NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	
and	CASE NO. 114
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	AWARD NO. 114

On May 13, 1983 the Brotherhood of Maintenance of Way Employes (hereinafter the "Carrier") 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 (3) 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 procedures.

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. Charles D. McInturf, hereinafter the Claimant, entered the Carrier's service as a Track Laborer on April 2, 1973. He had previous service with the Carrier between 1965 and 1972. The Claimant was subsequently promoted to the position of Group 2 Machine Operator and he was occupying that position when he was dismissed from the Carrier's service on December 9, 1991.

The Claimant was dismissed as a result of an investigation which was held on November 22, 1991 in the Roadmaster's Office in Tacoma, Washington. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rule 575 for his alleged theft of diesel fuel for personal use on October 31, 1991 while assigned as Group 2 Machine Operator at Belfair, Washington.

Findings of the Board

The Carrier's investigation was instigated as the result of a "confidential" memo, dated November 8, 1991, written to Maintenance Engineer Scott Kluthe. In that memo Mr. Reich wrote as follows:

> Frank Nelson told me this morning that he and the mechanic, (presumably that would be Jerry Morris) saw Charlie McInturf take 2 cans of fuel from the Car Mover and put them into the back of his personal vehicle. He allegedly told them that it was fuel for his own use.
>
> Frank stated that Jerry afterwards confirmed that later that same day he had checked the cans and found they had both been emptied.
>
> This supposedly occurred on Thursday, October 31st, the day Frank hauled the Car Mover to the Vancouver shop.
>
> This is very sketchy info but a more detailed enquiry by myself would not have been appropriate. This matter is turned over to you for further handling.

At the outset of the investigation the Organization Representative raised a procedural objection, alleging that the November 22, 1991 investigation was being held more than fifteen (15) days after the alleged incident which occurred on October 31, 1991; and therefore violated Rule 40.A. of the Schedule Agreement. It is obvious from Mr. Reich's memo that Carrier management did not have knowledge of the incident until November 8, 1991 and could not begin investigating the matter until that date. Within four (4) days of receiving that information the Carrier noticed the matter for investigation, and, in this Board's opinion, acted reasonably and within the procedures prescribed by Rule 40. Therefore, the Board finds no merit in the Organization's procedural objection.

Mr. Frank Nelson, a Machine Operator who was working with the Claimant on October 31, 1991, testified that he observed the Claimant place two (2) "old hydraulic oil cans" in the

back of the Claimant's personal vehicle; that he and the Claimant and other members of the work crew proceeded from Belfair to the Vancouver Work Equipment Shop where they unloaded certain machinery; that the two (2) cans remained in the back of the Claimant's vehicle, and that the Claimant drove off while he, Nelson, was inside the shop; that the cans contained diesel fuel; that he knew that the cans contained diesel fuel because he had touched the outside of one can and the smell of the residue on that can came, in his opinion, from diesel fuel; that he did not lift the cans to determine their weight, but that he looked in and saw that they contained liquid; and that the Claimant "didn't say the fuel was for his own use".

Mr. Gerald Godvig, the Traveling Equipment Maintainer at the Vancouver Shop, testified that when Mr. Nelson and the Claimant arrived at the Vancouver Shop that Mr. Nelson told him that the Claimant had placed two (2) cans of diesel fuel in the Claimant's personal vehicle; and that when the Claimant returned to the shop facility on or about November 5, 1991, either at the suggestion of a Mr. Cresswell or Mr. Nelson, he checked the cans which were in the Claimant's truck and he found that they were empty. Mr. Godvig testified that the type of plastic cans he found in the Claimant's truck were not normally used to carry diesel fuel but were usually the cans the Carrier used for engine oil, gear oil or hydraulic oil. Mr. Godvig testified that he did not know what the cans had contained when they were allegedly full, but they "had a diesel residue on the outside of them".

