NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	
and	CASE NO. 116
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	AWARD NO. 116

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. Larry B. Teske, hereinafter the Claimant, entered the Carrier's service as a Carpenter Helper on September 6, 1988. The Claimant was subsequently promoted to the position of Water Service Mechanic and he was occupying that position when he was suspended for five (5) days from the Carrier's service commencing December 23, 1991.

The Claimant was suspended as a result of an investigation which was held on December 9, 1991 in the Manager of Gangs' Office in Havre, Montana. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rule 570 when he failed to report for duty on November 18, 19, 20, 25 and 26, 1991.

Findings of the Board

The evidence of record establishes that the Claimant was sentenced by a court of competent jurisdiction in Montana to a ten (10) year jail term, all but ninety (90) days of which were suspended based upon a guilty plea. To allay the fears expressed by the Organization Representative at the investigation, this Board merely recounts the above sentencing facts, without considering any of the alleged criminal activity, because it is relevant to establish the reason for the Claimant's request for a bifurcated ninety (90) day leave of absence.

The first thirty (30) days of the Claimant's incarceration were scheduled to begin in the month of November, 1991; and the final sixty (60) days of the Claimant's incarceration were scheduled to begin on or about March 31, 1992.

By handwritten letter dated November 8, 1991, the Claimant presented the following request to Mr. Robert Krause, Manager of the Carrier's B&B Department at Havre, Montana:

> To Whom It May Concern
>
> I'm writing this letter in the effect of a 30 day leave of absence. For personal reasons. In addition to the 30 days I will need another 60 days in the near future.
>
> The first 30 days would begin on November 11, 1991 until the 13th day of Dec. 1991. This would be highly appreciated. Thank you.
>
> Sincerely,
> /s/

The Claimant testified that when he delivered the request for a leave of absence to Manager Krause that he was told that Mr. Krause "saw no problem with [him] getting a leave of absence", and that he, Mr. Krause, would notify the Claimant. The Claimant further testified that he had written his address and unlisted telephone number on the leave of absence letter, and that he anticipated he would be notified by Mr. Krause if "there was any problem."

In fact, the Claimant's request for the leave of absence

was not granted. Mr. Krause testified that when he spoke to the Claimant at the time he received the written request for a leave of absence that he did tell the Claimant he "didn't see any problem with approval out of Mr. Anderson's office"; but that subsequently when the written request was presented to another Carrier official, a Mr. Lutzenberger, that he, Mr. Lutzenberger, "disapproved the leave of absence".

Mr. Krause testified that, to the best of his knowledge, the Claimant was never notified in writing or verbally by a Carrier supervisor that his request for a leave of absence had been denied. Mr. Krause testified that he did speak with a Mr. Dwayne Whitaker, a local Union Representative, and advised Mr. Whitaker of the denial of the Claimant's leave of absence and that Mr. Whitaker stated he would inform the Claimant that his leave request had been denied.

The Claimant began serving the first thirty (30) days of his sentence on or about Saturday, November 9, 1991. As the result of his being incarcerated, he was not available for work on the days listed in the letter of discipline. It should be noted that the Carrier conducted two separate investigations on December 9, 1991; one which addressed the Claimant's alleged failure to report for duty on November 18, 19 and 20, 1991 and the other which addressed the Claimant's alleged failure to report for duty on November 25 and 26, 1991.

At both investigations a number of questions were raised regarding the nature of the Carrier's "policy" or "past practice" insofar as granting employee requests for leaves of absence were concerned and the extent to which, if any, that policy was "published".

It is not this Board's function to determine the propriety of a leave of absence policy, unless such policy is incorporated in the collective bargaining agreement. If such policy appeared in the collective bargaining agreement, and if a question arose regarding the Carrier's compliance with a provision in the agreement, then this Board could justifiably exercise jurisdiction in determining whether an employee's right to a contractually established leave of absence had been violated.

The only agreement provision cited that applies to leaves of absence is Rule 15B which was entered in the investigation as follows:

> The arbitrary refusal of a reasonable amount of leave of absence to employees when they can be spared, or failure to handle properly cases involving sickness or business matters of serious importance to the employee is an improper practice and may be handled as unjust treatment under this agreement.

That provision of the agreement does not give this Board the authority to conclude that the Carrier acts arbitrarily or improperly or unfairly when it determines that leaves of absence will not be granted to employees because they are incarcerated.

On the other hand, the Carrier does have an obligation to respond formally to a leave of absence request, particularly when the request is in writing and is made in advance of the time the employee seeks to be absent with permission from duty. It is this Board's finding that in the instant case the Carrier did not timely and properly respond to the Claimant's request for a leave of absence. The failure to respond constitutes, in this Board's opinion, an "arbitrary refusal". Had the Carrier responded in writing and advised the Claimant that his request for a leave of absence was being denied because it was not Carrier policy or practice to grant leaves of absence due to an employee's being incarcerated, it is likely that this Board would not conclude that such a leave of absence denial constituted an "arbitrary refusal of a reasonable amount of a leave of absence".

Clearly, the Claimant was absent from duty without permission on the November, 1991 dates in question. However, it is this Board's opinion that the Claimant was entitled to a response to his request for a leave of absence, so that he might have been in a position to arrange with the court or the Carrier some alternative regarding his sentence time or his work schedule.

In the peculiar circumstances of this case, and without establishing any precedent, this Board concludes that the Claimant should not have been suspended for his absence from duty. However, since the Claimant would, apparently, not have been available for duty in any event on the November, 1991 dates in question, there is no basis for awarding him any recompense in terms of back pay or benefits. Accordingly, without finding that the Claimant was not technically in violation of Rule 570,

it is this Board's opinion that the claim should be sustained and that the suspension should be removed from the Claimant's Personal Record.

Award: The claim is sustained in accordance with the above findings. The Carrier is directed to expunge the suspension from the Claimant's Personal Record.

This Award was signed this 20th day of March, 1992.

Richard R. Kasher

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