

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 925

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BURLINGTON NORTHERN RAILROAD COMPANY \*  
- and - \*  
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES \*  
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CASE NO. 24  
AWARD NO. 24

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 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 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 are dismissed from the Carrier's service may chose to appeal their dismissals to this Board. They have a sixty (60) day period from the date of their dismissals to elect to handle their appeals through the usual channels (Schedule Rule 40) or to submit their appeals directly to this Board in anticipation of receiving expedited decisions. An employee who is dismissed 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 dismissed 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 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, 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. Ygnacio Ybarra, hereinafter the Claimant, entered the Carrier's service as a Sectionman on June 13, 1957. The Claimant was subsequently promoted to Section Foreman and was occupying that position when he was dismissed from the Carrier's service effective October 18, 1985. The Claimant was dismissed as the result of an investigation which was held on October 2, 1985 at the Whitcomb, Washington Toolhouse. At the investigation, the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rule 500 and Rule 575 of the Safety and General Rules in that he allegedly was responsible for the theft of Carrier gasoline on September 23, 1985.

#### Findings and Opinion

On September 23, 1985 at approximately 6:30 p.m., Mr. Sam Kirkpatrick, Assistant Supervisor of Work Equipment, arrived at the Whitcomb Toolhouse. He observed the Claimant's automobile parked next to the Carrier's gas pump. He further observed that the gas hose was lying on the ground and that the gas cap was removed from the Claimant's car.

Mr. Kirkpatrick then proceeded to take several photographs of the scene and to record the license plate number of the car involved. At that time, the Claimant advised Mr. Kirkpatrick that he had needed "a couple of gallons of gas so that he could get back to town".

Both Rule 500 and Rule 575 clearly state that theft shall be considered sufficient cause for dismissal from railroad service. Theft is universally recognized throughout industry as just and sufficient cause for dismissal from service.

It is clear from the evidence and from the Claimant's own testimony that he did convert the Carrier's fuel to his own use on September 23, 1985. However, the question before this Board is did the Claimant's conversion of the fuel represent theft.

Both the Claimant and his supervisor, Mr. David L. Simmons, District Roadmaster, testified that the Claimant regularly used his own vehicle to report to various job sites, and although he was entitled to claim expenses associated with the use of his own vehicle, the Claimant never vouched for the gasoline he used in making these trips. It would appear that the Claimant felt that it was a "fair trade" to use the Carrier's fuel.

The Claimant further testified, without contradiction, that he found himself on a job site without sufficient gasoline to return to Umatilla, the site of the nearest gas station. Thus the Claimant apparently believed that by taking "a couple of gallons" of the Carrier's fuel, he was acting both reasonably and prudently.

The Carrier found, without contradiction from the Claimant, that the Claimant took the fuel without authorization from any Carrier officer and this clearly, in the Carrier's opinion, represented theft.

Normally this Board would concur with the Carrier's position. However, in this particular case, the Board must take into consideration several significant and mitigating factors.

First, we have carefully reviewed the Claimant's behavior on the day in question. It is clear from the testimony of Mr. Kirkpatrick that the Claimant was not transferring or attempting to transfer the fuel in a clandestine manner. The Claimant's actions were open and notorious, as that term is viewed in the legal sense. He made no effort to hide what he was doing and the Board notes that at 6:30 p.m. on September 23, 1985 that the sun had not set. The Claimant candidly responded to Mr. Kirkpatrick's questions by stating that he required the "couple of gallons" to drive to Umatilla. Mr.

Kirkpatrick testified that the gas gauge on the Claimant's vehicle did not register over a quarter of a tank. Thus, this Board finds that the Claimant was not filling the tank of his personal vehicle, but was acting reasonably, constrained by his needs, in supplying his vehicle with just enough fuel to return to Umatilla.

These facts convince this Board that the Claimant was not acting with the intent to "steal". He lacked the requisite mens rea to justify a finding that he was guilty of a criminal act.

Secondly, in reviewing the Claimant's work record with the Carrier and the testimony of his present supervisor, this Board is persuaded that the Claimant is not a man who would steal from his employer. The Claimant has an unblemished work record of twenty-eight years with the Carrier. Mr. Simmons, his current supervisor, testified to his conscientiousness and willingness to perform the duties assigned to him.

This Board must, however, find that the Claimant made a severe error in judgment by not explicitly requesting permission to obtain just enough of the Carrier's gasoline for his private use in order to return to the nearest gas station.

This Board does not condone the improper taking of any Carrier equipment or supply no matter how negligible the cost of said property. However, as we have found that the Claimant did not commit "theft" we have decided that he should not be dismissed from service for his unauthorized use of Carrier supplies.

Accordingly, we will sustain the claim by restoring the Claimant to service with seniority unimpaired but without back pay.

The Claimant is cautioned that during his remaining career with the Carrier, he is not to use Carrier material without express permission from his supervisors. If in the future, the Claimant uses his own vehicle for Carrier purposes, he is to provide the requisite vouchers to the Carrier. He is not to create his own "fair trades".

Award The claim sustained in accordance with the above findings.

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

Richard R. Kasher

Richard R. Kasher  
Chairman and Neutral Member  
Special Board of Adjustment 925