

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY \*

-and-

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\* CASE NO. 9

\* AWARD NO. 9

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES \*

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. Mark R. Bell, the Claimant, who entered service with the Carrier, subsequent to a prior resignation, on April 5, 1976, was dismissed from service effective December 20, 1983 as the result of an investigation held on November 28, 1983. The documents of record including a thirty-nine page transcript were reviewed, and the Referee requested additional documentation from the Organization and the Carrier which was also received and reviewed.

#### Findings and Award

At the time of his dismissal, the Claimant was employed as an Assistant Foreman at Galesburg, Illinois. The Claimant was notified on November 18, 1983 that he was to attend an investigation for the purpose of ascertaining the facts and determining his alleged responsibility regarding the theft of rail ties, which were allegedly removed from the Carrier's property and sold to private parties during the years of 1982 and 1983.

The Claimant attended the investigation on November 18, 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.

The Carrier's case is built almost entirely upon the testimony and written investigative report of Division Special Agent G. R. Brown.

A synthesis of the evidence establishes, with a high degree of certainty, that the Claimant was responsible for the sale of approximately four hundred ties obtained from the Carrier's property. The evidence also indicates that the Claimant only has supporting documentation in his records to establish that approximately fifty-seven of those ties were paid for by the Claimant; this is confirmed in the Carrier's auditing records. The record indicates that the Carrier has a policy, at certain locations including Galesburg, to allow employees to purchase used and no longer usable rail ties at the price of \$1.05 per tie, and that the Agreement of Sale, including the Waiver of Liability, does not prohibit such employees from then reselling the ties and realizing profits on the resales.

Evidence in the investigative report, supported by the investigator's testimony, establishes that a number of the rail ties discovered by the investigator and viewed by an expert in the rail tie business were not used to the extent that they were no longer usable. In fact, there is evidence in the record to establish that a number of the ties were, if "not new", of such good condition that they had approximately thirty additional years of use. These rail ties were linked to the Claimant, in that it was established that he was responsible for the sale of said ties. Although the Organization, in its argument supplied to the Referee, contends that ties may become slotted (various size rectangular slots) as a result of movement of tie plates and rails, and that such ties become unusable to hold the tie plates and rails but otherwise appear nearly perfect, this argument standing alone does not overcome the evidence submitted by the Carrier which shows that the Claimant is unable to account for approximately three hundred and fifty ties which he obtained and sold. The Claimant had no documentation to support a conclusion that those ties were properly purchased from the Carrier.

As a footnote to the December 3, 1983 report by the Division Special Agent, it was indicated that the Claimant was arrested and charged in a criminal proceeding. This matter was then raised by the Organization when it provided the Referee with a copy of an April 21, 1984 newspaper article indicating that a county jury had found the Claimant innocent of charges that he had stolen hundreds of railroad ties from the Carrier.

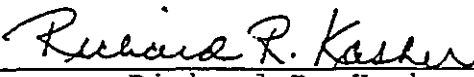
The Carrier argues, correctly, that the proceedings in a criminal court, which may be conducted concurrently with an on the property investigation, are not dispositive of the industrial relations dispute. That is, it is clear that in the arbitral forum the standard of proof is ordinarily lesser than that which applies in the criminal courts, and although a criminal jury may not have evidence to convict because there are reasonable doubts, the arbitrator is not bound by such a standard. We have some doubts in this case, raised particularly by the Organization's arguments regarding the possibility that records maintained by the Carrier are not complete. However, as discussed above, there is sufficient evidence in the record for us to conclude that the Claimant, a reasonably prudent man, should have maintained some records which would have established that the property he admittedly sold, approximately four hundred ties, had been properly obtained from the Carrier. He failed to do this, and we must therefore conclude that no such evidence existed which would be exculpatory.

Therefore, this Board must conclude that the Carrier has met its burden of proof and that the penalty in the circumstances is not arbitrary or overly severe.

Accordingly, the claim will be denied.

Award. Claim denied.

This Award was signed this 6th day of August 1984 in Bryn Mawr, Pennsylvania.

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