NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	
- and -	CASE NO. 62
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	AWARD NO. 62

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 was limited to disciplinary disputes involving employees dismissed from service. On September 28, 1987 the parties expanded the jurisdiction of the Board to cover employees who claimed that they had been improperly suspended from service or censured by the Carrier.

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 have been dismissed or suspended from the Carrier's service or who have been censured may chose to appeal their claims to this Board. The employee has a sixty (60) day period from the effective date of the discipline to elect to handle his/her appeal through the usual channels (Schedule Rule 40) or to submit the appeal directly to this Board in anticipation of receiving an expedited decision. An employee who is dismissed, suspended or censured 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 disciplined 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 discipline and the disciplined 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. Craig L. Dickerson, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on May 15, 1979. He was subsequently promoted to the position of Welder and was occupying that position when he was dismissed from the Carrier's service, effective September 16, 1988.

The Claimant was dismissed as a result of an investigation which was held on September 8, 1988 at the Carrier's depot in Grand Island, Nebraska. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rules 530 and 530A of the Carrier's Rules applicable to Maintenance of Way employees by "not being honest and withholding factual information regarding your activities while you were under doctor's care from August 26, 1988 to August 30, 1988 for a personal injury you sustained August 25, 1988 while assigned as Welder on Welding Gang No. 961 at Grand Island, Nebraska".

Findings and Opinion

On August 25, 1988, a Thursday, the Claimant completed a Personal Injury Report in which he contended that he had suffered "whiplash to neck and twisted knee (rt.)", an injury that allegedly occurred when the Carrier truck he was riding in hit an unmarked hole. As a result of the Claimant's complaints regarding injuries to his neck and knee, the Claimant was seen by a physician at the Saint Francis Medical Center in Grand Island, Nebraska.

Roadmaster R.A. Mason testified that he contacted the doctor's office in order to determine how long the Claimant would be out of work. Roadmaster Mason testified that as the doctor was not available he spoke with the head nurse who advised him that the Claimant would be out of work for five (5) days, that the Claimant was told to apply heat packs to his neck and that he was instructed to see his own doctor or a Carrier doctor in five (5) days or sooner if the injury got worse. Roadmaster Mason requested that he be sent the discharge instructions and he received same.

Roadmaster Mason called the Claimant at home on Friday morning, August 26, 1988; the Claimant told Mr. Mason that while the x-rays he had taken proved negative, he was "stiff and sore" and that he was taking Motrin, applying heat packs, and resting and that he had been advised by the doctor to be off from work for approximately seven (7) days.

On that Friday afternoon, at approximately 4:45 p.m., Roadmaster Mason, accompanied by Carrier Special Agent M.J. Beran, drove to the Claimant's house; they proceeded to Country Hills Golf Course; they observed the Claimant, and a woman who they presumed was his wife, arrive at the golf course at approximately 5:15 p.m.; they observed the Claimant drive a golf cart from a golf shed to the club house and emerge from the club house at approximately 5:34 p.m. carrying a five (5) pound bag of ice; they observed the woman they presumed to be the Claimant's wife with the Claimant at the first tee and saw her hit a golf ball at approximately 6:04 p.m.; and then they observed the Claimant hit the same ball at approximately 6:08 p.m. after which the woman and the Claimant alternately hit the ball again and again through the fairway.

Both Roadmaster Mason and Special Agent Beran testified that the Claimant did not appear to have a stiff neck or have any problems walking while he hit the golf ball on Friday, August 26, 1988.

Roadmaster Mason then testified that he was accompanied by Trainmaster John McCreery on Saturday, August 27, 1988 and that he observed the Claimant and the woman he presumed to be the Claimant's

wife playing golf at the same country club shortly after 3:00 p.m. that afternoon. Roadmaster Mason testified that he saw the Claimant hit a golf ball several times and that he did not appear to be restricted in any manner; that the Claimant's head was moving back and forth and that he was "walking over the golf course without any problems".

Roadmaster Mason testified that he called the Claimant at his home on Monday morning August 29, 1988 at approximately 8:55 a.m. and that when he asked the Claimant "how his neck was doing" that the Claimant said he was "still pretty sore and stiff" and that he had been using heat pads, resting and taking Motrin four times a day. When Roadmaster Mason asked the Claimant when he thought he might be able to return to work and if he thought he could return to work that day on a light duty assignment, the Claimant stated that he was "still pretty stiff and sore and couldn't hardly turn his neck, and he would not be able to return on light duty until maybe Wednesday, Thursday, later in the week".

Roadmaster Mason and Trainmaster McCreery located the Claimant at a YMCA on Tuesday, August 30, 1988 and delivered a Notice of Investigation to the Claimant in which the Claimant was notified that the investigation would concern the "alleged personal injury on August 25, 1988". Roadmaster Mason testified that the Claimant asked "What this was all about" and that he confronted the Claimant with the allegation that he, the Claimant, had been observed by witnesses playing golf at the Country Hills Golf Course at Hastings; and that the Claimant stated that he was not playing golf and that those who said he was were lying, since he did nothing on the past weekend except rest and apply heat packs. The Claimant did then concede that he had been at the golf course, but contended that he was just riding around in the golf cart and did not play.

Roadmaster Mason further testified that he then went to the Wagon Wheel Bar in Hastings, the establishment that had sponsored the weekend golf tournament, and obtained a score sheet which showed that the Claimant had shot a score of 42 and his wife, Julie Dickerson, had a score of 54.

