

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 925

NATIONAL MEDIATION  
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NATIONAL RAILROAD  
ADJUSTMENT BOARD

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BURLINGTON NORTHERN RAILROAD COMPANY \*  
- and - \*  
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES \*  
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CASE NO. 38

AWARD NO. 38

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. Kevin C. Mark, hereinafter the Claimant, entered the Carrier's service as a Sectionman on September 18, 1978. He was subsequently promoted to Machine Operator and was occupying this position when he was dismissed from the Carrier's service effective October 6, 1986. The Claimant was dismissed as a result of an investigation which was held on September 9, 1986 at the 28th Street Yard Office, Superior, Wisconsin. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated General Rules 565 and 566 of the Burlington Northern Safety Rules and General Rules G and 502 of the Burlington Northern Rules of the Maintenance of Way Department.

#### Findings and Opinion

On August 20, 1986 the Claimant came on duty at 6:30 a.m. He was responsible for the operation of a spike puller when it collided with a stationary tie shear at approximately 6:50 a.m.

The supervisor on the scene, Roadmaster R.T. Radika, testified that he had no reason to believe at the time of the incident that the

Claimant was impaired or demonstrated any of the standard indicia of being "under the influence". However, after Roadmaster Radika conferred with Roadmaster R.C. Romano, it was determined that the Claimant should undergo a urinalysis. The Claimant was directed by both Roadmasters to submit to a urinalysis. He refused. As a result of his refusal the Claimant was withheld from service on August 20, 1986, and an investigation was scheduled for the purpose of determining his alleged violation of Rule G and his alleged refusal to comply with instructions from proper authority (i.e. his refusal to submit to a urinalysis).

The Organization has raised numerous arguments in support of its position that the Carrier's supervisors acted improperly and without reasonable cause when they directed the Claimant to submit to a urinalysis. The Organization has also contended that the Claimant was justified in refusing to submit to a urinalysis and that the Claimant testified credibly that he had not stated to the Carrier's supervisors that he "could not pass a urinalysis, because he had been out partying until 3:00 a.m. on the morning of the incident".

If this Board were to decide this case on its merits, we would find that the Carrier had just cause to discipline the Claimant. We would adopt the Carrier's crediting the testimony of Roadmasters Radika and Romano to the effect that the Claimant, when directed to submit to a urinalysis, refused that order and admitted that he probably could not pass the test because "he had been partying that night and he felt he wouldn't pass it".

We would also find that the Carrier had reasonable cause to test the Claimant because the Claimant was in sole charge of the operation of the spike puller, and the record is clear that the accident occurred because the spike puller failed to brake in time.

Additionally, we would reject the Organization's contention that because the Conducting Officer, Assistant Superintendent of Maintenance J.A. Hovland, was in the hierarchy of supervision with responsibility over the Roadmasters who instigated the discipline that the investigation was being conducted in violation of the Claimant's rights to procedural due process under Schedule Rule 40. There is no showing on the record that the Conducting Officer had prejudged the case because of his position in the maintenance of way hierarchy.

This Board has not been unwilling in the past to sustain discipline for employees who have refused the types of direct orders similar to those issued to the Claimant in the instant case. The Claimant was obligated to submit to those orders, since they did not threaten his health or safety. More importantly, crediting the

testimony of Roadmasters Radika and Romano regarding the Claimant's stated reason for his refusal to submit to the urinalysis, we find that the Claimant essentially admitted that he was in violation of Rule G.

Had the investigation transcript ended at page 54 the instant claim would be denied. However, at the top of page 55 the Conducting Officer, consistent with his obligation to conduct a fair and impartial investigation, afforded the Organization's Vice Chairman, Mr. B.G. Glover, with an opportunity to make a closing statement. Mr. Glover began by stating "I'd like to close with a statement. To me, we have a case . . . ". The Conducting Officer then interrupted the Claimant's Representative and advised him that he hoped his statement would pertain to the particular investigation and not be "a rhetorical statement concerning the case now being held in the Circuit Court of Appeals". The Conducting Officer was making reference to a legal challenge instituted by the Organization to the Carrier's policies and procedures involved in "reasonable cause urinalysis and blood testing" of employees represented by the Organization. Earlier in the transcript the Conducting Officer had limited the Organization Representative's questioning on cross-examination of the Roadmasters regarding the self-same litigation.

Although this Board was disturbed by the Conducting Officer's rulings during the Organization Representative's cross-examination, we were not persuaded that the Conducting Officer had "crossed the line" and violated the Claimant's rights to procedural due process. However, when the Conducting Officer at the outset of the Organization Representative's closing statement issued "a chilling warning" to Vice Chairman Glover to confine his remarks to "this particular investigation" he clearly violated his responsibility to conduct a fair and impartial investigation.

The Chairman of this Board has sat as third party neutral in numerous cases within and outside of the railroad industry and we have never, prior to hearing the arguments of counsel or representatives, told those representatives that they would not be allowed to raise certain arguments in their clients' or the grievants' behalf. The Conducting Officer's limitation of argument affronts our sense of fair play, particularly in the context of the procedures of this Special Board of Adjustment. The Chairman of this Board ordinarily, except where we specifically request same, neither has the benefit of written submissions nor the benefit of reviewing cases cited in support of the parties' respective positions. Therefore, we must ordinarily rely upon the transcript and most particularly any opening or closing statements by the claimant's representative in order to properly and fully understand the scope of

the defenses being raised in the claimant's behalf.

The investigation in this case began at 1:00 p.m. It concluded at 3:20 p.m. Why the Conducting Officer in this case did not have the patience to listen to an additional five or ten minutes of argument by the Organization is beyond our comprehension. An employee with nine (9) years of service had his job at stake; Conducting Officer Hovland apparently was more interested in closing the hearing at 3:20 p.m. than in affording the Claimant a full and fair investigation. In these circumstances we are obligated to sustain the claim on procedural grounds.

Award      The claim is sustained. The Carrier is directed to restore the Claimant to service, with seniority unimpaired and with pay for all time lost and with all benefits intact, within fifteen (15) days of the receipt of this Award. The Carrier is further directed to cleanse the Claimant's Personal Record of any reference to the incident and the discipline involved herein.

This Award was signed this 13th day of January 1987 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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