

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 925

<u>BURLINGTON NORTHERN RAILROAD COMPANY</u>	*
	*
-and-	* CASE NO. 12
	* AWARD NO. 12
<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.

Mr. Keith Alan Wilant, the Claimant, who entered the Carrier's service on May 1, 1982, was dismissed from service effective April 17, 1984 as the result of an investigation held on March 26, 1984. The documents of record including a 46-page transcript were received and reviewed by the Referee.

Findings and Award

The Claimant was assigned as a Section Foreman at Cle Elum, Washington when he was advised by letter dated February 21, 1984 that he was to attend an investigation which was being conducted for the purpose of ascertaining the facts and determining his responsibility, if any, regarding the alleged selling of ties at Easton, Washington and for not remitting the payments to the Carrier. The notice further stated that such failure to remit funds to the Carrier constituted misappropriation and that the alleged sales occurred while the Claimant was employed as a Section Foreman at Cle Elum, Washington between the dates of October 22, 1982 and November 23, 1982.

The Claimant attended the investigation on March 26, 1984; he was accompanied by a duly designated representative of the Organization; and, he was afforded a full opportunity to present witnesses in his own behalf and to examine those witnesses presented by the Carrier.

Before turning to the merits of this case, there is a procedural issue which should be addressed. Prior to the investigation being conducted, the Organization's Vice General Chairman wrote to the Carrier and requested documentation regarding the allegations of improper sale of ties. The Carrier declined to provide this documentation to the Organization in advance of the hearing and advised that the documentation would be made available to the Organization at the investigation. This was done. During the investigation, the Organization requested a postponement on the basis that it needed time for the Claimant to review the documents. The requested postponement was for a two-week period. The Carrier's Conducting Officer was willing to grant the postponement but advised the Organization that the Claimant would be held out of service until the subsequent investigation was convened. The Claimant then decided to proceed with the investigation on the basis that he could not afford being taken out of service for the two-week period. It appears to this Referee that there was little basis for the Carrier to deny the Organization access to records which were going to be used in the investigation involving the Claimant. A better course of procedural due process would have resulted had the Carrier provided the Claimant and his Organization Representative with the documents which it had in its possession at the time the request was made prior to the investigation. However, we do not find that the Carrier's failure to disclose prior to the investigation resulted in fatal, prejudicial error. The Claimant was accused of committing a serious offense; i.e., misappropriation of Carrier funds. Being held out of service for such an alleged offense is not inconsistent with the practice in the industry. Thus, we do not construe the Investigating Officer's conditioning a postponement on the Claimant's being held out of service as being coercive. The Claimant could have chosen to take the two weeks and review the documents which were made available to him at the investigation. Therefore, we do not find that the Claimant was denied a full and fair hearing or any of the rights which the Organization has provided for in Schedule Rule 40 of its agreement with the Carrier.

Turning to the merits, the documents referred to above are the significant and convincing pieces of evidence which establish clearly that the Claimant, who was authorized to act as the Carrier's agent in the sale of ties to outside customers, received payment from a Mr. William Spagnola who was the owner of a company known as Evergreen Bark and Top Soil, on several occasions. Mr. Spagnola's testimony, supported by the documents (checks and check register), establishes that the Claimant, on several occasions, received checks from Mr.

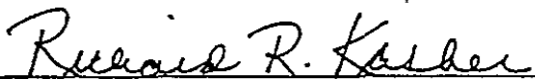
Spagnola which should have been drawn to the order to the Burlington Northern Railroad. Instead, several of those checks were drawn to "Cash" or to "Keith Wilant". Although the Organization has argued that the checks drawn to "Cash" and to "Keith Wilant" were drawn for the purpose of Mr. Wilant paying wages to individuals who would stack the ties for the outside customer, that argument is not supported by any objective evidence. The evidence of record indicates that on only one occasion did Mr. Spagnola understand that he was paying the Claimant wages to be distributed to individuals who were to stack the ties for him; while on the other occasions in question Mr. Spagnola testified that he understood that the payments were for property belonging to the Burlington Northern Railroad Company.

In the above circumstances, the Carrier could justifiably conclude that the Claimant had acted improperly, had violated his responsibility as an agent for the sale of ties, and had misappropriated the funds paid intended for the Burlington Northern for his own use.

Accordingly, we find that the Carrier had sufficient cause to discipline the Claimant, and that the discipline imposed for this offense was not overly severe or arbitrary.

Award: Claim denied.

This Award was signed this 8th day of August 1984 in Bryn Mawr, Pennsylvania.


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