NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 154

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Case/Award No. 154

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 W. Dubuque, hereinafter the Claimant, entered the Carrier's service as a Gang Laborer on September 28, 1972 and he was occupying that position when he was censured by the Carrier on February 5, 1993.

The Claimant was censured as a result of an investigation which was held on January 18, 1993 at the Roadmaster's office in Grand Forks, North Dakota. At the investigation the Claimant was represented by the Organization. The Carrier censured the Claimant based upon its findings that he had violated Rule 576 for his alleged failure to comply with instructions to attend a functional capacities evaluation appointment in Minot, North Dakota on January 7, 1993.

Findings and Opinion

On December 16, 1992 Roadmaster Dennis Vadnais wrote the following letter to the Claimant:

> On December 8, 1992, Carol Gordon, Rehab Manager, you and myself had conversation concerning your return from an off duty injury. It was decided at that time, that you would return to work on restricted duty via our early return to work program on Monday, December 14, 1992. It was also determined that it would be in your best interest to stay in that status until you had an opportunity to be reevaluated by Karen Rasmussen, physical therapist in Minot, N.D. An appointment and arrangement for a December 16, 1992 trip were made.
>
> On the morning of December 16, 1992 after missing your Amtrak connection, you informed me that you didn't think you were still required to go to Minot. At that time I informed you that because of your decision not to fulfill your part of our requirement that I could not let you return to work without a functional capacities evaluation.
>
> Carol Gordon has rescheduled for reevaluation for Thursday, January 7, 1993. The Amtrak tickets you received earlier this week can be used for the January 7, 1993 trip.
>
> Again John, I would like to reiterate Burlington Northern's concern to ensure that you are healthy and able to perform your duties. We feel that where you had just recuperated from a back injury and the seriousness of your recent head injury, it is important and in your best interests to properly determine those facts.
>
> Once again John, I would like to extend to you the opportunity to return to restricted duty via the early return to work program. This would enable you to return to work until your appointment on January 7, 1993. At that time if it is felt that you can return to full duty you may place yourself in accordance with governing rules.
>
> If you wish to take advantage of this offer feel free to call either Carol Gordon . . . or myself . . ..

The Organization has alleged that the notice of investigation was not sufficiently specific because neither Rule 576 nor any other rule was cited in the notice. The allegation is without merit. The notice tells the Claimant that the investigation is being held for his "alleged failure to comply with instructions to attend a Functional Capacities Evaluation

appointment in Minot, N.D. at about 10:00 a.m. Thursday, January 7, 1993". It is hard to imagine how a notice could be more specific.

The crux of this case, putting aside as irrelevant the issues of "leave of absence", the "medical board" procedures, the nature of what duties the Claimant performed on December 14 and 15, 1992, the question of whether the Claimant's neurosurgeon returned him to work "without restrictions" and the procedures of the "early return to work program", focuses exclusively upon whether the Claimant understood or should have understood that the Carrier was requiring him to undergo a functional capacities evaluation. Roadmaster Vadnais' letter quoted above states that there was a "requirement" on the Claimant's "part" to attend that evaluation.

The Claimant's contention that he believed he had not received a "direct order" and that "It [meeting the scheduled functional capacities evaluation] was kind of up to my own discretion" is disingenuous, at best. The Claimant met with Roadmaster Vadnais and Rehabilitation Manager Gordon and he knew, or should have known, that they were requiring him, in his best interests, the best interests of his fellow employees and the best interests of the Carrier, to attend the evaluation. The requirement placed upon the Claimant by the Carrier was reasonable and prudent. His failure to follow directions justified the investigation and the imposition of discipline.

Accordingly, the claim will be denied.

Award: The claim is denied in accordance with the above-findings.

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