

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 925

<u>BURLINGTON NORTHERN RAILROAD COMPANY</u>	*
	*
-and-	* CASE NO. 13
	* AWARD NO. 13
<u>BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES</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. Kris C. Kurrus, the Claimant, who entered the Carrier's service on May 28, 1981 was dismissed from service effective May 21, 1984 as the result of an investigation which was held on April 5, 1984 and May 11, 1984. At the time of his discharge, the Claimant was assigned as a cook for Tie Gang #8 operating at or near Winchester, Washington.

### Findings and Opinion

The notice of investigation in this case specified that the Carrier wished to ascertain facts and determine the Claimant's responsibility regarding his alleged causing of damage to the interior side of doors on kitchen car BN968483 and Univan BN968526 and his allegedly having endangered other employees on or about March 28, 1984.

The facts in this case establish that the Claimant who possessed numerous martial arts weapons had, at one time, thrown a "chinese star" at a cork target which he had hung on the door of one of the vehicles which was damaged. The Claimant admitted that when he missed the target on two occasions that this chinese star had caused damage to the Univan door. On March 28, 1984 the Foreman of the Tie Gang, Mr. Coronado, discovered that there were numerous punctures on the interior sides of the doors of the kitchen car and the Univan.

During the investigation the Claimant admitted that on at least two occasions he had thrown a knife at the kitchen door which action caused further damage.

The Claimant attempted, at the investigation, to explain his throwing of the knife at the kitchen door by saying that he was attempting to determine whether the puncture holes in the door, which he denied causing, had been made by that knife. At the time that the knife was thrown, two other employees were in the kitchen car facility; and the knife, although it was not directed at either of those employees, was thrown so that it conceivably could have hit either of those employees directly or as the result of a ricochet.

The evidence in the record before this Board is overwhelming in terms of the Claimant's atrocious lack of good judgment. The evidence also establishes that the Claimant did damage to the Carrier's property, which the Carrier could properly consider to be "vandalism" and therefore in violation of one of its published Safety Rules. Additionally, the Claimant was clearly guilty of engaging in activity which was capable of severely injuring other employees, and which the Carrier could properly consider to be violative of its Safety Rules which prohibit activities which endanger others.

There is no question that the Carrier had sufficient evidence in the record to conclude, without serious contradiction, that the Claimant had knowingly violated serious Safety Rules of the Carrier. Thus, the Carrier was justified in imposing discipline, and there is nothing in the record which would establish that dismissal from service was an arbitrary penalty in the circumstances. The Claimant was a short term employee and the Carrier should not be asked to restore an employee who demonstrates such poor judgment to service. This Carrier could not be assured that actions of the type which took place during late March of 1984 would not reoccur. Thus, this Board cannot excuse the bad judgment of the Claimant, and there is no basis for mitigating the Carrier's assessment of discipline.

The Organization argued during the investigation that the Claimant was not afforded the opportunity to make statements on the record at the time he so desired. We will not sustain this contention by the Organization, in view of the

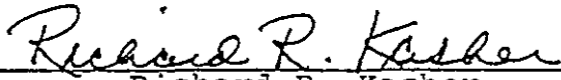
fact that the Carrier's Conducting Officer ran an orderly investigation, and did give the Claimant more than sufficient opportunity to make any statements and/or to introduce any evidence into the record. The Conducting Officer ran the investigation in a most fair and impartial manner, and in this Board's view the investigation was an exemplary one.

Finally, we should note that when the Claimant stated that he had previously been willing to take a polygraph test, the Conducting Officer recessed the investigation and gave the Claimant an opportunity to take such an examination. We should note for the record that the Claimant did not pass that polygraph examination, which asked whether he was responsible for more of the puncture holes in the doors of the cars than those to which he had previously admitted. We should further note that this Board did not weigh the evidence of the Claimant's failure of the polygraph test against him. The Carrier, as stated above, presented more than sufficient evidence to establish the charges during the direct presentation of evidence at the investigation.

Accordingly, the claim will be denied.

Award: Claim denied.

This Award was signed this 9th day of August 1984 in Bryn Mawr, Pennsylvania.

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