NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 148

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Case/Award No. 148

On May 13, 1983 the Brotherhood of Maintenance of Way Employes (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. John Earl Wells, hereinafter the Claimant, entered the Carrier's service as a Trackman on November 1, 1979. 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 November 12, 1992.

The Claimant was dismissed as a result of an investigation which was held on October 14, 1992 in the Trainmaster's office in Cheyenne, Wyoming. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rule G and Rule 565 while assigned as a Machine Operator on Surfacing Gang SC16 on October 1, 1992.

Findings and Opinion

The Claimant was working as a Machine Operator on Surfacing Gang SC16 on October 1, 1992 at Cheyenne, Wyoming and subject to the immediate supervision of Gang Foreman T.J. Melander.

October 1, 1992 was a Thursday. Newspaper articles entered in evidence and the general testimony of the Claimant establish that on Monday, September 28, 1992 there was a fire in the home of his sister, brother-in-law and children, a home located in Mesquite, Texas, which severely injured members of the Claimant's family.

Undisputed testimony by the Claimant establishes that he was unable to determine exactly who in his family was injured and the extent of their injuries. The Claimant reported to his assigned duties on the morning of October 1, 1992 and began work. Because he was concerned regarding the condition of his family members in Texas, he asked permission to make telephone calls in order to determine the status of the fire victims. At approximately 11:45 a.m. the Claimant, believing he had permission to do so, ceased working, "tied down" the equipment he was operating and proceeded to the depot to make telephone calls to Texas in order to resolve his concerns. There was, apparently, some difficulty in completing telephone calls from the Carrier's facility; but the Claimant did contact Carrier payroll employees at Division Headquarters, and after explaining the "family emergency", responsible Carrier representatives authorized the issuance of a six hundred dollar advance on his pay so that the Claimant could travel to Texas to attend to his family's needs.

Exhibit No. 3 in the record is a six hundred dollar check drawn by the Carrier to the Claimant and dated October 1, 1992. After completing his dealings with Carrier headquarters, the Claimant proceeded to a combination package store/bar where he, by his testimony, could use a telephone to make the telephone calls necessary to Texas to confirm the condition of his family. Sometime between the hours of 11:00 a.m. and 12:00 noon. Foreman Melander became aware of the fact that the Claimant was not on the property, and he subsequently determined that the Claimant's vehicle was parked "in front of one of the local establishments downtown called the Eagle's Nest", which establishment was characterized by Mr. Melander as a "beer joint".

Trainmaster Hamilton and Special Agent Nelson were notified regarding the fact that an employee, whom, apparently, Mr.

Melander did not believe had the authority to be absent from duty, was suspected of being in a "beer joint" on Carrier time. The collective testimony of Foreman Melander, Trainmaster Hamilton and Special Agent Nelson establish that Messrs. Melander and Hamilton observed the Claimant's van outside the Eagle's Nest, and that they waited outside of the Eagle's Nest from approximately 2:00 p.m. until approximately 2:30 p.m. when they observed the Claimant "drive up" to the Eagle's Nest with another individual and proceed inside. Messrs. Melander and Hamilton testified that they were then met by Special Agent Nelson, who arrived shortly before 3:00 p.m., and that they then entered the Eagle's Nest, observed the Claimant with a pool cue in his hand and invited him outside of the establishment in order to discuss the situation.

Messrs. Melander, Hamilton and Nelson testified that they smelled alcohol on the Claimant's breath, that his speech was slurred, that his eyes were red and watery, and they concluded that he was in violation of Rule G and Rule 565 and thus he was taken out of service and the instant investigation ensued.

This is a classic case of "jumping to conclusions". Additionally, a complete review of the testimony and documentary evidence in the record established the "shoddiness" of the Carrier's investigation. Had Special Agent Nelson or Trainmaster Hamilton done more than smell the Claimant's breath, they would have discovered the following:

1) that the Claimant justifiably believed that he had been released from duty to pursue inquiries regarding the condition of his family;

2) that the Claimant had contacted responsible Carrier representatives and had been authorized a six hundred dollar advance because of the "family emergency";

3) that the Claimant, when he entered the Eagle's Nest at approximately 1:00 p.m., was emotionally distraught and met an individual by the name of Wayne Faulkner, who, acting as a Good Samaritan and sympathetic to the Claimant's difficulty in contacting family and authorities in Texas by telephone, suggested that the Claimant go to the Cheyenne Sheriff's Department and seek help there;

