

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 925

<u>BURLINGTON NORTHERN RAILROAD COMPANY</u>	*	
	*	
-and-	*	CASE NO. 1
	*	AWARD NO. 1
<u>BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES</u>	*	

On May 13, 1983 the Brotherhood of Maintenance of Way Employees (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 of the Railway Labor Act. The Agreement was docketed by the National Mediation Board as Special Board of Adjustment No. 925 (hereinafter the Board).

This agreement contains certain relatively unique provisions concerning the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction is limited to disciplinary disputes involving employees dismissed from service. Although, the Board consists of three members, a Carrier Member, an Organization Member, and a Neutral Referee, awards of the Board only contain the signature of the Referee and are final and binding, in accordance with the provisions of Section 3 of the Railway Labor Act. Employees in the Maintenance of Way Craft or Class who are dismissed from the Carrier's service may choose to appeal their dismissals to this Board, and they have a 60 day

period from the date of their dismissals to elect to handle their appeals through the usual appeal channels, under Schedule Rule 40, or to submit their appeals directly to this Board in anticipation of receiving expedited decisions. The employee who is dismissed may elect either option, but upon such election waives any rights to the other appeal procedure.

The agreement further establishes that within thirty (30) days after a dismissed employee's written notification of his/her desire for expedited handling of his/her appeal is received by the Carrier Member of the Board, that said Member shall arrange to transmit to the Referee one copy of the notice of investigation, the transcript of investigation, the notice of dismissal, and the dismissed employee's service record. These documents constitute the record of proceedings and are to be reviewed by the Referee. In the instant case, this Board has carefully reviewed each of the above described documents prior to reaching findings of fact and conclusions. Further, under the terms of the agreement the Referee had the option to request the parties to furnish additional input regarding the appeal, in terms of argument, evidence, and awards, prior to rendering a final and binding decision in the instant case. The agreement further provides that the Referee, in deciding whether the discipline assessed should be upheld, modified or set aside, will determine whether there was compliance with the applicable provisions of Schedule Rule 40, whether substantial evidence was adduced at the investigation to prove the charges made, and

whether the discipline assessed was excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

Under paragraph 5 of the May 13, 1983 agreement the Referee must agree, as a condition of the assignment, to render an award in each dispute submitted within sixty (60) days of the date the documents specified above are received. The sixty (60) day period may be extended when funding of the dispute resolution procedures under Section 3 of the Railway Labor Act are suspended.

Mr. Max H. Poppen, the Claimant, was dismissed from service on September 28, 1983 as the result of an investigation held on September 6, 1983. The documents of record including a 121 page transcript, were received by the Referee on October 22, 1983, and this Award was rendered on December 1, 1983.

#### Findings and Award

On Sunday, August 28, 1983 the Claimant was assigned as a Truck Driver on Regional Steel Gang 952 at Wymore, Nebraska. The Claimant and two fellow employees, Truck Driver D. L. Brass and Assistant Foreman D. L. Rundle were assigned to ferry two buses to Alliance, Nebraska.

During their trip, the Claimant and Rundle (who was driving a pickup truck in order to return drivers Poppen and Brass back to Wymore) were separated from fellow driver Brass. When the Claimant and Assistant Foreman Rundle arrived at Alliance they

found Employee Brass' bus in the yard but could not find Mr. Brass.

Subsequently it was determined that an investigation was being conducted by Carrier operating and security personnel as they had found certain narcotic paraphernalia and marijuana among employee Brass' possessions. In the same room that this investigation was taking place, employee Rundle was charged with being under the influence of alcohol. At the same time as the Claimant was observing Carrier operating and security personnel interrogate his two fellow employees, he was asked to undergo a urine analysis.

The record is reasonably clear that the Claimant's initial reaction was one of surprise and upset, and he was argumentative with the Carrier's investigators. On the basis of the Claimant's initial reactions to Carrier personnel he was charged with violating Carrier Safety Rules 565 and 566.

A review of the entirety of the record establishes that the Carrier did not have just or sufficient cause for disciplining the Claimant. It must be remembered that the Claimant, without any cause for suspecting that he had committed any violations, was brought into an interrogation room where his two fellow employees were being charged with very serious offenses; to wit, use and/or possession of drugs and alcohol while on Carrier premises. No explanation was made to the Claimant as to why he was being required to stay in the same room, and Carrier personnel, on the record, had no reason to believe that

the Claimant had committed any wrongdoing. In spite of these facts, the Claimant was told that he was under investigation or suspicion and he was given no basis regarding the Carrier's suspicions or potential allegations. In fact, the Claimant was merely told that he was going to be written up for violation of Safety Rules 565 and 566 without any specific indication as to which provisions he was found to be violating.


In these circumstances, it is understandable that the Claimant reacted in a somewhat belligerent manner when he was first confronted by the Carrier's interrogation tactics. Therefore, we find that the Claimant's initial reaction was understandable and excusable. We also note that the Claimant after his initial reaction moderated his behavior and did not cause the Carrier any problems nor was he quarrelsome or insubordinate.

Clearly, the Carrier has the right to have its employees undergo physical examinations, including a urine analysis, in circumstances where the Carrier has reason to believe that an employee may not be in a condition to perform his responsibilities safely. However in the circumstances of the instant case, we find that the Carrier's right to request such a physical examination does not override the Claimant's right to be fairly interrogated when an alleged infraction of the Carrier's safety rules may be under investigation.

In all of these circumstances we find that the claim should be sustained.

AWARD: Claim sustained. The Carrier is directed to restore the Claimant to service with full back pay, less outside earnings, with seniority unimpaired, and with all rights and benefits under the collective bargaining agreement. This order is to be made effective within ten days of the receipt of this Award, provided the Claimant can meet the physical requirements for service which the Carrier uniformly imposes.

Signed this 1st day of December 1983 in Bryn Mawr,  
Pennsylvania.

  
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Richard R. Kasher  
Chairman and Neutral Member  
Special Board of Adjustment No. 925