NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	
- and -	CASE NO. 85
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	AWARD NO. 85

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. Marvin C. Rose, hereinafter the Claimant, entered the Carrier's service as a B & B Helper on March 26, 1979. The Claimant was subsequently promoted to the position of B & B Mechanic and he was occupying that position when he was dismissed from the Carrier's service on May 2, 1990.

The Claimant was dismissed as a result of an investigation which was held on April 2, 1990 in the Trainmaster's Office in Guernsey, Wyoming. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rules 565, 336(K) and 336(L) for backing a Carrier vehicle over a telephone pole and damaging Telephone Company equipment at 2:00 p.m. on March 16, 1990, near Bridger Junction, Wyoming.

Findings and Opinion

On March 16, 1990 the Claimant was assigned as a truck driver for Carrier vehicle #8738. At 2:00 p.m., while backing up in the depot at Bridger Junction, Wyoming, the Claimant struck a telephone pole and a Telephone Company circuit box causing damage to both.

B & B Foreman S.L. Talbot, who was a passenger in the truck, contacted his supervisor to advise him of the accident.

At approximately 3:00 p.m. on March 16, 1990, Signal Supervisor K.D. Harmon received a telephone call from Don McCammon, Manager of B & B, advising him that the Claimant had been involved in the accident and that the Claimant was to be taken in for urinalysis testing.

Trainmaster L.W. Taylor and Signal Supervisor Harmon accompanied the Claimant to the Regional Medical Center in Scottsbluff, Nebraska where the Claimant was tested.

Two urinalysis tests were conducted. One at Western Pathology in Scottsbluff, Nebraska and one at Compuchem Laboratory in Research Triangle Park, North Carolina.

The results from the Western Pathology testing showed positive for urine/alcohol .057% g% and the results from the Compuchem Laboratory testing showed a 56.00 positive reading for Urine Ethanol.

The Organization has argued that there are serious flaws involving the chain of custody of the Claimant's urine specimens. The Organization points out that although the accident occurred on March 16, 1990, the date of March 15, 1990 is listed on the Compuchem Laboratory Chain of Custody form, which form was filled out by the Lab Technician for Western Pathology. The Organization further points out that the analysis report form provided by Western Pathology shows that the specimen it tested was received on March 17, 1990 and that Compuchem Laboratory did not receive its sample until March 21, 1990, five (5) days after the incident. The Organization contends that no secure chain of custody was provided and that there is no way to determine which, if any, of the samples that were analyzed were, in fact, submitted by the Claimant.

While this Board is persuaded by the general contentions of the Organization regarding the necessity to ensure fairness, reliability and certainty in the urinalysis testing procedures and standards, we find insufficient evidence in the instant case to conclude that the procedures applied deprived the Claimant of fair and reasonable

testing.

It is clear to the Board that the Lab Technician, Twyla Lane, completing the Compuchem Laboratory Chain of Custody form, accidently entered the wrong date, i.e. March 15, 1990 instead of March 16, 1990, on that report. Such inadvertence did not prejudice the Claimant. It should be noted that neither the Claimant nor the Organization question other portions of the form which include the Claimant's signature, and there is no doubt that Ms. Lane was the Lab Technician and that the Claimant submitted a urine sample to her.

The Claimant's specimen was submitted to Ms. Lane at the Regional Medical Center on March 16, 1990 because, according to the unrefuted testimony of Trainmaster Taylor, the testing facility at Western Pathology had closed for the day. Exhibit #4, the letter from Dr. Alvin A. Armstrong, indicates that Western Pathology tested the sample the next day, March 17, 1990, when that facility had reopened for business.

The March 21, 1990 "receive date" on Exhibit #5, the Compuchem Laboratories report, becomes understandable when one takes into consideration that the date of the accident, March 16, 1990, was a Friday. The hearing record reflects that Airbourne, the company charged with delivering the sample, does not service the community of Scottsbluff, Nebraska during the weekends and a three (3) day lapse, assuming a Monday, March 19, 1990 pick-up in Scottsbluff to a Wednesday, March 21, 1990 receive date in North Carolina, is not unreasonable.

Accordingly, the Board finds no basis to discredit the laboratory reports submitted to the Carrier by the testing facilities.

However, the reports themselves do not establish, per se, that the Carrier had just and proper cause to dismiss the Claimant for his alleged violations.

B & B Foreman Talbot, Trainmaster Taylor and Signal Supervisor Harmon all testified that they did not observe any of the customary and usual indicia of alcohol intoxication, in spite of the fact that they were in the Claimant's presence for prolonged periods of time immediately subsequent to the accident to and through the urinalysis testing.

The Claimant was charged for a violation of Rule G; yet there is no objective evidence from either his co-worker or his supervisors that he used an alcoholic beverage while he was subject to duty, or

that he possessed or used an alcoholic beverage while on duty or on Company property or that he reported for duty under the influence of alcohol. In fact, the testimony of these witnesses appears to establish that the Claimant did not violate Rule G.

There is evidence in the record that the Claimant's urine contained an amount of alcohol. The Carrier has failed to establish that that amount of alcohol in the Claimant's urine [it should be noted that the standard reliable body fluids test for alcohol involves blood and not urine analysis] had any relationship to his performance or demonstrated that he engaged in on-duty or subject to duty use of a prohibited substance.

Absent some evidence in the record which would demonstrate that the urine/alcohol test meets the criteria of Rule G, this Board finds no basis to sustain the Carrier's conclusion that the Claimant violated the Rule.

Turning to the question of the Claimant's alleged violation of the cited "vehicle movement" rules, the Board finds that the Claimant was guilty of some negligence in the backing of the vehicle. Clearly, he would not have backed into a telephone pole purposefully; he must have been negligent. However, there is reason to believe that the Claimant, who was not the regular driver of the vehicle and who was backing out of the particular drive for the first time, would not have had the accident had he received proper guidance from a fellow crew member or his foreman.

In these circumstances, we find that the Carrier's imposition of discipline was overly severe.

Accordingly, the Board shall convert the Claimant's dismissal to a ten (10) day disciplinary suspension.

The Board also finds that the Claimant, by his own admission, "drank a few beers Thursday night [the night before he was to report to duty]". While there is no prohibition upon an employee consuming alcoholic beverages on his/her own time, when not subject to duty, the fact that some alcohol, apparently, remained in the Claimant's system on the date of the incident and the fact that the Claimant had been previously disciplined for a similar offense justifies the Carrier upon the Claimant's return to service to either refer the Claimant to employee counseling and/or to subject the Claimant to reasonable cause alcohol testing for one (1) year following his return to service.

Award: The claim is sustained in part and denied in part in accordance with the above findings. The Claimant's Personal Record shall be revised to reflect a ten (10) day disciplinary suspension for violation of Rule 336.

The Carrier shall reinstate the Claimant and make him whole for any lost pay and benefits in excess of the ten (10) day suspension.

This Award was signed this 24th day of June 1990.

Richard R. Kasher

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