

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 3408

**BROTHERHOOD RAILWAY CARMEN DIVISION
TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION**

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 111

File No. SCA 91-01-18

STATEMENT OF CLAIM

1. That the Burlington Northern Railroad Company violated the terms of the controlling Agreement, particularly Rule 35(a) and Rule 14(c) when they failed to investigate Twin Cities Seniority District Carman John S. Walsh before terminating him from Carrier Service.

2. That the Burlington Northern Railroad violated Article VIII of the November 29, 1986 National Mediation Agreement when they failed to recognize Mr. Walsh's Carman seniority in the Twin Cities Seniority District.

3. That, accordingly, the Burlington Northern Railroad be ordered to return Mr. John S. Walsh to active service and reimburse him for all wage loss incurred during the time he is being arbitrarily withheld from active service and in addition restore all fringe benefits including vacation, seniority rights unimpaired, pass privileges and be made whole for pension benefits and for any other benefit that he would have earned during the period of time that he is being withheld from service commencing November 8, 1990 and continuing until properly restored to active service.

F I N D I N G S

Under date of October 18, 1990, the Claimant received notice from the Carrier which read in pertinent part as follows:

. . . your employment with Burlington Northern Railroad is terminated effective October 18, 1990 due to your gross misconduct. . . .

At the time this occurred, the Claimant was an exempt employee working without an employment contract. He had been promoted to this status from a position as Carman and had retained seniority status as a Carman under the appropriate rule. Upon being notified as quoted above, the Claimant inquired as to "vacant positions within the seniority district so that I can exercise my seniority, as allowed for in Rule 14C". He was then advised by the Carrier as follows:

This is to advise that because you were dismissed from service with the Burlington Northern Railroad effective October 18, 1990, your employee file has been closed. Therefore your request to exercise your seniority is respectfully declined.

Rule 14(c) reads in pertinent part as follows:

An employee involuntarily relieved from an official or supervisory position with the Company . . . may within thirty (30) calendar days thereafter return to his former position provided it has not been abolished or a senior employee has not exercised displacement rights thereon.
. . .

The Organization argues that the Claimant was entitled, under the circumstances of his being "involuntarily relieved" from an exempt position, to exercise his Carman seniority under Rule 14(c). It follows, according to the Organization, that any disciplinary action taken against the Claimant must be preceded by an investigation under Rule 35(a), which of course did not occur in this instance.

The Organization also notes that the Claimant's seniority retention as a Carman is ensured through Article VIII of the 1986 National Mediation Agreement.

The Board finds the Organization's position is correct in instances where an employee leaves exempt status while still holding employment status with the Carrier. Here, however, the Claimant was terminated from employment for alleged cause. While the Carrier had the option (which in many cases is elected) simply to release the Claimant from his exempt status, it is not required to do so. Rather, the Carrier elected to terminate the Claimant.

In support of this position, the Carrier cites Fourth Division Award No. 2511 (Bailer) as well as others following the same reasoning. Fourth Division Award states in pertinent part as follows:

In order for the Board to hold that claimant's termination was improper it would be necessary to find that Carrier violated an enforceable limitation on its otherwise unrestricted right to terminate employees with or without cause. But there was no contractual

limitation on Carrier's right to terminate claimant,
since his employment was not covered by any agreement.

The Board finds this reasoning fully applicable here.

A N A R D

Claim denied.

Herbert Marx Jr.

HERBERT L. MARX, Jr., Chairman and Neutral Member

Maxine M. Timberman

MAXINE M. TIMBERMAN, Carrier Member

Robert K. Schaffer Jr. Dissenting

ROBERT K. SCHAFER, Employee Member

NEW YORK, NY

DATED: April 30, 1992