

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

*
*
*
*
*
*
*

CASE NO. 121

AWARD NO. 121

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 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. Gene A. Green, hereinafter the Claimant, entered the Carrier's service as a Laborer on May 15, 1981. The Claimant was occupying the position of Sectionman when he was suspended by the Carrier for a period of five (5) days effective January 28, 1992.

The Claimant was suspended as a result of an investigation which was held on January 13, 1992 in the Roadmaster's Office in Essex, Montana. At the investigation the Claimant, who did not attend, was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rule 532 because of his alleged failure to report for duty on December 23 and 26, 1991.

Findings of the Board

Carrier Special Agent John A. Sitton testified that he served the original notice of investigation dated December 26, 1991 and a postponement notice also dated December 26, 1991 upon the Claimant and that the Claimant acknowledged receipt of those notices on December 27, 1991. Over the Organization's objection, after observing that the Claimant was not present at the investigation, Special Agent Sitton testified that the Claimant was "currently incarcerated in the Flathead County Jail at Kalispell, Montana".

The evidence of record indicates that the Claimant was sentenced to a two (2) year

term beginning December 9, 1991; and that the Claimant by letter dated December 4, 1991 "to Whom It May Concern" requested a "personal one year leave of absence". By letter dated December 12, 1991 the Carrier's Manager of Track Maintenance R.C. Harman, responded to the Claimant's request for a "personal" one year leave of absence and advised that the request was denied "account no reason was given for needing the leave of absence".

There is no factual dispute that the Claimant did not report for work on December 23, and 26, 1991, and there is no dispute that the Claimant did not have permission to be absent on those scheduled work days.

The Organization has raised two issues in this case which should be addressed. First, the Organization contends that the investigation was improperly postponed because there was no agreement between the Carrier and the Organization to postpone the investigation. The Organization submits that the Claimant, although he acknowledged the postponement notice, did not have the authority to waive that provision in the agreement which requires that a postponement of an investigation can only be effected if there is an agreement between the BN and the BMW. The second issue raised by the Organization concerns the question of whether the Carrier violated Rule 15B of the collective bargaining agreement by its alleged "arbitrary refusal of a reasonable amount of leave of absence to employees when they can be spared".

The first issue causes this Board some considerable concern. Although the Organization is technically correct when it argues that the postponement was effected through the Claimant and not through agreement with the Organization, there is absolutely no reason to conclude, and the Organization has not argued, that the Claimant would have been available for the January 6, 1992 investigatory hearing when he was not able to be present for the January 13, 1992 investigatory hearing. This Board has not, in the past, applied overly technical rationales in the analysis of rules that are intended to establish the procedural guidelines for the proper handling of claims. On the other hand, when a rule is clear on its face, this Board should respect that rule. Although no prejudice has been shown to have occurred as a result of the postponement of the hearing, the Carrier should have solicited and obtained the consent of the Organization for the postponement of the January 6, 1992 investigation. It did not. If this Board were to countenance this "act of unilateral postponement", then how could we distinguish in future cases when a unilateral postponement action was proper and when it was not? Accordingly, the Board is constrained to sustain the claim on the basis that the Carrier violated a clear procedural requirement under Schedule Rule 40; that is, to obtain agreement before an investigation is postponed. Ironically, sustaining the claim would appear to be an exercise in futility since (1) the Carrier is

not restricted from "recharging" the Claimant with future unauthorized absences due to his incarceration and (2) the Claimant, while his Personal Record will be expunged of the discipline he will not be entitled to any "make whole" remedy as it is clear that he was not available for service during the dates of his suspension.

The second issue raised by the Organization, although it is now moot, concerns the question of whether the Carrier properly denied the Claimant's request for a leave of absence. By way of dicta, the Board will briefly address that issue. First, it should be observed that the Carrier did not violate any principle of fair play or due process by introducing evidence which established the basis for the Claimant's absence from duty and his non-appearance at the investigation. The fact that the Claimant was incarcerated did not influence this Board in terms of deciding the merits or the procedural aspects of the instant claim.

As explained in Award No. 116 of this Board, it is not our "function to determine the propriety of a leave of absence policy, unless such policy is incorporated in the collective bargaining agreement". This Board went on to observe in Award No. 116, which also involved an employee absent from duty due to being incarcerated, that Rule 15B, which concerns the "arbitrary refusal of a reasonable amount of leave of absence to employees when they can be spared," does not give the Board "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". This Board further observed, in Award No. 116, that had the Carrier responded in writing, which it did not, to the request for a leave of absence and denied that request because it was not Carrier policy or practice to grant extended 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'".

As a final observation, by way of dicta, the Board would note that the Claimant's Personal Record reflects at least three thirty (30) day medical leaves of absence which were, apparently, granted by the Carrier in May 1988 and in August and then again in September of 1991. It would appear that when the Claimant provided the Carrier with a justifiable reason for his request for a leave of absence, that those requests were granted.

Based upon the foregoing facts and observations, this Board is constrained to conclude that the claim should be sustained on procedural grounds in accordance with the above findings.

Award: The claim is sustained. The Carrier is directed to expunge any reference to this discipline from the Claimant's Personal Record. This Award was signed this 30th day of June, 1992.

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