

· 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. 104

AWARD NO. 104

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. Donald D. Blomberg, hereinafter the Claimant, entered the Carrier's service on June 5, 1957 as a Sectionman. The Claimant was subsequently promoted to the position of Machine Operator and he was occupying that position when he was dismissed from the Carrier's service on August 2, 1991.

The Claimant was dismissed as a result of an investigation which was held on July 23, 1991 in the Roadmaster's Office in Tacoma, Washington. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that the Claimant had violated Rules 564 and 575 for falsification of Timeroll #543406 on June 28, 1991 while assigned as a Group 2 Machine Operator at Tacoma, Washington.



Findings and Opinion

Roadmaster Ronald Kazen, Assistant Former Lyle Leggett and Terminal Trainmaster Daniel Burns all testified that they had some contact with the Claimant on June 28, 1991 in the vicinity of the Trainmasters' office in the Tacoma, Washington terminal. Truck Driver R.J. McHenry testified that he was on the gang to which the Claimant was assigned on June 28, 1991, that the Claimant did not report at the scheduled time, 7:00 a.m., on that date, and that a Mr. Wilbur Byrd, a Section Laborer, was "running the front end loader", which the Claimant was ordinarily assigned to operate, on June 28, 1991.

The collective testimony of these witnesses establishes, without contradiction, that the Claimant was in the vicinity of the Trainmaster's office at approximately 12 noon on June 28, 1991; that the Claimant was assigned on that date as a Machine Operator; that the Claimant, when asked what he was doing in the vicinity of the Trainmaster's office in the terminal area, told supervisory personnel that he was "on vacation"; that the Claimant submitted a timecard in which he claimed eight (8) hours straight time pay for work performed on Friday, June 28, 1991; and that a physical investigation disclosed that the Claimant was not working with his assigned gang for a part, if not all, of the time that the gang was working on June 28, 1991.

The Claimant testified that he was "a little bit late" on the morning of June 28, 1991 because he "made out part of [his] payroll before [he] left the house". The Claimant testified that he could not state with certainty the exact or definite times he operated his machine on June 28, 1991. The Claimant did testify that he did not operate the machine to which he was assigned during the afternoon of June 28, 1991 and that he did, during a conversation with Roadmaster Kazen at approximately noon on June 28, 1991, state that he was "on vacation". The Claimant testified, in response to the question "Did you mean you were on vacation that day?", as follows:

Not that day, that afternoon. I wasn't feelin' good and stuff, I've been having these pains up and down my head and I took one set of my pressure pills and then I went and took another one and then some pain pills on top of that.

The Claimant also testified that he decided, at or about the point in time that he was speaking with Roadmaster Kazen, that he would start his vacation at noon on June 28, 1991.

In explaining why he decided to take vacation on the afternoon of June 28, 1991, the Claimant testified as follows:

Like I said before, what I did, I got up and I took my pressure pills, which is blood pressure pills. I ain't been feelin' good, I got this pain up and down the side of my head which I've had for quite awhile so, I took some more and then I took some pain pills on top of that and I was feelin' woozy and I didn't think I really should be runnin' the machine so I went on vacation so I (garbled) to go which that's probably wrong but then I turned around and I said well, I won't submit no expenses or mileage or anything for that month and so I didn't turn that in or nothin' and I thought well, maybe it would make up the difference. Other than that I wouldn't have turned in them 4 hours and I still got that pain up and down my head but I ain't takin' any more of them pills, I'll tell you that. I was feelin' woozy when I come back down here to mail my payroll, that's true. I'll admit it.

Assuming that the Claimant's testimony is entirely truthful, he has provided insufficient justification for this submitting false information to the Carrier regarding the work he performed on June 28, 1991.

If the Grievant was "woozy" because of the combination of pain medication and blood pressure pills he took on the morning of June 28, 1991, he was required to report that fact to the Carrier before he operated heavy equipment. It is extremely probable that had the Claimant reported his condition to Roadmaster Kazen, or any other responsible Carrier supervisor, on the morning of June 28, 1991 he would have been permitted to mark off and he could have justifiably and "legally" commenced his "vacation" as of that time. He did not. He made the unilateral decision to quit work, at least as early as noon. If that was all that he did, and if it was subsequently discovered that his physical condition was the cause for his early quit, discipline might not have imposed. However, the Claimant compounded his wrongdoing when he sought pay for time he did not work. The Claimant knowingly submitted a false payroll record, and his long service with the Carrier does not mitigate this most serious offense. Accordingly, the Board will deny the claim.

Award: The claim is denied. This Award was signed this 5th day of October, 1991.

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