

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 925

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*****
BURLINGTON NORTHERN RAILROAD COMPANY      *
- and -                                   *
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES *
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CASE NO. 105  
AWARD NO. 105

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.

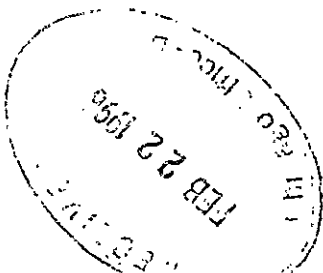
In the instant case, this Board has carefully reviewed each of the above-described documents prior to reaching findings of fact and conclusions. Under the terms of the Agreement the Referee, prior to rendering a final and binding decision, has the option to request the parties to furnish additional data; 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. Jeffrey W. Heide, hereinafter the Claimant, entered the Carrier's service on August 20, 1990 as a Sectionman. The Claimant was occupying that position when he was dismissed from the Carrier's service effective July 16, 1991.

The Claimant was dismissed as a result of an investigation which was held on June 26, 1991 in the Roadmaster's Office in Spokane, 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 Rule 530(b), which provides that theft or pilferage shall be considered sufficient cause for dismissal from railroad service. The charge concerned the Claimant's alleged attempted theft of railroad ties on June 13, 1991 while the Claimant was assigned as a Laborer on Tie Gang #5 at Ritzville, Washington.



### Findings and Opinion

Tie Gang Foreman D. Franklin testified that on the evening of June 13, 1991 he was contacted by the Adams County Sheriff's Department and advised that those police authorities had apprehended three (3) individuals who were allegedly involved in the improper removal of ties from the Carrier's property. Mr. Franklin testified that he then contacted Roadmaster D.P. Manson, sometime after 10:00 p.m., and they investigated the incident.

The police report of the incident was sponsored by Mr. Franklin. The report indicated that at approximately 8:30 p.m. on the evening of June 13, 1991 the Claimant, fellow employee Paul Moore and a Mr. Paul James, a non-railroad employee who was allegedly in the process of purchasing the ties from the Claimant and Mr. Moore, were apprehended after they had loaded approximately 20 used ties in a two-tone blue Ford pickup truck which had been parked underneath the I-90/195 overpass adjacent to the Carrier's right of way.

The relevant and controlling facts in this case are virtually undisputed. While no member of the Adams County Sheriff's Department appeared at the investigation to testify, it is significant, in this Board's opinion, to note that the Claimant did not dispute critical facts contained in that report. Specifically, the Claimant was alleged to have told Deputy Glenn Ball, when he was first apprehended, that he had received permission from the Roadmaster to remove the ties. Deputy Ball observed that when the Claimant was asked the Roadmaster's name who had given him permission to take the ties that the Claimant then "looked very nervous"; and that after the Claimant and the other two individuals who had been apprehended were read their rights, and after the Claimant was asked how Deputy Ball might contact the Claimant's supervisor that the Claimant then stated that he did not, in fact, have permission to take the ties and he was worried about losing his job.

Although the Claimant arrived at the investigation some forty-five minutes after the scheduled start, and although Tie Gang Foreman Franklin had completed testifying, the Conducting Officer, diligently, intelligently and in order to assure the fairness of the hearing, began the hearing again and had Mr. Franklin testify so that the Claimant and his representative, Mr. Bean, had the full benefit of the investigation.

The evidence in the record, which includes Mr. Moore's testimony to the effect that the Claimant told him that he, the Claimant, had permission from Roadmaster Manson to remove the ties and the Claimant's admission that although he did not have such permission he told Mr. Moore that he did, establishes beyond any doubt that the Claimant knowingly engaged in conduct prohibited by Rule 530(b).

The Claimant's, as well as Mr. Moore's, tour of duty on June 13, 1991 began at 5:00 a.m. and ended at 1:30 p.m. Some seven (7) hours later the Claimant was observed loading Burlington Northern property into a private vehicle. Deputy Ball observed that the "time of night" and "the location they chose" indicated to him that the Claimant's intent was nefarious. This Board has no reason to doubt that observation. The Claimant's admission that he did not have permission to remove the ties from the Carrier's property and Roadmaster Manson's testimony that he did not have the authority to give permission for the removal of the ties confirms the Claimant's violation of Rule 530(b).

Violation of that rule represents, possibly, the most serious transgression an individual can commit in the context of his/her employment relationship. The "trivial" value of the property (a characterization of the Claimant's representative and not the Board) has absolutely no bearing on the question of guilt or appropriate penalty. The fact that the Claimant and Mr. Moore were relatively new employees and had only limited time to familiarize themselves with the Carrier's rules, likewise, represents absolutely no mitigation in the context of a requirement or rule that every employee is mandated to understand. One does not appropriate his/her employer's property without permission.

Based upon the foregoing facts, admissions and analysis, the claim is denied.

Award: The claim is denied. The Carrier had just cause to dismiss the Claimant. 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