

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 925  
Case/Award No. 139

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 139

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. Mark Robert Zinko, hereinafter the Claimant, entered the Carrier's service as a Trackman on September 5, 1978. He was subsequently promoted to the position of Machine Operator and he was occupying that position when he was censured by the Carrier.

The Claimant was censured as a result of an investigation which was held on September 16, 1992 in Edmonds, Oklahoma. At the investigation the Claimant was represented by the Organization. The Carrier censured the Claimant based upon its findings that he had violated Carrier Rule L by creating a disturbance at the Stroud Motor Inn, in Stroud, Oklahoma on or about August 7 and 8, 1992.

### Findings and Opinion

The Claimant and a number of fellow employees, including Machine Operators L.A. Trujillo, R.L. Crespin and M.E. Medina, were part of a crew, Tie Gang TP04, scheduled to work during early August, 1992 in the vicinity of Stroud, Oklahoma in seniority district 64. These employees were, apparently, headquartered in

seniority district 25 and working out of Trinidad, Colorado at the time of the investigation.

The investigation was, apparently, held in the vicinity of Stroud, Oklahoma because the incident occurred in that location.

The Organization Representative raised a number of objections regarding the site and the nature of the investigation. He pointed out that one of the principals, Mr. M.E. Medina, and several witnesses could not attend the investigation because it was approximately 650 miles distant from their headquarters point; and that the same problems of transportation and expenses accrued to the principals who did attend the investigation, including the Claimant. The Organization Representative also raised a number of complaints regarding the proper interpretation and application of decisions emanating from the Report and Recommendations of Presidential Emergency Board No. 219, Arbitration Board No. 298 and the interpretations issued by the BMWE and NRLC Contract Interpretation Committee.

This Board is charged only with the responsibility of determining whether discipline has been properly imposed. Questions raised by the Organization Representative regarding payment for travel expenses and other related matters are properly pursued in other forums.

In the instant case, the Claimant was occupying room number 209 in the Stroud Motor Lodge on the evening of August 7, 1992 with Mr. R.L. Crespin, and Principals Trujillo and Medina were occupying room number 208.

Mr. Carl Peglow, Manager of Production for the Fort Worth Division, testified that Tie Gang Roadmaster Traylor advised him that there had been a report from the Stroud Motor Inn regarding a disturbance on the evening of August 7 and the early morning hours of August 8, 1992. Mr. Peglow testified that he visited with management of the Stroud Motor Lodge on August 12, 1992 and spoke with a Ms. Clara Fisher, the owner/manager of the motor lodge. Mr. Peglow introduced a letter from Ms. Fisher into the record. That letter reads as follows:

This is in reference as per a.m. conversation concerning the conduct of your employees on the night of August 7th. We had two rooms that were very disorderly and after several complaints from other guests, we called the police at 11:52 p.m. They were here fifteen minutes and again at 1:36 a.m., they were here until 1:51 a.m. The rooms were number 208, Larry Trujillo and Manuel Medina. The other room was number 209, Mark Zinko and Rich Crespin. The next morning, we had to refund \$41.93 to Mr. & Mrs. Rich Osborne. They were irate, to say the least. We had another incident of food throwing in room 220,

William Holloway and S.L. Rucker. They threw food all over the walls and floor. We had to paint to get the catsup stain off. Most of your people were very nice people. I know there are a few bad apples. We will appreciate whatever you can do. We also appreciate your men staying here and wish this had not happened.

Special Agent Richard Brown testified that he was advised of the incident and investigated the matter with the Chief of Police at Stroud, Oklahoma. Mr. Brown testified that he was advised by the local police "that it was Burlington Northern employees who were alleged to be disturbing the other guests".

On examination by the Organization Representative, both Manager of Production Peglow and Special Agent Brown conceded that they had no direct evidence or any personal knowledge which would establish that the Claimant was responsible for the complained of disturbance. Special Agent Brown acknowledged that "nobody was charged" by the police for causing a disturbance, and that "I do not have any names" of Burlington Northern employees who were allegedly "making noise and bothering people".

The Claimant testified that insofar as the incident of August 7 was concerned "I was not there", that he had spent most of the evening playing pool in town with a Tom Pantazes, and that "I did not get back to the motel until after the police department had left".

The Carrier has justifiable concern when its employees create a situation that adversely affects the Carrier's good will and standing in the communities in which the Carrier does business. The Carrier has the right in such circumstances to investigate the matter and to determine who was responsible for the action which damaged the Carrier's reputation and ability to conduct its business properly. If the Carrier establishes, by substantial and convincing evidence, that certain employees were responsible for damaging the Carrier's reputation and adversely affecting its good will, then the Carrier may discipline those individuals for "conduct unbecoming an employee" as specified in Rule L.

However, in the instant case, there is no evidence which would establish the Claimant's guilt aside from the fact that he was a temporary resident in room 209 of the Stroud Motor Inn. Although the hearing was held in Edmonds, Oklahoma, neither of the possible eyewitnesses, Ms. Fisher nor the Police Chief, appeared to testify. Neither Manager Peglow nor Special Agent Brown could testify directly or even through hearsay that the Claimant was responsible for the disturbance.

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In these circumstances, the claim must be sustained and any reference to the incident shall be expunged from the Claimant's Personal Record.

Award: The claim is sustained. The Carrier is directed to physically expunge all reference to this incident from the Claimant's Personal Record. This Award was signed this 24th day of December, 1992.

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