NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	*	
	*	
-and-	*	CASE NO. 6
	*	AWARD NO. 6
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	*	

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 Section 3 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 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 choose to appeal their dismissals to this Board, and they have a sixty (60) day period from the date of their dismissals to elect to handle their appeals through the usual appeal channels, under Schedule Rule 40, or to submit their appeals directly to this Board in anticipation of receiving expedited decisions. The employee who is dismissed may elect either option, but 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's written notification of his/her desire for expedited handling of his/her appeal is received by the Carrier Member of the Board, that said 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 had the option to request the parties to furnish additional data regarding the appeal, in terms of argument, evidence, and awards, prior to rendering a final and binding decision in the instant case. 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 excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

Under paragraph 5 of the May 13, 1983 agreement the Referee must agree, as a condition of the assignment, to render an award in each dispute submitted within sixty (60) days of the date the documents specified above are received. The sixty (60) day period may be extended when funding of the dispute resolution procedures under Section 3 of the Railway Labor Act are suspended.

Mr. Craig M. Whitlock, the Claimant, who entered service with the Carrier on September 26, 1974, was dismissed from service on November 8, 1983 as the result of an investigation held on October 25, 1983. The documents of record, including a 70 page transcript, were received by the Referee on November 26, 1983, and this award was rendered on January 24, 1984.

Findings and Award

On October 17, 1983 the Claimant, who was a truckdriver assigned to Worland, Wyoming, received a notice of investigation which advised him that a hearing would be held to determine his responsibility in connection with his alleged unauthorized removal and sale of Burlington Northern property commencing with the year 1980 to and including 1983.

The Claimant attended this investigation and was afforded a full opportunity to present testimony, to produce witnesses, and to examine witnesses presented by the Carrier.

The essential elements of evidence upon which the Carrier relied in finding that the Claimant was guilty of violating Carrier rules, concern the removal and sale of Burlington Northern ties without proper authority. The record of evidence was built primarily upon the testimony of a Carrier Division Special Agent who interviewed the Claimant as well as a number

of individuals who allegedly bought Burlington Northern ties from the Claimant. Although there was some evidence in the record that some ties which were sold to the individuals in question came from a company known as Holly Sugar, where the Claimant's father was a company representative, there is also significant and substantial evidence in the record to show that a number of ties, as well as some rail, came from the Carrier's premises and were sold to the parties in question. There is also evidence in the record that the Claimant was responsible for and participated in the removal of the ties and the rail, and used the monies gained through their sale for his own benefit.

Although the Claimant denied certain elements of his alleged involvement in these transactions, the Carrier had the right to rely upon the testimony of its Division Special Agent regarding admissions of guilt made to the Division Special Agent by the Claimant during interviews on October 4 and 5, 1983. Additionally, there is evidence in the record which contradicts the claim that all ties sold off company premises for private profit came either from the Holly Sugar Company or were ties bought by fellow employee John Miller from Carrier Roadmaster Fransen. Roadmaster Fransen testified at page 21 of the transcript that he sold only 50 ties to Mr. Miller, and this testimony by Mr. Fransen stands unrefuted as neither the Claimant nor any other principal at the investigation exercised the offered right to question his testimony.

This Board should also note that neither the Claimant nor any of the other principals at the investigation chose to have witnesses appear who might have offered exculpatory evidence; such as the purchasers of the Burlington Northern ties, or the Claimant's father who allegedly provided the Holly Sugar ties to the Claimant.

This Board should address the Organization's contention that the Claimant was not afforded a fair and impartial hearing as Rule 40 of the schedule agreement, regarding investigations, requires that precise and specific charges be given to employees subject to investigation, and that the charge in the instant case was not sufficiently specific. The Carrier would have acted more prudently had the charge been more explicit and identified the dates of the alleged transactions, the names of the alleged purchasers, as well as specifying that it was rail ties and rail which were involved in the alleged unauthorized removal.

However, a review of the entire transcript and record before us indicates that the Claimant had clear knowledge of the charges against him, specifically as a result of the interviews conducted with the Division Special Agent wherein the exact dates and items of concern were discussed. The record also reflects that the Claimant was fully familiar with the incidents in question, which is evidenced during his testimony and during the testimony of his fellow employees and Carrier witnesses. The Claimant indicated in his testimony that he was aware of the fact that a former employee of the Carrier, Alcaraz, had taken pictures of him unloading ties at a individual's residence, and this fact also supports this Board's conclusion that the Claimant had reasonable, constructive, actual, and specific knowledge of the nature of the charges which the Carrier was bringing against him.

Although the Organization has contended that the Claimant was the subject of some form of spite, as the result of charges being instigated by Alcaraz and his son, that fact, although it may be true, does not overcome the Carrier's reliance upon substantial and probative evidence that the Claimant violated Carrier rules in terms of unauthorized removal of Carrier property.

In these circumstances, the Board must find that the Carrier did not violate the terms of the collective bargaining agreement when it disciplined the Claimant, and we cannot find a basis for mitigating the discipline as, in the circumstances, it cannot be considered arbitrary or overly severe.

Accordingly, the claim will be denied.

AWARD: Claim denied. This award was signed this 24th day of January, 1984 in Bryn Mawr, Pennsylvania.

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