

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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CASE NO. 103

AWARD NO. 103

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. Wayne M. Multari, hereinafter the Claimant, entered the Carrier's service on October 9, 1980 as a Laborer. The Claimant was occupying that position when he was suspended from the Carrier's service for five days.

The Claimant was issued a five (5) day suspension as a result of an investigation which was held on July 9, 1991 in the Pasco Yard Office in Pasco, Washington. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that the Claimant had violated Rule 570 for being absent without authority on June 17, 1991 while working as a laborer on track removal Gang #2 at Snake River Junction, Washington.



Findings and Opinion

Mr. H.F. Berneking, Foreman of Rip Out Gang #2, stationed at Snake River Junction, Washington, testified that he was responsible for handling the timebook and timerolls for the gang to which the Claimant was assigned on June 17, 1991. Mr. Berneking testified that his review of the records disclosed that the Claimant, who was absent, had not received permission to be absent from work on June 17, 1991, and that his further review of the records established that the Claimant had not "called off" consistent with Carrier policy.

Mr. Berneking sponsored a letter from the Carrier's Chief Clerk for Maintenance of Way Employees at Seattle, Washington which stated that she, a Ms. Constance S. Harris, had not received a telephone call or voice mail message from the Claimant or his representative on Monday, June 17, 1991.

The Claimant testified that he did, in his opinion, comply with the Carrier's rules regarding "calling off" when at 2:30 a.m., Seattle time, he placed a call to Ms. Harris' office "through BN Operator in St. Paul, Tom Looney". The Claimant and the Organization sponsored a written statement from a Mr. Looney. That statement reads "I Thomas Looney verify that Wayne [the Claimant] call in on switch board 2:30 a.m. PAC 5:30 a.m. Central Standard Time for call for bids Connie Harris 467-3217 here verify copies you might need Mr. Walster".

There is no evidence in the record before the Board to challenge the statements of either Chief Clerk Harris or BN Operator Looney. In a recent case decided by this Board a similar statement presented by Ms. Harris was accepted as supporting evidence for the Carrier's conclusion, based upon investigation by its supervisory personnel, that a Maintenance of Way employee had failed to properly call in and report off. In that case there was insufficient evidence to challenge the substantial and convincing evidence presented by the Carrier that the claimant there had not complied with the Carrier's reporting procedures.

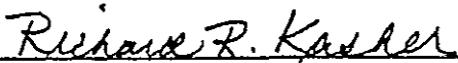
The instant case is somewhat different. There is no challenge in the record to Mr. Looney's status as a BN Operator. There is no challenge in the record to Mr. Looney's written representation that the Claimant called in to a specified and appropriate telephone number used to contact the Carrier when an employee does not intend to report to work. If the Carrier had doubts regarding the credibility of Mr. Looney's exculpatory written statement, then the investigation should have been recessed and Mr. Looney should have been summoned at a reconvened investigation to testify regarding his recollections and records. As that was not done, the only evidence in the record before this Board establishes sufficient doubt regarding the reliability of the Carrier's records, and must result

in the conclusion that the Carrier has failed to meet the standard of proof established by the parties who negotiated the governing procedures of Special Board of Adjustment No. 925.

Had Mr. Looney testified and had the Carrier concluded that his testimony was not credible, then this Board may have reached a different conclusion. However, based upon the limited evidence in the record, this Board must conclude that the Carrier has failed to meet its burden of proof and establish that the Claimant violated Rule 570. Accordingly, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to physically expunge the five (5) day suspension from the Claimant's Personal Record and to make him whole for all lost wages and benefits which occurred as the result of the suspension.

This Award was signed this 5th day of October, 1991.



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