4) that Mr. Faulkner, because of the Claimant's obvious emotional and physical distress, volunteered to

drive the Claimant in his, Mr. Faulkner's, vehicle to the Cheyenne Sheriff's Department;

5) that Mr. Faulkner and the Claimant were at the Sheriff's Department between the hours of 1:00 p.m. and 1:30 p.m. seeking assistance, as attested to by the Cheyenne Sheriff as reflected in Exhibit No. 1;

6) that at the advice of the Sheriff's clerk, Mr. Faulkner and the Claimant then proceeded to the local office of the American Red Cross, where the Claimant was able to determine, unfortunately, that his sister's sixteen year old son had died in a fire, which, apparently, was the result of an arson set by a sibling;

7) that the Claimant was at the office of the American Red Cross between the hours of 1:30 p.m. and 2:30 p.m. (which evidence is contained in Exhibit No. 2, and which time places in substantial doubt the contradictory testimonies of Messrs. Melander and Hamilton, one of whom testified he observed the Claimant arrive at the Eagle's Nest at 2:25 p.m. and the other of whom testified that he observed the Claimant arrive at the Eagle's Nest at 2:30 p.m.);

8) that the bartender at the Eagle's Nest and a patron could have attested to the fact that the Claimant did not arrive at the Eagle's Nest until shortly before 3:00 p.m. and had only drunk, at most, one beer, which Mr. Anderson, the patron, had purchased for him; and

9) that neither the bartender, nor the patron, nor Mr. Faulkner believed or determined that the Claimant was intoxicated, and their testimony establishes that his red-watery eyes were due to his crying on a number of occasions.

There are many more facts in this record which lead this Board to conclude that the Carrier paid no attention to the overwhelming evidence in the record which shows that (1) the Claimant justifiably believed he had been released from duty to attend to a family emergency and (2) the Claimant was not intoxicated.

Even if the Claimant was intoxicated and even if he had been drinking alcoholic beverages from the moment he left duty, because that was the way he dealt with his emotional distress,

that has no impact upon this case if, as this Board has found, the Claimant justifiably believed he was no longer subject to duty.

As the Organization Representative has pointed out, it is curious indeed why the Carrier did not charge the Claimant with being absent from duty without permission. It is this Board's conclusion that no such charge was made because the Carrier could not explain away (1) the permission the Claimant received to take time off and make telephone calls to verify the situation in Texas and (2) the issuance of a six hundred dollar advance by Division Headquarters for the Claimant to use to attend to emergency personal business.

This claim will be sustained based upon the fact that the Claimant was not subject to the Carrier's jurisdiction at the time he was attending to personal business, which he justifiably believed he had a right to do. In different circumstances, an employee would be expected to receive more specific and direct authorization to absent himself from the work site to attend to personal business for an unspecified period of time. In the circumstances of this case, and as the Claimant was not able to easily obtain contact with and specific permission from on-site supervision to absent himself from duty, since such supervisors were not proximate to the Claimant's work location, it is understandable why the Claimant believed there was no time limit on how long it would take him to verify the condition of his family members and to take appropriate steps to aid them.

If there was ever a case where mitigating circumstances were present, this is it. The Conducting Officer, to his substantial credit, developed a completely full and fair record; which demonstrated clearly that Messrs. Melander, Hamilton and Nelson investigated none of the relevant facts and took none of the mitigating circumstances into consideration. This Board is surprised and disappointed that we have been left to decide this case, when those who reviewed the investigation transcript should have concluded that no discipline should have been assessed.

The Chairman of this Board has upheld the discipline in numerous "Rule G" cases, many of which occurred on this property, when employees "snuck off" for a beer or two or brought alcoholic beverages onto the property and/or consumed alcoholic beverages on the property. The Claimant did not "sneak off". He did not leave the Carrier's property to have a beer or two. Somebody other than this Board should have made that determination before this case was submitted to arbitration. Since they did not, the

Carrier will be obligated to fully reimburse the Claimant for all lost wages and benefits.

Award: The claim is sustained. The Carrier is directed to physically expunge any reference to the above discipline from the Claimant's Personal Record and to reinstate the Claimant will full back pay, seniority unimpaired and make him whole for all lost benefits.

This Award was signed this 24th day of April, 1993.

Richard R. Kasher

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