s).
>
> Employees interested in reviewing the full Burlington Northern Respirator Manual, including the Respirator Policy should contact their immediate supervisor or the Pacific Safety Department.

Claimant, who sported a beard, requested the opportunity to have the respirator fitted over his beard to determine if a satisfactory seal/fit could be accomplished. Carrier declined Mr. Morris' request, and when Claimant refused to shave his beard, Carrier charged him with insubordination. Subsequent to an investigation, Claimant was dismissed from service.

The dismissal was appealed on the property, wherein several MofW members submitted statements maintaining that they had been fit-tested while regularly maintaining facial hair/beards. However, Carrier upheld the discharge, and when the issue remained unresolved, it was submitted to Special Board of Adjustment (SBA) No. 925 for adjudication. (A second Claimant, in like circumstances, constituted one of these Awards. However, that issue does not relate to this dispute in any way.) As a result, and set forth in Awards 137 and 138, dated December 24, 1992, Carrier's decision to dismiss Claimant was overturned. The Board premised its decision, in pertinent part, on the

following:

> "First, it is a well-established rule in the context of the workplace that a direct order from proper authority must be obeyed, unless such order would jeopardize an employee's health or safety. Claimant Morris testified that he was fair-skinned, and that if he was required to shave his beard and work in the high sun of July and August he would likely suffer a severe sunburn. His testimony might be construed as a defense....(but)..the theory, absent additional evidence, is a difficult one to support.
>
> Secondly, the Organization does not dispute the Carrier's right to promulgate a reasonable rule, which is consistently applied and which is established for the purpose of protecting employees.
>
> Thirdly, the Organization Representatives attempt to establish a record, which would demonstrate that employees in other crafts, subjected to the same hazards of silica dust, were not required to (1) be fit-tested for respirators and/or (2) be clean shaven for said fit.
>
> Finally, this Board is troubled when rights of 'personal preference' appear to be negated by the arbitrary implementation of a rule or policy.
>
> For in the context of a claim of disparate treatment, employees must be given the opportunity to challenge a rule, even if that rule is a reasonable one, by showing that the rule was not uniformly and consistently applied to similarly-situated employees.
>
> Based on the foregoing analysis, this Board concludes that Claimant Morris was subject to disparate treatment by the Carrier, and in spite of their refusal to obey proper authority, their exercise of a 'personal right' should not have resulted in their dismissal from service."

The Board directed Carrier to return Claimant to service

with full back pay and benefits and with seniority unimpaired. Carrier complied with said directive, and Claimant returned to service in February, 1993.

Approximately one (1) year later, on February 17, 1994, Claimant was scheduled for respirator fit-testing. It is not disputed that Claimant was told, "several times" in the week prior to the fitting, that he must report for the requisite test "clean shaven." However, when Claimant arrived on February 17 , he was still unshaven. Claimant's immediate supervisor, R. Creswell, told Mr. Morris that shaving cream and shavers were "available", if he chose to use them. Claimant refused Mr. Creswell's offer, stating that he "didn't want to." Mr. Creswell then summoned Roadmaster Jackson who repeated the directive, however, Claimant remained steadfast in his refusal to remove his beard.

Shortly thereafter, Claimant was removed from service, and cited to attend an investigation on charges of insubordination and failure to comply with instructions from proper authority. Specifically, Carrier asserted that Claimant had violated of Rules A, I and 532 (B) of the Maintenance of Way Rules. Following the investigation, by letter dated March 28, 1994, Mr. Morris was dismissed.

The Organization appealed on behalf of Mr. Morris maintaining that Carrier violated the Agreement when it assessed "the improper, unwarranted and excessive discipline of dismissal

against M. Morris without good and sufficient cause." The Organization further asserted that:

1. Carrier failed to deny the Organization's letter of appeal within the time limits set forth in Rule 42 of the Agreement.

2. Claimant did not receive a fair and impartial hearing as he was subjected to "double jeopardy."

3. Claimant should not have been dismissed for refusing to shave his beard in the "absence of evidence" that his beard presented a clear present personal danger.

