

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 925

<u>BURLINGTON NORTHERN RAILROAD COMPANY</u>	*
	*
-and-	* CASE NO. 8
	* AWARD NO. 8
<u>BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES</u>	*

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 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. John R. Miller, Jr., the Claimant, who entered service with the Carrier on May 11, 1970, was dismissed from service effective November 8, 1983 as the result of an investigation held on October 25, 1983. The documents of record including a seventy-page transcript, were received by the Referee on December 16, 1983, and this Award was rendered on January 31, 1984.

Findings and Award

The Claimant was a Section Foreman at Worland, Wyoming, when he was advised by letter dated October 17, 1983 that he was to attend an investigation which was being conducted for the purpose of ascertaining the facts and determining 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 the investigation scheduled on October 25, 1983; he was accompanied by a duly designated representative of the Organization; and, he was afforded a full opportunity to present witnesses in his own behalf and to examine those witnesses presented by the Carrier.

This case is somewhat of a companion case to Case/Award No. 6, decided by this Board involving a fellow employee of the

Claimant who was subject to an investigation of the same charge, and which investigation took place at the same time as the investigation in the matter hereunder consideration.

This Board has addressed the Organization's procedural objections raised in Case/Award No. 6, and has found that they are not sufficient to find that the Claimants, either in that case or in this case, were denied their rights to procedural due process.

There is sufficient probative evidence in the record, of a clear and convincing nature, for this Board to conclude that the Carrier had just cause to find the Claimant guilty of the unauthorized removal and sale of Carrier property. Although the Claimant in this case did not admit, with the same degree of candor, that he had violated Carrier rules, as did the Claimant in the companion case, this Board finds that the Claimant, while functioning as a Section Foreman of the gang in question, did sell Carrier property, without permission, and benefitted thereby. The evidence of record establishes that the Claimant sold one hundred and fifty rail ties to a company known as Bower and Huber for five dollars each. The only evidence in the record which the Claimant can rely upon which shows that some of those ties were purchased from the Carrier is his statement that he purchased a hundred ties from the Carrier, evidenced by a check made payable to the Carrier. However, there is sufficient reason for the Carrier to doubt the Claimant's testimony. First, the check proffered indicated in the lower left hand corner that the purchase involved was for "fifty ties" and, secondly, the Claimant's failure to contradict the testimony of Roadmaster Fransen, to the effect that the Claimant only bought fifty ties from the Carrier, creates substantial reason to conclude that the Carrier had probative evidence of value regarding the Claimant's misappropriation of Carrier property.

Under the circumstances, this Board finds that the Carrier could properly determine that the Claimant was guilty as charged, and there is no showing of any reason to mitigate the penalty imposed by the Carrier.

Accordingly, the claim will be denied.

Award: Claim denied.

Signed this 31st day of January, 1984 in Bryn Mawr, Pennsylvania.



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