

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 925

<u>BURLINGTON NORTHERN RAILROAD COMPANY</u>	*
	*
-and-	* CASE NO. 10
	* AWARD NO. 10
<u>BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES</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.

Albert Tommy Castillo, Felix R. Medina, and Daniel Thomas Stone, the Claimants, were employed at the Carrier's Keenesburg, Colorado facility as B & B Mechanics. As the result of an incident which occurred on January 11, 1984 the Claimants were notified that an investigation would take place on January 18, 1984 in order to determine whether they allegedly violated Safety Rule 565. The Claimants were advised that they were suspected of smoking marijuana while on Carrier premises and being in the possession of such prohibited substance. As the result of the January 18, 1984 investigation, the Carrier concluded that the Claimants had in fact violated the safety rule in question and therefore by letters dated February 3, 1984 each of the Claimants was advised that he was dismissed from service of the Carrier due to his having possessed and used marijuana while on duty and on the Carrier's property.

The documents of record including a forty-nine page transcript were received and reviewed by the Referee, who asked that the Organization and the Carrier furnish a brief written statement regarding the nature of their respective positions. These statements were also reviewed by the Referee.

Findings and Award

At approximately 10:40 a.m. on the morning of January 11, 1984 two of the Carrier's Special Agents, J. W. Campbell and

J. Bertelson, observed the three Claimants standing in front of a building and allegedly passing a type of cigarette between them and smoking that cigarette. One of the agents approached the group and testified that although he could not find the remnant of the cigarette that he did smell the aroma of marijuana. A search did not produce any other cigarette but did result in the finding of a pipe in the possession of Claimant Stone, and subsequent analysis of that pipe established that it had the residue of marijuana in it.

The Claimants and their representatives have argued essentially that there is no hard or physical evidence of their possession and/or use of marijuana, particularly smoking of a marijuana cigarette. There is further contention on behalf of the Claimants that the Carrier's investigators could not with certainty determine that an odor of marijuana was present where the odor was not confined to an enclosed room. Additionally, the argument is made on behalf of the Claimants that the photographs taken by the Carrier's investigators are not conclusive and that the explanation of the Claimants should be believed; that is, that one of the Claimants, Mr. Stone, was applying a medication to his mouth because of a severe dental problem while the other Claimants had no marijuana or narcotic paraphernalia on their persons.

This Board finds that the Carrier had substantial evidence to conclude that the Claimants were in violation of Carrier rules when they passed a marijuana cigarette from one individual to the other and that each of those Claimants smoked that cigarette. This Board has carefully studied each of the photographs, and although they are not entirely conclusive, they are significantly supported by the testimony of the two agents regarding their eyewitness observations. Even at a distance of fifty yards, one may be presumed to know when a cigarette is being smoked as opposed to when an individual is merely putting hands to mouth. The agents testified that they observed a cigarette being smoked, and in the face of certain denials that even a regular cigarette was being smoked, (particularly we focus on the denial of Claimant Stone,) we find that the inconsistency of the stories by the three Claimants represents further support for the Carrier's conclusions. The Board further notes, that at the Organization's request, witnesses for the Carrier were sequestered. Nevertheless, the stories of the two investigators were entirely consistent, lacked any indication of malice, and appeared to be totally candid. On the other hand, the testimony of the Claimants showed a lack of consistency, an element of evasiveness, and

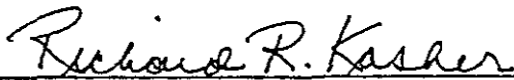
a lack of any significant explanation for their smoking activities.

Additionally, the Carrier's special agents demonstrated through their qualifications that they knew how to detect marijuana and its aroma. If we were to sustain the claim on the basis that the corpus delecti, "the marijuana cigarette remains", was missing, then in an analogous situation where employees were observed drinking and their drinking was confirmed by the smell of alcohol on their breath but the bottle could not be found, and on that basis alone guilt could not be assessed, then we would merely encourage employees to find better ways of disposing of the physical evidence. The absence of physical evidence alone does not overcome the competent eyewitness observations of the Carrier's specially trained personnel.

Accordingly, the claim will be denied.

Award: Claim denied.

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


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