4. Claimant had the "weight of authority" behind his action in view of earlier Awards 137 and 138.

In its denial, Carrier maintained that the discipline was "fully warranted" in light of Claimant's refusal to shave his beard in an effort to be fit tested. With regard to SBA No. 935, Awards 137 and 138, Carrier noted that Claimant was returned to work "solely on the Board's assumption" that he had been treated in a disparate manner. In that connection, it is not disputed that subsequent to Claimant's 1992 discharge and reinstatement, any employee who had been previously allowed a fit-test without being clean shaven, was directed to be re-tested, sans facial hair. Finally, Carrier reiterated that:

> "Burlington Northern is responsible for the safety and health of its employees and the promulgation of safety rules is not a subject of mandatory bargaining under the Railway Labor Act. The system-wide policy for respirator use is a direct result of OSHA citation and applicable Federal regulations. There are awards on numerous properties which fully support the Carrier's right and

obligations to provide a safe working environment for the employees."

At the outset, the Organization asserted that Carrier failed to deny the Organization's letter of appeal, dated July 7, 1994, in a timely manner. Rule 42 of the Agreement provides, in relevant part:

> A. All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Company shall, within sixty (60) days from the date the same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance.

In the present case, Carrier received the letter of appeal on July 8, 1994. It is not disputed that Carrier denied the appeal by letter dated, and mailed September 2, 1994. On September 6, 1994, Carrier discovered that the denial was mailed via regular mail. Consequently, Carrier mailed a copy of the September 2 letter of denial via certified mail on September 6. In addition, Carrier faxed a copy of the denial letter to the Organization on that same day. There is no language in Rule 42, supra, which stipulates that said correspondence must be sent certified mail. Further, Carrier sent a second copy, via certified mail, and faxed a third copy of the letter. Finally, the Organization did not produce any evidence which leads us to conclude that Claimant was harmed if, arguendo, Carrier's letter

was tardy.

With regard to the merits of this dispute, we have two (2) issues before us. The primary issue to be decided is whether, on February 17, 1994, Mr. Morris was insubordinate when he refused a direct order to become clean shaven in order to be properly fit-tested. That question can only be answered affirmatively. There is no dispute that following Claimant's reinstatement, Carrier's Vice President Occupational & Environmental Health & Safety, Dr. Mears, issued instructions to all General Managers ordering an end to any inconsistencies in applying the Carrier's respirator program, promulgated in compliance with OSHA Respirator Standard 29 CFR 1910.134.. Specifically, each of the individuals who testified that they were not clean-shaven and had "passed" the fit testing, in addition to others who had been "improperly" tested, were retested in accordance with the existing policy. Carrier's assertion that it had, since Claimant's 1993 reinstatement, "consistently adhered" to the existing policy, was not refuted.

At some time after returning to service in February 1993, Claimant bid, voluntarily, to the position of Traveling Mechanic, a position that Claimant knew required fit-testing and respiratory training. Claimant was forewarned on "several" occasions, that the requisite fitting would take place on February 17, 1994, and that he would have to be clean shaven in order to insure a proper fit. Claimant did not follow the

directive, and when his supervisor(s) asked him why, Mr. Morris stated it was because he "didn't want to."

This record clearly sets forth the reasons for Carrier's respirator fit-testing policy, and the process of promulgating that policy. Further, there is no evidence on this record which would lead us to conclude that said policy is either improper or unreasonable. Finally, previous Awards regarding this issue support Carrier's right to require certain individuals, in positions such as Claimant held, be clean shaven. (See for example Public Law Board [PLB] 5198, No.1 and PLB 2774, No.189).

The second issue to be decided is whether Carrier's assessed discipline is proportionate to Claimant's proven rule violation. Insubordination has been held by many tribunals as sufficient grounds for permanent dismissal. (See for example: First Division Awards No. 24023 and 12098, Second Division Awards No. 1171 and 8580, in addition to SBA No. 1010 Case No. 178). We are not convinced that Claimant assumed that he was protected by the language set forth in SBA 935, Awards 137 and 138. Nor are we convinced that Claimant, a long time Carrier employee, was naive about the consequences of his refusal to obey a directive. Based on the foregoing, we find no reason to disturb Carrier's decision to discharge Claimant.

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AWARD

Claim denied.

Nancy Faircloth Murphy, Chair
Dated at Memphis, New York on November 14, 1997

Union Member
Dated at Chicago, IL
on March 27, 1998

Company Member
Dated at Fort Worth, TEXAS
on February 27, 1998

I dissent to that portion of the Award that states, "... the Organization did not produce any evidence which leads us to conclude that Claimant was harmed if, arguendo, Carrier letters were tardy." The overwhelming arbitral precedent on the issue of Carrier time limit defaults establishes that in the event of a time limit default, the claim must be sustained as presented, in accordance with the clear and unambiguous language of the time limit rule. The time limit rule does NOT require a showing of harm in order for a full sustaining monetary award. This Board has no authority to add such a requirement to the time limit rule.