

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. 42

AWARD NO. 42

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. Jeffrey D. Wyckoff, hereinafter the "Claimant", entered the Carrier's service on April 22, 1977 as a Sectionman. At the time the Claimant was dismissed from the Carrier's service, by notice dated July 22, 1987, he was occupying the position of Grinder Operator.

An investigation was held on June 29, 1987 for the purpose of ascertaining the facts and determining the Claimant's alleged failure to "fully follow the prescribed program issued by E.A.P. Coordinator S.K. Daly during the second probationary period resulting from a previous violation of Rule 'G' on June 14, 1985".

At the investigation the Claimant was represented by the Organization's Vice General Chairman assigned to the district.

At the conclusion of the investigation, the Carrier issued a notice of dismissal to the Claimant dated July 22, 1987 based upon his alleged failure to comply with the requirements of his second probationary period.

#### Findings of the Board

Ms. Sherry K. Daly, the Carrier's Employee Assistance

Coordinator, testified that in June of 1985 the Claimant, who had been dismissed from the Carrier's service for a violation of Rule "G", signed a "Rule G Agreement" which provided, in essence, that he would comply with the Carrier's requirements regarding rehabilitation for alcohol and/or drug abuse. This agreement specified, in part, that the Claimant would attend alcohol/drug education classes, regularly attend meetings of aftercare groups on a weekly basis, provide documentation to the EAP Coordinator verifying such attendance, submit to random drug screening tests during the suspension and probationary period and abstain from the use of all alcohol, drugs or any mood altering chemicals while subject to the Employee Assistance Program.

Ms. Daly further testified that she worked with the Claimant during the period of his "probation" and that at one time, by letter dated April 28, 1986, she recommended that he be reinstated to service, with the Claimant's understanding that he would still be on probation. Ms. Daly testified that shortly after the issuance of the April 28, 1986 letter she was advised by the Claimant's counselor in Forsyth, Montana, that he, the Claimant, was not complying with the the prescribed rehabilitation program. Further rehabilitation ensued and the Claimant was reinstated to the Carrier's service on June 16, 1986, at which time he entered into the "Second Probationary Period". The Claimant signed a document dated June 16, 1986 document, which was witnessed by an Organization representative, under which the Claimant agreed to this Second Probationary Period and to submit to an investigation in the event he "failed the prescribed program". The Claimant was again required to attend AA meetings on a weekly basis and to provide documentation verifying his attendance. He was also required to abstain from using alcohol or any other mood altering chemicals.

In July and August of 1986 the Claimant failed to regularly attend AA meetings and he was advised in writing by EAP Coordinator Daly that if he did not verify his attendance at such meetings that she would be forced to notify officials of the Carrier of his non-compliance.

Ms. Daly testified that subsequent to this notification she met with the Claimant to discuss his non-compliance and that he "admitted to drinking alcohol". The Claimant was then placed on a medical leave and he entered into a chemical dependency program on or about October 5, 1986 at Ms. Daly's recommendation. On November 2, 1986 the Claimant successfully completed treatment and on November 3, 1986 he again entered into a "Rule G EAP Client Agreement" with Ms. Daly where he again agreed to abstain from the use of alcohol and/or drugs and to attend a minimum of three (3) AA and/or NA meetings per week.

Ms. Daly testified that the Claimant did not complete the recommended twenty (20) weeks of aftercare counseling and that he did

not obtain verification for a number of the aftercare meetings he was required to attend. Ms Daly testified that these failures continued for some time and that when she discovered in June of 1987 that he had tested "positive" for THC (the active ingredient in marijuana) during a routine physical examination that she concluded that "Mr. Wyckoff was not going to comply with the requirements of his Second Probationary Period".

On June 18, 1987 Ms. Daly issued a letter to management advising that the Claimant was not complying with the prescribed program of the Employee Assistance Coordinator. Ms. Daly also testified that she was aware that the Claimant had been withheld from service prior to her issuance of her June 18, 1987 notice to management regarding the Claimant's non-compliance based upon a Medical Department decision to withhold the Claimant because of the positive drug test.

Ms Daly's June 18, 1987 letter regarding the Claimant's non-compliance led to the Carrier's issuance of the June 22, 1987 notice of investigation.

In presenting its defense of the Claimant, the Organization contends that the Carrier did not comply with Rule 40(A) which provides that an investigation is to held within fifteen (15) days from the date of the occurrence or when information is received by an officer of the Carrier. The Organization contends that Ms. Daly has admitted to being an officer of the Carrier and that she had information and notice regarding the Claimant's alleged failure to comply with the requirements of his probationary period well prior to the fifteen (15) day period established by Rule 40. The Organization further submits that the notice of investigation fails to meet the requirements of Schedule Rule 40(C) which establishes that a notice of charges must be specific. The Organization submits that the notice of investigation speaks of the Claimant's alleged failure to "fully follow the prescribed program" and that this notice is over-broad since it gave the Claimant no information regarding any specific provisions in the Assistance Program that he was allegedly violating. Therefore, the Organization submits that the claim should be sustained because the Carrier violated both of these procedural requirements clearly established by Rule 40.

