

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 925

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| <u>BURLINGTON NORTHERN RAILROAD COMPANY</u>       | *              |
|   | *              |
| -and-   | * CASE NO. 11  |
|   | * AWARD NO. 11 |
| <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 sixty (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 that employee 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 one copy of the notice of investigation, the transcript of investigation, the notice of dismissal, and the dismissed 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 had the option to request the parties to furnish additional data 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. Roger G. Pearson, the Claimant, who entered service with the Carrier on June 3, 1970 was dismissed from service effective March 16, 1984 as the result of an investigation held on February 21, 1984. The documents of record including a forty-nine page transcript were received by the Referee and reviewed thoroughly.

#### Findings and Award

The Claimant was a Track Inspector assigned to the Lincoln, Nebraska Division. On February 15, 1984, the Claimant was notified to attend a disciplinary investigation, the purpose of which was to ascertain the facts and determine his responsibility, if any, regarding his alleged dishonesty by soliciting a statement by Brakeman J. F. Gust regarding the Claimant's alleged performance of duties; those duties were his alleged riding on the head end of a train on the date of January 17, 1984.

The gist of this case involves the Carrier's conclusion that the Claimant, in attempting to respond to allegations in another investigation, improperly solicited a false statement from Brakeman J. F. Gust which would have confirmed that the Claimant was in fact performing service between St. Joseph, Missouri and Clarke, Missouri on January 17, 1984.

When the entirety of the transcript is reviewed, it is abundantly clear that the Carrier has totally failed to produce any evidence which would establish that either the Claimant or Brakeman Gust engaged in any subterfuge in an attempt to issue false statements to the Carrier. Importantly, the record shows that the Claimant, in the presence of Brakeman Gust's Local Chairman of the United Transportation Union, asked Brakeman Gust if he could confirm that the Claimant was in fact riding the head end of the train in question on January 17, 1984. The testimony of the Claimant, Gust and Local Chairman Thompson all confirm that the Claimant asked Gust to sign the statement "only if it truly reflected the facts".

The Carrier has apparently used the term "soliciting" in order to cast some pejorative meaning upon the Claimant's request to obtain a corroborating statement from another employee. Clearly, this is not a case of "soliciting" as that term might be used in the negative sense. The evidence of record establishes clearly that Brakeman Gust had no reason to fabricate, was not asked to fabricate, and the Claimant should have known that should such a fabrication be offered that the Carrier could quickly confirm by checking crew calling records regarding the presence of the brakeman.

On the basis of the facts alone, this claim will be sustained. However, this Referee should observe that the conduct of the proceeding by the Investigating Officer as well as the conduct of the first witness, interestingly another investigating officer on the property, shows nothing but disrespect for the elements of fair play and due process in the investigative procedure. An investigating officer has significant power to control the course of a hearing. In this case, that power was totally abused. It is ironic that at the conclusion of the investigation the Claimant and the Local Chairman of the Organization were asked whether in their opinion the investigation had been conducted in a fair and impartial manner. They both properly replied in the strongest negative terms. The investigating officer cut short the Local Chairman's attempt to develop facts regarding the discipline, if any, meted out to Brakeman Gust. Subsequently, this evidence was introduced into the record. It was initially ruled by the investigating officer as not being "pertinent". Thus, for the purpose of saving one or two pages of transcript, the investigating officer nearly blocked the Organization's attempt to explore a clearly relevant line of questioning which could have established what was disparate treatment. It is unnecessary to review the rest of

the record where instances of the investigating officer's prosecutorial behavior offend the sensibilities of a fair trier of fact. Had we not sustained this claim on its merits, we certainly would have sustained it on the basis that the hearing officer violated the concepts of due process and failed, miserably, to conduct a fair and impartial hearing.

Accordingly, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to restore the Claimant to service within ten days of the receipt of this Award, provided that the Claimant can meet the physical requirements uniformly employed for individuals in his craft or class. The Claimant shall be entitled to full back pay and restoration of all benefits, less any outside earnings.

This Award was signed this 7th day of August 1984 in Bryn Mawr, Pennsylvania.

  
Richard R. Kasher  
Chairman and Neutral Member  
SBA No. 925