

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. 26

AWARD NO. 26

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. Bradley D. O'Neill, hereinafter the Claimant, entered the Carrier's service as a B&B Helper on March 28, 1977. He was subsequently dismissed from service on December 30, 1980. He re-entered the Carrier's service on March 29, 1985 as a Second Class Carpenter and he was occupying this position when he was dismissed from the Carrier's service effective November 15, 1985. The Claimant was dismissed as the result of an investigation which was held on October 22, 1985 at the Northtown General Office Building in Minneapolis, Minnesota. At the investigation, the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated General Rule A, General Rule D, Rule 502B, and Rules 568, 574, 585, 586 and 589 of the Safety and General Rules which provide in part for the prompt reporting of on-duty injuries. The Claimant was alleged to have violated these rules while he was assigned as a Second Class Carpenter on July 11, 1985.

#### Findings and Opinion

On July 15, 1985 the Claimant contacted Mr. Al Waich, Assistant Supervisor in the Twin Cities Region, to advise him that he was

having medical problems and was unable to report to work. On July 22, 1985, as the Claimant had not returned to work, Mr. Russell D. Link, Regional Supervisor Bridge and Building, called the Claimant at his home. The Claimant informed Mr. Link that he was experiencing chest pains and indicated that he would be out of work for an extended period of time. Mr. Link then advised the Claimant to request a leave of absence in writing.

On or about July 31, 1985, Mr. Link received the Claimant's written request for a medical leave of absence for the period of July 29, 1985 through August 29, 1985. On August 2, 1985, Mr. Link notified the Claimant, in writing, that his leave of absence would be granted contingent upon receipt of a doctor's statement. The doctor's report was to be submitted to Mr. Link on or before August 9, 1985.

On August 12, 1985, Mr. Link again called the Claimant to remind him that the doctor's report was still due. When the Claimant did not reappear for work, Mr. Link telephoned him for the third time on September 3, 1985. The Claimant informed Mr. Link that he was still unable to report to work. On or about September 6, 1985, Mr. Link received the Claimant's written request for an additional leave of absence beginning September 9, 1985 and ending October 9, 1985. On September 10, 1985, Mr. Link advised the Claimant, in writing, that this leave of absence was approved contingent upon the Claimant's supplying the Carrier with a doctor's report by September 20, 1985. On or about September 26, 1985, Mr. Link received a note from Dr. James E. Johanson advising that the Claimant was under his care and was unable to work at that time.

On October 8, 1985 Mr. Link received a telephone call from Mr. John Stilwell, Manager, Division Claims, advising him that the Claimant had submitted a Personal Injury Report alleging that he had slipped and fallen while at work on July 11, 1985.

General Rule D states as follows:

"Accidents, injuries, defects in track, bridges, signals, or any unusual condition which may affect the safe operation of the railroad, must be reported by the quickest available means of communication to the proper authority, and must be confirmed by wire or on required form."

It is the opinion of this Board, that the Claimant, in waiting approximately ninety (90) days before properly reporting his alleged injury, did not meet his obligations under General Rule D. Mr. Link and Mr. Waich testified that the Claimant never advised either of them of an on the job injury. It is clear from the record that the Claimant did have several conversations with both supervisors and therefore he had numerous opportunities to inform them of his alleged injury.

The Organization maintains that the Claimant was not properly apprised of the rules governing the reporting of an on the job accident. Specifically, the Organization contends that the letter distributed by Mr. Link on March 20, 1984, which describes in detail the procedures to be followed in cases of job site accidents, was not received by the Claimant as he was not then a Carrier employee. The Board finds this argument to be without merit. The Claimant has an initial seniority date of 3/28/77. He passed several rules examinations and he had a copy of the Carrier's Safety Rules. The Board does not find it believable that the Claimant, with his length of service, did not know or understand the rules sufficiently to, at minimum, verbally report his alleged on the job injury to one of his supervisors.

The Organization also raises the issue of timeliness regarding Rule 40A in the current BN/BMW Agreement. This Rule states:

"A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employees of the Security Department) and except as provided in Section B of this rule."

The Organization initially contends that since the alleged incident occurred on July 11, 1985, disciplinary action can not be taken some three (3) months later. Secondly, the Organization maintains that Mr. Stilwell had information about the Claimant's alleged on the job injury on October 3, 1985 and therefore the October 22, 1985 investigatory hearing was not timely. After a thorough review of the record, this Board rejects both arguments. If, as the testimony of record clearly shows, the Claimant never advised Carrier supervision of his alleged job site accident on July 11, 1985, the Carrier would have had no reason to investigate. The Claimant requested and was granted medical leave at this time. The Claimant asked for an additional leave of absence on or about September 6, 1985, and despite the fact that he never provided medical documentation for his first thirty (30) day absence, he was granted the second leave. It is this Board's opinion that the Carrier, in the person of Mr. Link, made every attempt to deal fairly and equitably with the Claimant. Regarding Mr. Stilwell's letter of October 3, 1985, this Board finds the Carrier's position, i.e. Mr. Stilwell had no indication on the date he corresponded with the

Claimant that there was any reason to initiate an investigation, to have merit. Mr. Link's testimony, which is highly believable throughout, convinces this Board that it was not until October 8, 1985 when Mr. Stilwell first contacted Mr. Link regarding the Claimant's Personal Injury Claim that the Carrier saw any need for an investigation.

It is clear to this Board that the Claimant knowingly concealed an alleged on the job injury for approximately three months. Such action not only was violative of the cited Rules, but raises serious doubt as to whether the Claimant was in fact injured on the job. In any event, the Board finds that the clear violation of well-known Rules justified the imposition of discipline. The Board further finds that dismissal was not arbitrary in the circumstances.

Award: Claim denied

This Award was signed this 18th day of January in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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