Mr. Mason's testimony was substantially confirmed and corroborated in relevant detail by Special Agent Beran insofar as the events of Friday, August 26, 1988 were concerned and by Trainmaster McCreery insofar as the events of Saturday, August 27, 1988 and Tuesday, August 30, 1988 were concerned.

Roadmaster Thomas M. Mroczek, who was privy to the telephone conversation between Roadmaster Mason and the Claimant on Monday morning August 29, 1988 substantially confirmed Roadmaster Mason's

testimony to the effect that the Claimant had indicated that the "stiffness and soreness [in his neck and knee] was still due to the personal injury that he had claimed on the 25th".

The Claimant testified that he suffered injuries to his neck and knee while he was a passenger in a Carrier truck that hit an unmarked hole on Carrier property; that he saw a physician who instructed him to take five (5) to seven (7) days off and who prescribed Motrin and a heating pad.

The Claimant acknowledged that he was playing golf on Friday, August 26 and Saturday, August 27, 1988, and he stated that this activity was consistent with the instructions he had received from his doctor. The Claimant testified that his doctor had told him that he could return to work at any time that he felt better and that on the afternoon of Friday, August 26, 1988 his neck was not stiff. The Claimant testified that he intended to return to work on Monday because he was feeling better, and that he had advised Roadmaster Mason of this fact when he spoke to him on that Friday morning.

The Claimant contended that the reason he did not return to work on Monday, August 29, 1988 was due to a back injury that had no relationship to the injury he had suffered to his neck and knee on the previous Thursday. The Claimant testified that the neck injury had healed itself by Friday afternoon, apparently as a result of the Motrin and heat treatments he had taken. The Claimant conceded that he did not tell Roadmaster Mason "directly" that the time off he took on Monday and Tuesday, August 29 and 30, 1988, were attributable to a "different injury", the recurrence of an old back injury. The Claimant also explained that when Roadmaster Mason inquired, on Tuesday, August 30, 1988 about the Claimant having been observed playing golf that he denied playing golf because he assumed that Roadmaster Mason was speaking about Monday or Tuesday,

The Claimant also testified that he had not received pay for the time off due to the injury to his neck and knee; that he had not been contacted by a claim agent regarding this injury; and that he had been in contact with Head Welder G.K. Sears on Saturday, August 27, 1988 and that he had told Mr. Sears that he would probably be back to work on Monday. The Claimant testified that he saw Head Welder Sears again on Sunday, August 28, 1988 and that he had advised him at that time that it "might be a couple of days before I come back, because I was sore". The Claimant testified that he told Mr. Sears "I got screwed up playing golf, is what I told him".

The Carrier has the responsibility for determining credibility in disciplinary cases progressed under Section 3 of the Railway Labor Act. That is because the ultimate triers of fact, the neutrals who

sit on Boards such as this Board, are not at the transcribed investigations and do not have the ability to assess demeanor and other standard indicia of truthfulness.

However, if there ever was a case where the trier of fact sitting many miles distant from the scene of the investigation could make a credibility determination and be 100% assured that that determination was correct, this would be that case.

The Claimant's testimony is totally unbelievable! If, in fact, the heating pad and a few tablets of Motrin "healed him" in the brief period of time between the onset of his injury and the beginning of a golf tournament [which we note had been pre-planned for several weeks], then we would suggest to the Claimant that he take this cure to Lourdes, because he would achieve much greater financial success as a healer than as a welder.

Roadmaster Mason and Roadmaster Morczek confirmed that the Claimant stated on Monday, August 29, 1988 that he was "still" stiff and sore. There can only be one reasonable explanation for the use of this word. The Claimant intended to mislead the Carrier into believing that he continued to suffer from an injury, which was suspect at best, that occurred on the previous Thursday. If the Claimant told a fellow employee on Sunday, August 28, 1988 that he would not be back to work because he "screwed his back playing golf", why did he not give this same excuse to Roadmaster Mason on Monday, August 29, 1988 or to Roadmaster Mason and Trainmaster McCreery on August 30, 1988. Clearly, the Claimant was not telling the truth. His lack of honesty was confirmed by his denial that he was playing golf when he was confronted with this allegation by Roadmaster Mason, and it is clear that he originally denied the fact because he was unaware that one of the witnesses to his golfing activities was Roadmaster Mason himself.

The totality of the evidence establishes that the Claimant violated Carrier rules which require the honest reporting of information and prohibit the withholding of factual data. The Organization's contentions that the Claimant merely used bad judgment by playing in the golf tournament because the medication eased his pain and that the Claimant's continuing absence from work was due to a previous personal injury are found to be totally lacking in merit by this Board because of our conclusion that the Claimant's testimony is unreliable and contradictory. We also conclude that the fact that the Claimant had not yet received compensation for the three (3) days he was absent from work is not relevant to the ultimate determination that the Claimant violated the rules cited in the Notice of Dismissal.

Finally, the Claimant was aware of the nature of the charges against him, and the fact that Rules 530 and 530A were not listed in the Notice of Investigation does not render the notice invalid or in violation of Schedule Rule 40.

Accordingly, the claim will be denied.

Award: The claim is denied. This Award was signed this 3rd day of November 1988 in Bryn Mawr, Pennsylvania.

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