

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 159

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 159

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.

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. Jeffrey C. Stephens, hereinafter the Claimant, entered the Carrier's service as a Sectionman on June 28, 1990 and he was occupying that position when he was dismissed from the Carrier's service on April 5, 1993 for his alleged violation of Rule 564 of the General Rules as the result of certain off duty conduct which occurred on December 13, 1992.

The Claimant was dismissed as a result of an investigation which was held on March 18, 1993 in the Trainmaster's Office in Sheridan, Wyoming. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had engaged in vicious behavior and conduct that subjected the Railroad to criticism and loss of goodwill by his actions on December 13, 1992.

Findings and Opinion

Roadmaster Stephen Heidzig testified that on January 8, 1993 he received a request from the Claimant's father for a "work release", because the Claimant "was in jail for 30 days and his father wanted to get him a work release".

Roadmaster Heidzig testified that he discussed granting the work release with his superintendent, and it was decided that such a release would be granted on January 11, 1993; and it was. Roadmaster Heidzig testified that on January 14, 1993 he received a copy of a newspaper article regarding the Claimant's incarceration and his having pled guilty to certain charges.

That newspaper account reads as follows:

Jeffrey Christopher Stephens, 22, pleaded guilty Wednesday in county court to battery and criminal entry.

Sampson [Judge J. John] fined him \$350 plus \$20 court costs and \$50 for the Crime Victims Compensation Fund for each charge. He sentenced him to 90 days in jail for each count and ordered the sentences to run consecutively, then suspended 150 days. Stephens will serve 30 days beginning at 6 p.m. Wednesday, records said.

Sampson also ordered Stephens to pay \$705.99 restitution, records said. He placed him on one year of unsupervised probation with the conditions that he break no other laws, undergo an evaluation for alcohol use and violence, go to no bars or liquor stores and pay the fines and costs.

Court records said the charge stemmed from a Dec. 13 incident in which Stephens broke into the home of Dawn Marie Stephens, his estranged wife. The affidavit said he stabbed her waterbed with a kitchen knife, pushed Dawn Stephens onto the bed and choked her, and broke the phones in the home when she tried to call 911.

Law enforcement officers found there were red marks on her throat, her nose was bloody and there were a bruise and cut on her left arm, the affidavit said.

Later, officers found he had pushed her vehicle more than 100 feet with his truck, the affidavit said.

Roadmaster Heidzig testified that as a result of his being made aware of this article an investigation regarding the Claimant's conduct was instituted.

Special Agent Kenneth Willey testified that he investigated the incident and gathered court records which confirmed that the Claimant had pled guilty to the battery of his estranged wife.

Both Roadmaster Heidzig and Special Agent Willey testified that the Claimant's actions would cause the Carrier to lose "goodwill"; and focused their attention upon the facts that Sheridan is a "small town", the Carrier is one of the "largest employers" in the area and that the Sheridan newspaper is available to "a large percentage of the population".

In the Claimant's defense, the Organization introduced a number of newspaper articles which involved individuals who were arrested and convicted of "DUIs" and other similar offenses; and represented that these individuals were Burlington Northern employees who had not been disciplined as a result of their off-duty conduct.

The Organization also claimed that the incident occurred on December 13, 1992 and that the Carrier had notice of the Claimant's incarceration as of January 8, 1992, but that the investigation was not scheduled to be convened until January 28, 1993, twenty days after the Carrier's knowledge of the incarceration and five days beyond the fifteen day limit of Schedule Rule 40 which addresses timely investigations.

Turning first to the Organization's claim that the investigation was not scheduled in a timely manner, it is this Board's finding that the Carrier did not have knowledge of the nature of the incident until January 14, 1993. Therefore, we find that the investigation was timely scheduled consistent with the requirements of Schedule Rule 40.

The Claimant was terminated pursuant to Rule 564 which prohibits, among other actions, "vicious" conduct which subjects the Carrier to "criticism and loss of goodwill". The Claimant has not disputed the charge that his conduct was "vicious". However, it is clear that the Claimant's conduct did not occur while he was on duty and was not directed toward fellow employees or others on Carrier property. The question then becomes, as the Organization has correctly pointed out, did the Claimant's off duty conduct subject the Carrier to criticism and/or loss of goodwill.

The newspaper article does not identify the Claimant as a Burlington Northern employee, nor do the criminal court documents so identify him. The Carrier's supposition that because Sheridan is a small town and because the Burlington Northern is a major

employer and because nearly everyone reads the newspaper it must have been known that the Claimant was a BN employee is, as the Organization has maintained, mere conjecture.

Based upon these findings, it is this Board's conclusion that the Carrier has failed to present sufficient probative evidence to establish that the Claimant's off duty conduct, as improper as it was, subjected the Burlington Northern to criticism and/or loss of goodwill. Accordingly, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to reinstate the Claimant with seniority unimpaired and to make him whole for all lost wages and benefits. The Carrier is further directed to physically expunge any reference to this discipline from the Claimant's Personal Record. This Award was signed this 20th day of December, 1993.

Richard R. Kasher

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