

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 925

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BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 77

AWARD NO. 77

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 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. Darrell B. Brown, hereinafter the Claimant, entered the Carrier's service as a Sectionman on November 6, 1978. The Claimant was subsequently promoted to the position of Machine Operator and he was occupying that position when he was suspended for thirty (30) days by the Carrier on November 8, 1989.

The Claimant was suspended as a result of an investigation which was held on October 17, 1989 in the Trainmaster's Office, 1100 N.E. Division Street, Bend, Oregon. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated General Rule 570 as he had absented himself from duty without proper authority as he had allegedly failed to report for duty at the designated time and place on September 18 through September 22, and September 25 through September 27, 1989 while working as a Machine Operator at Maupin, Oregon.

Findings and Opinion

Roadmaster D.C. Young testified that the Claimant was assigned to his territory as the result of the Claimant's having been awarded a Machine Operator position on the territory by bulletin dated August 18, 1989. Roadmaster Young testified that the Claimant was released to report to his position as Head Welder at Maupin, and that he expected that the Claimant would begin work on September 18, 1989 as scheduled; but, in fact, the Claimant did not report for duty until September 28, 1989. Roadmaster Young testified that he was not contacted by the Claimant prior to September 28, 1989 and asked for permission to be absent from work.

Upon questioning by the Claimant and the Organization Representative, Roadmaster Young testified that he received a message on his "recorder" and that "the message did state that Mr. Brown would report to work on the 28th". Roadmaster Young testified that he did not pick up his messages on a daily basis; that the message on his answering machine advised that the Claimant would not be in attendance on the 27th of September; and, that he recalled that a reason was given for the absence but he could not remember the reason.

The Claimant testified that he was released from Roadmaster Reich's district to report to Maupin on Monday, September 18, 1989. The Claimant testified that he called Roadmaster Young's answering machine on several occasions, asked Roadmaster Young to return his calls and left his telephone number. The Claimant testified that he "Never got a return message telling me that I would be due and my reason for not being there is I had to see the doctor about the injury I received on the Burlington Northern". The Claimant testified that he was attended by a Dr. Shelly Thiel on September 27, 1989. The Claimant testified that he had suffered an on-duty ear injury on August 27, 1989.

Roadmaster Young was recalled to testify, and he stated as follows:

"Q. Mr. Young, have you had conversations with Dr. Shelly Thiel?  
A. Yes, I have.

Q. Regarding the 27th of September. What did you find when you talked with Dr. Thiel on that day?

A. I did not talk with Dr. Thiel about Mr. Brown seeing her on the 27th. Mr. Brown had told me that the doctor was holding him out of service, the reason he had not reported to work and I was trying to verify that through Dr. Thiel.

- Q. Did Dr. Thiel tell you that she in fact had held Mr. Brown out of service?
- A. She told me that there was nothing on his record stating that he was being held (inaudible).

The Carrier disciplined the Claimant because of his alleged failure to appear to duty on the dates of September 18 through 22, 1989 as well as for his failure to work the dates of September 25 through 27, 1989.

The Organization and the Claimant contend that any of the days of alleged absence prior to September 27, 1989 are not properly considered in view of the fact that Schedule Rule 40, Investigations and Appeals, requires that an investigation be held within fifteen (15) days of the alleged occurrence, and that the notice of investigation in the instant case does not comply with this contractual time limit. The Organization and the Claimant also argue that the Claimant's absence on September 27, 1989 was for legitimate cause, as the Claimant was being medically examined for an on-duty injury, and that the Claimant made all reasonable efforts to bring his expected absence to the attention of the Carrier prior to said absence.

Obviously, this Board has no jurisdiction to determine the extent and severity of any on-duty injuries, unless, in a particular case, such a question has been joined in the investigation.

In the instant case, the question of the Claimant's alleged on-duty ear injury is not before the Board for consideration.

The evidence is uncontroverted. The Claimant was released to report to the Machine Operator position at Maupin, Oregon and was scheduled to begin on September 18, 1989, a Monday. The Claimant did not report for the full week of Monday through Friday, September 18 through September 22, 1989; neither did he report for work on his next three (3) scheduled days of Monday through Wednesday, September 25 through September 27, 1989. The Claimant did, apparently, attempt to advise Roadmaster Young that he would not be at work on September 27, 1989 because of a medical appointment.

However, there is no evidence in the record to establish that the Claimant was unable to report to work when assigned or that he had Carrier permission not to report to work or that he was being "medically withheld from service" by a designated Carrier physician.

In these circumstances, the Board must conclude that the Claimant was properly charged with violation of Rule 570 which provides, inter alia, that "Employees must report for duty at the

designated time and place", and that employees "must not absent themselves from duty . . . without proper authority".

The Board finds that the Claimant's absence from duty was one continuous absence which began on September 18, 1989 and extended through September 27, 1989. The Board further finds that the Carrier began to conduct an on-the-property inquiry regarding the Claimant's absence, and that the notice of investigation was issued timely when the Carrier had reason to believe that the Claimant's absence was not justifiable. Accordingly, the Board concludes that the notice of investigation in this case did not violate the time limits prescribed by Schedule Rule 40.

Finally, based upon the Claimant's prior disciplinary record and the length of the Claimant's unauthorized absence from duty, the Board does not find that the thirty (30) day suspension was arbitrary or overly severe. Therefore, the claim will be denied.

Award: The claim is denied. This Award was signed this 25th day of March 1990.



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