This transcript proved particularly difficult to analyze; not because the testimony was purposefully unclear, but because the Claimant failed to follow the prescribed Employee Assistance Program on so many occasions and he was given so many opportunities to comply with the various requirements of the several probationary periods, that this Board had some trouble in tracing the chronology of this claim.

We have concluded, after a particularly thorough review of the

record, that the Carrier had just cause to discharge the Claimant. As noted above, the Carrier's Employee Assistance Coordinator afforded the Claimant several chances to comply with the minimal requirements of the rehabilitation program. The two (2) most important requirements in any alcohol or drug rehabilitation program are (1) abstinence and (2) aftercare. In this case, the Claimant, on at least one occasion, admitted that he had begun drinking again, and he was given an opportunity to "recycle" in the rehabilitation program. Additionally, and more importantly, the record evidence establishes that the Claimant regularly and consistently failed to fully comply with his obligation to attend aftercare (AA) meetings and/or to provide verification to the Carrier that he was attending such meetings.

The Claimant's excuses for his sporadic attendance at aftercare sessions is not convincing, and is, in fact, disingenuous. More importantly, the Claimant admitted at the investigation (pg. 52) that he did not follow the program for rehabilitation as established by the EAP Coordinator.

The Organization's contention that the Carrier had fifteen (15) days to schedule an investigation as of June 11, 1987, the date the Claimant was taken out of service by Medical Department directive because of the positive drug test, is, in this Board's opinion, a "red herring" argument. The Claimant was not charged with an infraction of the Rules because of his alleged positive drug test. It is clear that at or about the same time the Claimant took the drug test as part of a routine physical examination that he was regularly failing to attend AA meetings, a commitment which he made to the Carrier in exchange for the Carrier's agreement to rescind any discipline for his original violation of Rule "G".

It does appear that when Ms Daly, the EAP Coordinator, received information to the effect that the Claimant tested positive for THC on a drug screen that she reviewed his record of compliance with the requirements of the rehabilitation program, and she concluded, based upon substantial evidence which is found in this record, that the Claimant's attendance at aftercare meetings was abysmal. It was on this basis, the failure to comply with the rehabilitation program, that the notice of investigation was issued, and it was on this charge that the Claimant was dismissed from service. The Claimant's alleged failure to pass a drug screen was not a part of the investigation and thus the date of that failure triggered no time period under Rule 40. We might also note that the Carrier's determination as to when an employee, such as the Claimant, has failed to comply with the requirements of an assistance program does not necessarily occur on a specific date because of a specific failure; the determination in such a case of "failure to comply" will likely be cumulative; that is, the Carrier's Employee Assistance Coordinator will review the entirety of an employee's

rehabilitation record in order to determine if that employee is complying with the prescribed program. Accordingly, we find that the Carrier did not untimely bring this charge or schedule the investigation; and in view of the Claimant's admissions of non-attendance/non-compliance, the Board finds just cause for the discipline.

The Organization also contends that the charge was not sufficiently precise, and thus neither the Claimant nor the Organization could properly and fairly construct a defense. We find insufficient merit in this argument to reverse the discipline on procedural grounds. It is clear that the Claimant full well knew the basis upon which the Carrier concluded that he was not "following the prescribed program". He did not deny that Ms Daly had counseled him regarding his obligation to attend AA meetings, and he was prepared with several excuses, albeit they were weak and unconvincing, as to why regular attendance at AA meetings was difficult. It was not necessary in this Board's view, in light of the Claimant's regular counseling regarding his shortcomings, for the Carrier to have "chaptered and versed" every AA meeting he had missed or meeting for which he had failed to provide documentation verifying his attendance, in order for the Claimant to have received adequate notice regarding the nature of the charge.

While we have some sympathy for the Claimant's addiction, and while we recognize that the Carrier has an established program to help in the cure and aftercare of that condition, nevertheless we must conclude that discharge in this case was not inappropriate. The Carrier has, since June of 1985, almost two (2) full years to the date of the Claimant's discharge, worked with the Claimant in an effort to return him to service as a cured and useful employee. Unfortunately, the Claimant has not worked with the Carrier sufficiently to address his problem. After the Carrier's extensive efforts, this Board does not believe we should offer the Claimant "one last chance". The Carrier has afforded him several "last chances", all of which he has failed, and now it becomes the Claimant's responsibility, as a non-employee, to address and solve his problem. Accordingly, the claim will be denied.

Award     The claim is denied. This Award was signed this 25th day of September 1987 in Bryn Mawr Pennsylvania.

Richard R. Kasher

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