

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. 95

AWARD NO. 95

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. Stephen Hoffman, hereinafter the Claimant, entered the Carrier's service as a Sectionman on February 10, 1970. The Claimant was subsequently promoted to the position of Foreman and he was occupying that position when he was dismissed from the Carrier's service on December 13, 1990.

The Claimant was dismissed as a result of an investigation which was held on November 20, 1990 in the Northtown General Office Building, Fridley, Minnesota. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rules A, B, I, 530, 530A, 530B, and 550 by his failure to give factual information and falsifying a timeroll by falsely claiming overtime for October 11, 1990.

Findings and Opinion

The Claimant was working as Foreman of Tie Gang #3 during the week of October 8 through 12, 1990 under the direction of Roadmaster J.W. Zweep.

The gang was assigned to a schedule of four 10-hour days, and their work week ended on Thursday, October 11, 1990. It was the Claimant's responsibility to submit timerolls for himself and the members of his gang, reflecting the hours actually worked and indicating whether those hours were straight time hours or overtime hours. The gang was scheduled and ordinarily worked straight time hours of 6:30 a.m. to 4:30 p.m.

The Claimant was dismissed from the Carrier's service as a result of the timeroll he submitted on October 15, 1990, in which he claimed that he was entitled to four (4) hours overtime and that the members of his crew were entitled to two (2) hours overtime for work performed on Thursday, October 11, 1990.

Roadmaster Zweep testified that he observed the Foreman and his gang working on October 11, 1990, and that the gang's work had been completed, that is, "all tools loaded in the tool cars, the machines tied down and at 3:15 everybody was on the bus and headed back to headquarters". Mr. Zweep further testified that the drive back to headquarters would take approximately 30 to 35 minutes; and that when he drove by the depot at 8th Street, in Sioux Falls, at approximately 5:00 p.m. he observed the crew bus tied up. Mr. Zweep testified that the normal quitting time for the gang on October 11, 1990 was 4:30 p.m.; that had they worked past 4:30 p.m. they would have been entitled to additional compensation; that there was no reason why the gang would have gone to work earlier than 6:30 a.m. on October 11, 1990; that he did not make any "deal" with the Claimant justifying the Claimant's submitting a timeroll claiming overtime hours not actually worked; that when he reviewed the timeroll he "cut" the two (2) hours overtime claimed for each of the gang members and that he cut two (2) of the four (4) overtime hours claimed by the Claimant, giving the Claimant "the benefit of the doubt" presuming that the Claimant may have begun planning the work for the day at 4:30 a.m., two (2) hours before the scheduled starting time; and that when he concluded that the Claimant had submitted an incorrect timeroll, which he believed was a falsification, that he reported this to the Division Superintendent.

Ms. Jane Skarhus, Timekeeper for the Roadmaster at Sioux City, Iowa, testified regarding her receipt and processing of the timeroll in question as well as her general responsibilities concerning the handling of timerolls for employees in the Maintenance of Way Department.

The Claimant testified concerning the work he and his gang performed on the day in question. The Claimant testified that he began work on October 11, 1990 at 5:30 a.m., one (1) hour prior to his scheduled starting time, and that he worked during his "half hour meal or my 20-minute meal" thus, in his opinion, entitling him to two (2) hours of overtime compensation for work on October 11, 1990.

When asked why he "show[ed] four hours overtime worked for yourself on that date", the Claimant responded as follows:

Because on October 11, sir, while talking to Mr. Zweep, I brought up a conversation that I already asked Mr. Zweep about in his testimony, that another time when we left Benson, working for Mr. Fluck, we were given two hours plus for the machine operators and myself for loading up the equipment because all the laborers were dismissed earlier. And I asked Mr. Zweep if this was possible for us at this time, and his answer to me was, first, he smiled and laughed, and he said to me, "Just remember, it has to come through my office," meaning the payroll. And I took for that -- that it was not a yes answer and it was not a no answer. I took it was a yes answer, sir, for granting us two hours overtime.

The Claimant testified that he believed, based upon his conversation with Mr. Zweep and his previous experience in being given a "bonus" of overtime when he and his crew had done similar tie up and loading work at the conclusion of a work day, that Mr. Zweep's response and that "back practice" justified his claim for overtime.

The Claimant also testified regarding his personal problems with alcohol and gambling addictions; and he testified that on October 14, 1990 after "I blew \$1,400 on the Indian Reservation because of my compulsive gambling . . . I went over to talk to Mr. Morris [the Roadmaster at Northtown] . . . And the state of mind I was in, with my sickness, there was no way I could perform [further] duty". The Claimant testified that he requested vacation time and subsequently spoke with the Carrier's Employee Assistance Counselor, Mr. Rowley, and then enrolled himself in a treatment facility/plan known as New Beginnings.

