NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	
- and -	CASE NO. 40
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	AWARD NO. 40

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. Charles E. Lewis, hereinafter the "Claimant", entered the Carrier's service on September 5, 1978 as an Extra Gang Laborer at Denver, Colorado. At the time the Claimant was dismissed from the Carrier's service by notice dated June 11, 1987 he was occupying the position of Group 5 Machine Operator working out of Trenton, Nebraska.

On Friday, May 22, 1987 the Claimant was operating a spike puller which was damaged, allegedly due to the Claimant's improper operation of the machine. The Claimant was notified at approximately 10:30 a.m. that morning that the Carrier was directing him to submit to a urinalysis test. At some point thereafter, the Claimant requested an opportunity to speak to an Organization representative regarding the instruction from the Carrier to take the test. This Board finds it unnecessary to discuss the merits of the issues of (1) whether the Claimant ultimately refused to submit to the urinalysis

test and was therefore guilty of insubordination or (2) whether the Claimant was responsible for improper operation of the spike puller and therefore guilty of a Safety Rules violation; because in our opinion the Carrier committed a fatal procedural error when it failed to give the Claimant the minimum five (5) days' notice of investigation required by Schedule Rule 40 contained in the parties' collective bargaining agreement.

The notice of investigation dated May 22, 1987, the same date of the incident, was sent to the Claimant at 6135 East 33rd Avenue, Denver, Colorado 80205. The notice of dismissal dated June 11, 1987 was sent to the Claimant at 1635 East 33rd Avenue, Denver, Colorado 80205. In answering the Conducting Officer's first two questions at the beginning of the investigation, the Claimant stated that "No, I didn't receive no notice" and that 6135 East 33rd Avenue, Denver was his home address. It is obvious that the Claimant misunderstood the Conducting Officer's second question as it appears that the Carrier corrected the mistake in transposing the Claimant's address when it sent the notice of dismissal to 1635 East 33rd Avenue as opposed to 6135 East 33rd Avenue. The Claimant only discovered that there was an investigation pending when he spoke to Organization Representative S.M. McDonald on or about May 26, 1987, one day prior to the scheduled investigation. The Carrier has produced no evidence, in the nature of a returned receipt, to establish that the Claimant received the requisite notice specified in Schedule Rule 40.

As this Board has observed in the past, we are most reluctant to sustain claims on procedural grounds. However, the parties did not negotiate Schedule Rule 40 only for the exercise. This rule contains significant procedural due process safeguards; and the instant case highlights why proper notice must be given to employees whose jobs may be in jeopardy.

Without intending any disrespect to the Claimant, it is clear that he is not "a man of letters". The Carrier's Employee Personal Record reflects that he completed, at most, one year of high school. His responses to questions during the investigation indicate that he has some difficulty in listening and/or comprehending. Therefore, it is most critical where an investigation is going to be conducted, which might result in the loss of his job, that he be given the minimum notice required by the rule of that investigation so that he might fully confer with a qualified Organization representative in order to adequately explain his side of the story.

As the Carrier denied him this right, since (a) the notice was apparently sent to the wrong address and (b) the notice could not have been received, being sent on May 22, 1987, five days prior to the scheduled investigation, the claim must be sustained.

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 11th day of August 1987 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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