NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY -and BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	CASE NO. 19 AWARD NO. 19

On May 13, 1983 the Brotherhood of Maintenance of Way Employes (herinafter 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 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 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.

Mr. Steven A. Olson, hereinafter the Claimant, entered the Carrier's service on January 26, 1970 as a Student Telegrapher. Thereafter, he transferred to the Maintenance of Way Department and when he was dismissed from service on May 14, 1985 he was occupying the position of Section Foreman at Elk River, Minnesota. The Claimant was dismissed as the result of an investigation which was held on April 29, 1985 at which he, the Claimant, was represented by the Organization. The Carrier dismissed the Claimant as a result of its finding that he had unauthorized possession of Railroad Company material on Monday, April 15, 1985.

Findings and Opinion

At the time that the Claimant was dismissed from the Carrier's service he had a fifteen year record which was clear of any disciplinary infractions.

On Monday, April 15, 1985 the Claimant was assigned to lead a gang whose tour of duty began at 7:30 a.m. and concluded at 4:00 p.m. The Claimant was under the direct supervision of Mr. R. T. Radika, the Roadmaster in the assigned territory. At approximately 3:55 p.m., some five minutes prior to the conclusion of the Claimant's shift, the Claimant attempted to contact Roadmaster Radika to ask his permission to remove certain rock fines mixed with dirt from Carrier premises. The Claimant was unable to contact Roadmaster Radika and he thereafter, at approximately 4:10 p.m., used a Carrier vehicle (a front loader tractor) to place approximately two tons of fine and dirt in his dump

truck which he had brought on to Carrier property. The Claimant was observed by an anonymous individual, who contacted Carrier security personnel to advise that Carrier property was being appropriated.

The Claimant was confronted by Carrier security personnel and offered a statement which reads as follows:

> "At 4:10 p.m. on April 15, '85, I Steve Olson took BN tractor at Elk River and went to the fine pile and loaded approx. 2 ton of fine and dirt and took it to my home for a base on my driveway. I used my own dump truck and took approx. 20 min. I did not think it was wrong because most of the fines were mixed with dirt. I called Mr. Radika at 3:55 p.m. on 4/15/85 to see if this would be all right but I could not get ahold of him. I took 1 scoop at Depot #5.
>
> /s/
>
> Steve A. Olson"

The Claimant has not denied that he took the material from Carrier premises. Essentially the Claimant contends that the material was of no value or at best scrap value. The Claimant has also contended that he has, in the past, removed property of this type from the Carrier's premises with the permission of Roadmaster Radika. Roadmaster Radika testified that had he been asked permission by the Claimant to remove scrap material that he would have granted such permission.

The Carrier read several rules into the record. First, the Carrier recited General Rule A, which provides that employees must be conversant with rules and special instructions and that if there is any doubt regarding the meaning of a rule that the employee must apply to the proper authority of the Carrier for explanation. Secondly, the Carrier referenced Rule 500 which provides in relevant part that employees will not be retained in service who are dishonest. The Carrier also read Rule 500(b) into the record. That rule provides that theft or pilferage shall be considered sufficient cause for dismissal. Finally, the Carrier referred to Rule 575 which provides that theft or vandalism shall be considered sufficient cause for dismissal from railroad service.

It is apparent from the rules which the Carrier has relied upon that it has found that the Claimant was guilty of theft or pilferage of Carrier property. That is the issue which this Board will address.

We recognize that the Organization has raised certain procedural objections to the investigation. Specifically, the Organization has contended that the Claimant was not given sufficient time to prepare his defense; that witnesses who had knowledge of the incident were not called by the Carrier; and, that a previous investigation has been held on the same subject. First, we find that the Organization's contention that the Claimant was given insufficient time to prepare a defense lacks merit. The charge was clear, the Organization requested a postponement of the initial hearing/investigation which was granted, and, finally, the Conducting Officer gave the Organization at least two specific opportunities to have the investigation postponed if the Organization felt that a better defense could be prepared with more time. The Organization and the Claimant declined the invitation to have the investigation postponed and we will not now entertain a claim that the Claimant was given insufficient time to prepare his defense. Secondly, the Organization's contention that there were other witnesses that had significant knowledge of the incident were not called to the investigation by the Carrier, does not persuade this Board that the Carrier erred procedurally in the conduct of the investigation. Neither the Organization nor the Claimant identified these two alleged witnesses. More importantly, the Organization and the Claimant were afforded the opportunity to call these individuals as witnesses and they declined. Finally, we find nothing in the record to indicate that the Claimant is subject to double jeopardy as a result of the instant investigation. There is no evidence in the record that a previous investigation was held regarding the same charges and/or that the Claimant was disciplined for the same charges. Accordingly, we find no merit in any of the Organization's procedural objections.

We would note, however, that the Carrier's Conducting Officer denied the Organization's proper request to sequester witnesses. We find no rational basis for the Carrier's Conducting Officer's refusal to grant this request. In our reading of the evidence there is no showing that the failure to sequester witnesses prejudiced the Claimant. However, the Carrier should be put on notice that this improper denial of a reasonable request by the Organization could have resulted in the sustaining of the claim on procedural grounds alone, if it was found that the non-sequestration resulted in prejudice to the Claimant.

In addressing the merits of this case, this Board finds that the Carrier has failed to meet its burden of proof in terms of theft, dishonesty or pilferage. The record evidence is clear that the Claimant, although he had railroad property in his possession without authorization, did not intend to steal or pilfer the property in question. Testimony of record establishes clearly that the Claimant attempted to obtain authorization to take property which he believed was of little value. Certainly, a thief would not make that request prior to "stealing" the property he was seeking to have authorization to obtain. Secondly, this Board notes that the Claimant openly and notoriously brought his own truck on Carrier property and in broad daylight began to scoop fines into his truck using Carrier equipment. Such activities do not represent the actions of a "thief".

It is clear that the Claimant acted improperly. He should have obtained permission to remove the property before he started his operation. However, there is no showing that the Claimant had any criminal intent when he began to take property which he believed was of no value from the Carrier's premises.

This Board should note that the fact that the property was of "no value" or of "little value" has no bearing on our decision that the Claimant was not guilty of theft. It is well-established in arbitral law that theft is theft and that the value of the items taken do not mitigate the offense.

However, in the instant case the Claimant was guilty of poor judgment. He was not guilty of theft and therefore he should not have been dismissed from the Carrier's service.

Accordingly, we find that the Carrier might properly have charged the Claimant with acting beyond the scope of authorization and could have required the Claimant to have returned the property. The Carrier might then have justifiably reprimanded the Claimant and placed such reprimand or written warning on the Claimant's service record. However, in this Board's view there was no basis for the Carrier dismissing the Claimant from service.

AWARD: The claim is sustained. The Carrier is directed to return the Claimant to service with seniority unimpaired and with full back pay and benefits. The Claimant's service record will be cleared of the charge which resulted in the dismissal.

This Award was signed this 30th day of July 1985 in Bryn Mawr, Pennsylvania.

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