NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	
- and -	CASE NO. 34
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	AWARD NO. 34

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 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. Gary David Little, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on July 7, 1975. He was subsequently promoted to Section Foreman, and he was occupying the position of Undercutter Foreman, headquartered at Mt. Pleasant, Iowa, when he was dismissed from the Carrier's service effective March 3, 1986. The Claimant was dismissed as the result of an investigation which began on October 23, 1985 and resumed on February 4, 1986. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rules 500, 500B and 506 for selling Carrier materials to outside parties on various occasions from September 6, 1985 to September 20, 1985, while he was assigned as Foreman, Undercutter Gang, at Mt. Pleasant, Iowa.

Findings and Opinion

The Board will first address the Organization's and the Claimant's objection to the recess of the investigation on October 23, 1985 and the subsequent resumption of the investigation on February 4, 1986. The Organization has contended that the initial investigation was improperly and unilaterally recessed by the Conducting Officer. The Board disagrees. The Conducting Officer recessed the investigation in order to obtain the presence of Mr. J.L. Thornburg, Roadmaster, Ottumwa, Iowa. Prior to recessing the

investigation, the Organization Representative had raised numerous objections because Mr. Thornburg was not present at the investigation, and, in the Organization's opinion, Mr. Thornburg possessed first hand knowledge of the events which gave rise to the Carrier's institution of charges. Although numerous other Carrier witnesses were available, and although certain of those witnesses attested to the fact that Roadmaster Thornburg had not been involved directly in the incident(s) or the on the property investigation, the Conducting Officer, in an effort to satisfy the Organization's repeated objections regarding Mr. Thornburg's absence, recessed the investigation. As it turned out, Mr. Thornburg had not been present at the initial investigation because on that same day, October 23, 1985, his wife was giving birth. The Board also notes that when the Conducting Officer recessed the investigation on October 23, 1985 he rescheduled the hearing for November 5, 1985; less than two weeks later. The Organization requested a postponement of the November 5, 1985 hearing, and the request was granted. Thereafter the Conducting Officer rescheduled the hearing for November 19, 1985, December 3, 1985 and January 7, 1986. Each of these attempted reschedulings proved to be inconvenient to the Organization and/or the Claimant, and their requests for postponements were granted. Thus the hearing did not resume until February 4, 1986. Clearly the delay in rescheduling the hearing cannot be claimed as prejudicial in view of the fact that the Claimant was responsible for that delay. The Board finds that the Carrier did not deprive the Claimant of his procedural rights by recessing the investigation or because of the fact that the investigation did not resume for approximately three and one half months after it began.

Additionally, the Board finds that the charges were reasonably specific and that the Claimant had more than sufficient notice and time to prepare his defense regarding the allegation that he had sold Carrier material to outside parties. Accordingly, the Organization's claim that the Notice of Investigation was not sufficiently precise, as required by Schedule Rule 40, is found to be lacking in merit.

The record before the Board is rather extensive. There is much testimony regarding the question of whether the Claimant sold a number of truckloads of ballast rock residue, on or about September 10, 1985 to a Mr. Paul Carr, a non-employee of the Carrier.

The record establishes that ballast rock residue created as a result of the undercutting operation is regularly disposed of by the Carrier and is a commodity of "no value" in terms of reuse in rail operations. Testimony establishes that authorized Carrier representatives frequently "give away" the ballast residue to local farmers and others who are in the vicinity of the right of way where

the undercutting work is being performed. There is no contention in the instant case that the ballast residue, allegedly sold by the Claimant to Mr. Carr, was of any value to the Carrier.

On the other hand, there is repeated and reliable testimony from knowledgeable Carrier supervisors which establishes that when any Carrier material, whether it be of value or not, is sold, authorization to sell the material must be obtained and the person to whom the material is being sold is required to sign a waiver of liability, so that the Burlington Northern will be protected in the event some injury or damage is sustained by the outside purchaser. Accordingly, this Board finds that if the evidence establishes that the Claimant sold ballast rock to Mr. Paul Carr on or about September 10, 1985, and if the evidence further establishes that the Claimant failed to obtain authorization to effect such a sale, then the Board will be constrained to find that the Claimant was in violation of Rule 506 of the Maintenance of Way Department which provides as follows:

> "Unless specifically authorized, employees must not use the Railroad's credit and must neither receive nor pay out money on the Railroad account. Property of the Railroad must not be sold nor in any way disposed of without proper authority. All articles of value found on Railroad property must be cared for and promptly reported."

As the Organization and Carrier Members of this Board well know, questions of credibility are resolved by the Carrier as part of its review of the investigation transcript prior to its determination of whether discipline should be imposed. The instant case is a case of pure credibility. The Carrier chose to credit the testimony of Special Agent R.A. Young who interviewed Mr. Paul Carr, after the Carrier had received hearsay notice that ballast rock residue had been sold to Mr. Carr. When Mr. Carr was first interviewed by the Special Agent, he signed a statement wherein he attested to the fact that he had paid the Claimant $60.00 on September 9, 1985 for four (4) truckloads of ballast rock, which he, Carr, had removed from the "BN right of way at the Eldon 'Y', Rural Eldon, IA." Mr. Carr further attested to the fact that on September 12, 1985 he paid "BN Foreman Gary Little $120.00 cash for ten dump truck loads of ballast rock".

The Claimant challenged Special Agent Young's testimony and contended that Mr. Carr had made a subsequent statement, which was in the nature of a total recantation. In fact, the record does reflect that Mr. Carr did totally change his story, and testimony was given to prove that the payment to the Claimant was made for a lawn mower which the Claimant had sold to Mr. Carr.

The Carrier chose to credit Mr. Carr's initial statement. In this Board's opinion the Carrier had good reason to do so. There is absolutely no showing of any reason why Mr. Carr, when initially confronted, would fabricate a story regarding his purchase of some fourteen (14) truckloads of ballast rock from the Claimant. On the other hand, there are many reasons why Mr. Carr, upon reflection, would change his story. First, Mr. Carr was concerned, once he realized that the purchase of the ballast rock was not authorized, that he might bear some responsibility for possible wrongdoing; secondly, Mr. Carr was concerned that the Claimant might lose his job or suffer discipline as a result of the sale; and thirdly, Mr. Carr was concerned that his brother-in-law, Mr. D.J. Peterson, a Burlington Northern employee who had helped him, Mr. Carr, load and transport the ballast rock, would be subjected to Carrier discipline. In these circumstances, the Carrier had good and sufficient reason to credit Mr. Carr's first statement and to conclude that the Claimant had, in fact, sold Carrier property without authorization and without obtaining the required release form.

The Board would observe that although we did not "sit in" at the investigation, a reading of the transcript convinces us that the Claimant was evasive and deceitfully creative in his attempts to cover up the fact that he contracted with Mr. Carr for the sale of ballast rock residue on or about September 10, 1985.

The Carrier has strong reason, in terms of its potential liability and in terms of the preservation of its capital resources, to prohibit the sale of Carrier property and to establish strict guidelines when such sales are to be made.

In view of the seriousness of the Claimant's offense and considering the fact that the Claimant engaged in a convoluted scheme to deceive the Carrier once the sale had been discovered, this Board finds no reason to disturb the Carrier's imposition of discipline. Accordingly, the claim will be denied.

Award The claim is denied. This Award was signed this 16th day of May, 1986 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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