As noted above, the Carrier's position that the Claimant was justifiably dismissed is based upon its conclusion that he failed to give factual information and falsified a timeroll. The Carrier further indicated that in assessing the discipline the Claimant's Personal Record was taken into consideration.

The Organization contends that the Carrier violated Rule 40(C), as it failed to give the Claimant proper notice regarding which rules' violations were involved in the investigation.

The Organization further submits that the Claimant, with eighteen years' experience as a Foreman, had been commended for his work and, as the result of his experience, expected that orders given by his supervisor would be direct and clear. The Organization contends that Mr. Zweep was aware of the Claimant's request "to turn in the additional time", and that Mr. Zweep did not tell the Claimant "No" but merely said "Just remember, it has to come through my office". The Organization argues that that answer by Mr. Zweep was not clear and precise and therefore was subject to understandable misinterpretation or misunderstanding by the Claimant.

The Organization further points out that, as Mr. Zweep "cut" the timerolls for the Claimant and other members of the gang, no overpayment occurred.

The Organization asserts that the Claimant, in spite of his condition on October 14, 1990, was conscientious enough to ensure that the timeroll of the gang was turned in on the morning of October 15, 1990, the same day that he entered treatment for alcohol and gambling addictions.

In conclusion, the Organization submits that the Claimant had no fraudulent intent, and that he submitted the timeroll claiming overtime because he did not receive a "No" from Roadmaster Zweep and because a previous supervisor had allowed "extra time when the crew had done the work in a similar good fashion".

While the Board does not have the ability to make "credibility" determinations, since the Chairman does not sit at the investigation or have the opportunity to ask the witnesses questions, we are persuaded that the Claimant was, in fact, suffering from a variety of deep, serious personal problems. That conclusion is buttressed by a review of the Claimant's Personal Record which indicates a prior dismissal for the use of alcoholic beverages.

Having noted that fact, the Board is constrained by the evidence in the record. That evidence establishes, without contradiction, that the Claimant sought additional pay for himself and for his crew for time not worked. The Claimant knew that he had not worked four (4) hours of overtime on October 11, 1990, and while Roadmaster Zweep gave him the "benefit of the doubt" by crediting him with two (2) hours of overtime there is still substantial "doubt", in this Board's opinion, whether the Claimant worked any overtime at all on the day he claimed four (4) hours.

The Organization has argued that the Claimant did not have "fraudulent intent". In fact, the Claimant did intend to be paid by the Carrier, at the premium rate, for hours he did not work. Clearly, the Claimant intended to extract wages from the Carrier's payroll department for not working. Was the Claimant's intent "fraudulent"? The only defense the Claimant has is that Roadmaster Zweep allegedly said "Just remember, it has to come through my office". If Roadmaster Zweep made such a statement, and he denies that he did, that statement alone does not, in this Board's opinion, justify the conclusion that the Claimant had tacit approval to seek to be paid for time which he had not worked. A reasonable person would understand that not being given permission to be paid for time not worked meant that a claim should not be filed seeking, what the Claimant euphemistically calls, a "bonus". If Roadmaster Zweep made such a statement, a reasonable person would understand the implied threat in such a statement. That is, if you attempt to submit an improper claim for pay "I [Roadmaster Zweep] will be the one reviewing that claim, and I know that you did not work the time you are claiming".

It is conceivable that the Claimant, under the pressure and control of his addictions, committed the act with which he is charged. That fact alone, does not, in this Board's opinion, justify seeking pay improperly. Accordingly, the Board finds that the Claimant committed an offense justifying the imposition of severe discipline.

The Organization has argued that the Notice of Investigation was not sufficiently precise and therefore violated Schedule Rule 40(C). While the notice does not specify the alleged rules' violations, the notice states that the investigation is being conducted "for the purpose of ascertaining the facts and determining your responsibility in connection with the overtime claimed on timeroll #523-033, Mech. TG #3, for the date of October 11, 1990 while working as Foreman, Mech. TG #3." It is this Board's opinion that the Claimant was given sufficient notice with regard to his potential "responsibility" insofar as the timeroll in question was concerned. There is no showing that the Claimant was not prepared to respond to the possible charges which would be raised during the investigation concerning any improprieties involved in the submission of the specific timeroll. In these circumstances, the Board finds no merit in the Organization's procedural objection.

Based upon the foregoing findings, the Board concludes that the Carrier was justified in disciplining the Claimant and for terminating his employment based upon the seriousness of the offense and the Claimant's prior record.

If the Carrier concludes that the Claimant, a twenty (20) year employee, was suffering from problems of addiction, and if the Carrier concludes that the Claimant has successfully undergone rehabilitation for those addictions, and if the Carrier believes that the Claimant should be given one final opportunity to resume employment, then that decision should be made by the Carrier and not by this Board.

Award: The claim is denied. This Award was signed this 18th day of May 1990.

*Richard R. Kasher*

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