

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 135

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 135

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 procedure.

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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. Roy Wodarz, hereinafter the Claimant, entered the Carrier's service as a Laborer on May 18, 1978. The Claimant was subsequently promoted to the position of Traveling Mechanic and he was occupying that position when he was suspended from the Carrier's service for thirty days.

The Claimant was suspended as a result of an investigation which was held on September 15, 1992 at the Carrier's facility in Essex, 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 564 by his allegedly falsifying overtime worked on August 31, 1992 on Steel Gang RC51.

Findings and Opinion

The Claimant and Machine Operator Dennis Mavis were assigned to Steel Gang RC51 which was working in the Belton area and under the supervision of Roadmaster D.J. Wagner and Steel Gang Foreman F.J. LaTray.

Supervisors Wagner and LaTray testified that it was the practice and procedure for members of the Gang to verbally advise how much overtime they had worked and that that information would then be sent by facsimile "into Havre on that day's timeroll".

Roadmaster Wagner testified that on the afternoon of August 31, 1992 at approximately 2:38 p.m., with a quitting time that day of 5:30 p.m., Machine Operator Mavis asked "Is it okay if I work with the mechanic [the Claimant]? We have approximately four hours of overtime to work on the swing, on the speedswing. It's leading off and swinging with the weight of the boom". Roadmaster Wagner testified that he gave Mr. Mavis and the Claimant permission to work the overtime; and that he "worked the laborers until approximately 4:30" and then proceeded to return Foreman LaTray to his personal vehicle. Roadmaster Wagner testified that as he and Foreman LaTray were driving through Belton they observed Mr. Mavis getting into his personal vehicle; and that they looked at their watches and noted that it was approximately 5:20 p.m.

Supervisors Wagner and LaTray testified that the following morning they confronted Mr. Mavis and asked at what time he had finished the overtime assignment, and that Mr. Mavis said "Yeah, Roy [the Claimant] and I worked on the speedswing until 8:30 last night". Roadmaster Wagner testified that he then said to Mr. Mavis "Well, Dennis, we drove through Belton last night at 20 minutes after 5:00, and we saw you climbing into your personal vehicle", to which Mr. Mavis replied "I told Roy [the Claimant] that wouldn't work with you two guys". Roadmaster Wagner testified that Mr. Mavis then told him that "Roy told him to say what time they got done with work", and that he then asked Mr. Mavis "Did you or did you not work after 5:20 last night?"; that Mr. Mavis said "No"; and further stated "It was worth a try, wasn't it?". Roadmaster Wagner testified that Mr. Mavis "kind of laughed and walked away".

Supervisors Wagner and LaTray testified that they then "flagged down" the Claimant at approximately 9:20 a.m. on September 1, 1992, and asked the Claimant "Roy, what time did you guys get done last night on the speedswing?"; and, that the Claimant stated "We got done at 8:00 last night." Roadmaster Wagner testified that he then asked "You and Dennis [Mr. Mavis]?" and that the Claimant said "Yes". Roadmaster Wagner testified that he then said to the Claimant "That's kind of funny because I saw you dropping Dennis off last night at 20 minutes after five at Belton", and that the Claimant stated "Yeah, I dropped Dennis off at 20 minutes after five and we went and got some O rings and we were gonna drive back out to the work site and put them back in the speedswing". Roadmaster Wagner testified that he then said to the Claimant "That's kinda funny because Dennis told me that he didn't work past 5:20 last night. I want to know, did Dennis work with you after

5:20, or not?" and that the Claimant said "No, he did not, I worked until 8:00 last night, not Dennis".

The testimony of Supervisors Wagner and LaTray is consistent, and as the Carrier has, apparently, chosen to credit that testimony this Board is obligated to honor that credibility determination absent material, contradictory evidence in the record.

Mr. Mavis admitted that he did not work overtime on the evening of August 31, 1992. That admission is not repaired or rehabilitated by his and the Organization Representatives' creative attempts to establish a smoke screen regarding alleged travel time and missing of lunch time compensation which Mr. Mavis seeks to translate into the four hours of overtime he originally represented to supervision as time that he had worked. Mr. Mavis' case is not before us. The question is whether the Claimant participated in an effort to falsify a timeroll.

There is no evidence to establish that the Claimant did not, as he has stated, work overtime on the speedswing on the evening of August 31, 1992. There is substantial evidence, crediting the testimony of Messrs. Wagner and LaTray, that the Claimant, until confronted by Mr. Mavis' admission, led Carrier supervisors to believe that he and Mr. Mavis had worked together on the evening of August 31, 1992, on an overtime assignment, repairing the speedswing.

While the Claimant and the Organization Representatives have attempted to establish that the Claimant did not understand that he was being questioned not only regarding his overtime work but also about the overtime hours which were originally claimed by Mr. Mavis, the Carrier had the right to rely upon the testimony and credibility of Messrs. Wagner and LaTray, who stated that the Claimant sought to have them believe that Mr. Mavis worked with him during the course of the four to five hour overtime assignment on the evening of August 31, 1992.

Although much of the transcript is consumed with argument regarding when and under what circumstances and to what extent overtime is payable for travel time or missing a lunch period, those elements of fact are irrelevant to the issue before this Board. The question here is whether the Claimant engaged in an act of dishonesty prohibited by Rule 564. The Carrier had the right to rely upon what it considered to be the credible testimony of Roadmaster Wagner and to conclude that the Claimant had participated in an effort to falsify an overtime report.

In assessing the thirty day suspension, the Carrier took into account the Claimant's Personal Record which reflected fourteen years of unblemished service.

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In these circumstances, the Board concludes that the Carrier was justified in imposing discipline, and that the measure of discipline was not unduly harsh or arbitrary. Accordingly, the claim will be denied.

Award: The claim is denied. This Award was signed
this 24th day of December, 1992.

Richard R. Kasher

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