

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 102

AWARD NO. 102

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 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 was limited to disciplinary disputes involving employees dismissed from service. On September 28, 1987 the parties expanded the jurisdiction of the Board to cover employees who claimed that they had been improperly suspended from service or censured by the Carrier.

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 they 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 have been dismissed or suspended from the Carrier's service or who have been censured may chose to appeal their claims to this Board. The employee has a sixty (60) day period from the effective date of the discipline to elect to handle his/her appeal through the usual channels (Schedule Rule 40) or to submit the appeal directly to this Board in anticipation of receiving an expedited decision. An employee who is dismissed, suspended or censured may elect either option. However, upon such election that employee waives any rights to the other appeal procedure.

The Agreement further establishes that within thirty (30) days after a disciplined employee notifies the Carrier Member of the Board, in writing, of his/her desire for expedited handling of his/her appeal, the Carrier Member shall arrange to transmit one copy of the notice of investigation, the transcript of investigation, the notice of discipline and the disciplined employee's service record to the Referee. 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. Under the terms of the Agreement the Referee, prior to rendering a final and binding decision, has the option to request the parties to furnish additional data; including argument, evidence, and awards.

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 arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

Background Facts

Mr. Kenneth D. Beeler, hereinafter the Claimant, entered the Carrier's service as a Sectionman on April 4, 1977. The Claimant was subsequently promoted to the position of Track Laborer and he was occupying that position when he was censured by the Carrier on June 13, 1991.

The Claimant was censured as a result of an investigation which was held on June 3, 1991 in the Roadmaster's Office in Tacoma, Washington. At the investigation the Claimant was represented by the Organization. The Carrier censured the Claimant based upon its findings that the Claimant had violated Rule 570 for being absent without authority on May 16, 20, 21 and 22, 1991 while working as a laborer at Tacoma, Washington.

Subsequently, the Claimant was suspended from the Carrier's service for five (5) days beginning on June 24, 1991. This

suspension was issued as a result of an investigation which was held on June 11, 1991 in the Roadmaster's Office in Tacoma, Washington. Again, the Claimant was represented by the Organization and the Carrier based the suspension upon its findings that the Claimant had violated Rule 570 for being absent without authority on May 28, 29 and 30, 1991 while working as a laborer on Steel Gang #3 near Seattle, Washington.

Although the two matters involved separate incidents and were the subject of separate investigations, they have been consolidated before the Board under one case number in view of the similarity of the incidents, the charges, the defenses raised by the Claimant and the conclusions of the Carrier regarding the imposition of the disciplines.

Findings and Opinion

Mr. D.L. Mesford, Roadmaster of Steel Gang #3, testified at both investigations. Roadmaster Mesford testified that he was not contacted by the Claimant, prior to the Claimant's absences on May 20, 21, 22, 28, 29 or 30, 1991, regarding the reasons that the Claimant was going to be absent. Mr. Mesford also testified that he did not authorize the Claimant to be absent on any of the days in question. Mr. Mesford further testified that the employees under his jurisdiction are required to call in and advise management when they will not be attending work and to request permission to be absent. Mr. Mesford testified that a Ms. Connie Harris, the employee who receives calls from employees seeking permission to be absent, was not available at the investigations because she was on jury duty. Mr. Mesford sponsored exhibits verifying Ms. Harris' jury duty status and an affidavit which established that she had not received a call from the Claimant regarding his absences on the days in question.

The Claimant testified that he was not present for his assignments on the days for which he was charged with being absent. The Claimant testified that he did not perform any duties as a laborer on those days because "I was under the assumption I was on a medical leave". The Claimant testified that he did not have an approved medical leave form, and that he had no documentation from a physician or a hospital which would establish that he was ill or incapacitated and therefore not able to work on the days in question.

There is evidence in the record that Roadmaster Mesford received a telephone call on or about May 21, 1991, from an individual who identified herself as a hospital nurse. In this telephone conversation Mr. Mesford was advised that the Claimant would not be able to work as he was hospitalized. The Conducting Officer queried the Claimant regarding the allegation concerning his hospitalization. He asked the Claimant what was the condition for which he was being treated and the Claimant responded "I don't think

that pertains to the investigation but I was in the hospital". The Conducting Officer then asked the Claimant how long he was hospitalized and the Claimant responded "I believe until the 26th, 27th". The Conducting Officer then asked the Claimant if he was hospitalized on May 28, 29 and 30, 1991 and the Claimant responded "No, I was not but I still believed I was on a medical leave at that time".

It may very well be that the Claimant had a legitimate and justifiable excuse for each and every day of his absence. Had the Claimant communicated the reasons for his anticipated absence to appropriate Carrier representatives, he may have received permission to be absent and no charges would have resulted. It is also conceivable that had the Claimant communicated the nature of his illness or injury to Roadmaster Mesford or to other Carrier representatives he would have received an approved medical leave of absence. Finally, it is not inconceivable that had the Claimant, at either investigation, advised the Conducting Officer of the reasons for his absences that the Carrier representative(s) who reviewed the investigative records might have concluded that discipline should not be imposed.

However, based upon the record before this Board we find no basis to conclude that the Claimant did not violate the Carrier's rules since the only evidence in the record establishes that the Claimant was absent without permission. The Organization is correct when it contends that "Confinement in a hospital certainly [should] be considered adequate reason for being absent from duty". However, the Claimant has provided no verification that he was, in fact, hospitalized, and he has provided no documentary or other evidence which would establish, if in fact he was hospitalized, the reason for such hospitalization.

In these circumstances, the Board has no option other than to conclude that the Carrier had proper and just cause for disciplining the Claimant. The Board has no reason to conclude that the discipline was arbitrary or overly severe, since the Claimant has provided no evidence of mitigation which would justify reduction of the disciplines imposed. Accordingly, the claims will be denied.

Award: The claims are denied. This Award was signed this 8th day of August 1991.

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