Mr. Robert Ramsfield, a Truck Driver who was working with the Claimant's crew on October 31, 1991 and who provided the crew with fuel for their machinery, testified regarding his usual procedures in delivering fuel to work crews; and that while he usually provided the crew with one can of diesel fuel daily, on occasion he provided crews with two cans of fuel. Mr. Ramsfield testified that he was familiar with the Claimant's "Volkswagon pickup" and that, to his knowledge, the Claimant used this personal vehicle for transportation from his lodging facility "to his machine, wherever that may be tied up".

The Claimant testified that he had approximately thirty (30) years of service with the Carrier; that on October 31, 1991 he was working as a Machine Operator on Car Mover BNX 76-0002; that he placed two (2) five-gallon containers in

the back of his personal vehicle; that he was not questioned by Mr. Nelson when he did this; that he drove his personal vehicle to the Vancouver Work Equipment Shop on October 31, 1991 for the purpose of unloading his machinery; that he did not unload the two (2) cans from the back of his truck at Vancouver; that one of the cans contained diesel fuel and the other contained used motor oil which had been drained from the work equipment; that he poured the waste motor oil into a fifty-gallon barrel which was used for the purpose of soaking fence posts; and that as he was "low on fuel, in fact I'd been running on the little red x at the end of the gauge for about the last 20 miles and I did make inquiries around the Shop as to what . . . where I could acquire some fuel quickly and apparently there was no place that was quick and easy to get to so I took a couple of gallons out of the diesel and put it in my truck to keep from running out but it was fuel I had already burned doing business for the Company, I want you to understand that". The Claimant further testified that although he was entitled to claim mileage when using his personal vehicle for "Company use", that, in fact, he only claimed mileage when he used his vehicle in moving from "one work headquarters to another", but that "as far as transportation to and from the job and parts and supply and things, no, I don't turn in mileage". The Claimant testified that he has "on occasion been short on fuel and put some [presumably Carrier fuel] in it [presumably his personal vehicle] . . .. "

In support of his statement that he was entitled to "mileage" for the use of his personal vehicle but did not claim such, the Claimant submitted expense vouchers for the month of September and the first week of October, 1991, which reflected that he did not claim mileage expenses except when he moved from one headquarters point to another.

The Claimant was charged with violation of Carrier Rule 575 because he allegedly "stole diesel fuel for personal use on October 31, 1991." The Claimant, to his credit, was candid in admitting that he did, in fact, use "a couple" of gallons of Carrier diesel fuel because his personal vehicle was running out of fuel and there was no nearby facility at which he could refuel his truck. The Board finds that the Claimant was "candid". Although the memorandum from Mr. Reich to Maintenance Engineer Kluthe stated that the Claimant had told fellow employees that he was going to use the fuel for his own use,

neither Mr. Nelson nor Mr. Godvig nor Mr. Ramsfield testified that the Claimant made such a statement. If, in fact, the Claimant had an intention to "steal" Carrier property it is unlikely that he would have told fellow employees of his intention and it is more likely, after hearing their testimony, that he would have denied that he used any fuel belonging to the Carrier to keep his personal vehicle operating.

There is no question that the Claimant acted improperly. If he had decided to use his personal vehicle for his convenience and the Carrier's benefit and to not "charge" the Carrier for the daily use of that vehicle by not claiming mileage expenses, that decision fell entirely within the Claimant's justifiable discretion. If he had made such a judgment and if he were prudent, he would have ensured that his vehicle had sufficient fuel so that he would not have to rely upon using "a couple of gallons" of Carrier diesel fuel.

Based upon the foregoing findings, this Board concludes that the Claimant committed an act justifying discipline; but that in the absence of any malicious or prefidious intent, the penalty of discharge is overly severe. In these circumstances, it is the Board's opinion that the Claimant's discharge should be converted to a disciplinary suspension without pay.

Award: The claim is denied. The Carrier had just and sufficient cause to discipline the Claimant for his breach of applicable rules. However, in light of the absence of intent, the Board directs the Carrier to convert the Claimant's discharge to a disciplinary suspension without back pay or benefits and to reinstate him with seniority unimpaired.

This Award was signed this 20th day of March, 1991.

Richard R. Kasher

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