

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 163

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Case/Award No. 163

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 choose 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. Steven A. Olson, hereinafter the Claimant, entered the Carrier's service as a Laborer on January 30, 1970. The Claimant was subsequently promoted to the position of Track Inspector and he was occupying that position when he was suspended for ten days from the Carrier's service on April 5, 1993 for his alleged violation of Rule 337 on January 25, 28 and February 4, 1993.

The Claimant was suspended as a result of an investigation which was held on March 4, 1993 in the Roadmaster's Office in St. Cloud, Minnesota. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rule 337 for his unauthorized use of company vehicle #7556 after tie up on January 25, 28 and February 4, 1993.

Findings and Opinion

The Claimant, a twenty-three year employee of the Carrier, who for the last ten of those years was employed as a Track Inspector, worked, during the relevant time frame, under the supervision of Roadmaster Ronald Radika. During late January and early February, 1993 the Claimant's track inspection responsibilities covered the geographic area between Mile Post 16.3 at Northtown and St. Cloud.

The evidence of record establishes that the Claimant had a "set schedule"; which required him to "tie up" at St. Cloud on Mondays and Thursdays and to "tie up" at his headquarters point, Elk River, on Tuesdays, Wednesdays and Fridays. When the Claimant or other similarly-situated employees tied up at St. Cloud they were lodged in a Carrier-designated facility and paid certain expenses in accordance with the collective bargaining agreement.

Roadmaster Radika testified that on or about January 21, 1993 he became "suspicious", and believed that the Claimant was "tying up" at Elk River on days when he should have been at St. Cloud, in a Carrier-designated motel, where he would be receiving expenses.

The testimony of Roadmaster Radika and several special agents establishes that the Claimant, on the three days in question, used Company vehicle #7556, his assigned hi-rail vehicle, to proceed from St. Cloud to Elk River. It is undisputed that the Claimant was not on Carrier business when he used the vehicle to transport himself to Elk River, a site closer to his home.

The Claimant testified that he drove from St. Cloud to Elk River on January 25 and 28 and February 4, 1993 in order to attend to "emergency" business, which he characterized as a "family emergency". The Claimant did not explain the nature or the cause of the so-called "emergencies". It is also undisputed that the Claimant did not obtain permission from any Carrier supervisor, who had the authority to grant such permission, to use Carrier vehicle #7556 for his personal use.

The Claimant acknowledged, as did other witnesses who, on occasion, had the need to use a Carrier vehicle for personal use, that permission for such use must be obtained; and that even in emergency situations where a Carrier vehicle was used for personal needs it was required that supervision be notified shortly after such use that the vehicle had been taken and the purposes for which the vehicle had been taken.

The Claimant was charged with "unauthorized use of company vehicle #7556 after tie-up on January 25, 28 and February 4, 1993." While the Claimant contends that he made several efforts to contact Roadmaster Radika prior to his use of the vehicle on the dates in question, there is not one scintilla of evidence in the record to support the Claimant's contention that he made any such efforts before or after he used the vehicle for personal business. In fact, after the Claimant first used the vehicle on January 25, 1993 allegedly to attend a meeting with his attorney, he had numerous opportunities to advise Roadmaster Radika or another Carrier supervisor that he had taken the vehicle before he took the vehicle for a third time on February 4, 1993. It is inconceivable that in the nine day period between January 25 and February 4, 1993 the Claimant was unable to notify someone in supervision that he had used the vehicle on January 25, 1993 for personal business.

When one claims that "emergency conditions" necessitated taking action outside the bounds of a collective bargaining agreement or rules of conduct, then that individual has an affirmative obligation to establish that an emergency, in fact, existed. The Conducting Officer gave the Claimant several opportunities to explain why it was critical for him to use the Carrier vehicle for personal purposes before first obtaining permission from supervision. The Claimant declined to explain the "emergency" because the matter was "personal".

The Claimant has failed to establish that his use of the vehicle was authorized or that there was an emergency condition which justified his not first obtaining permission before he used the vehicle for personal use. Accordingly, this Board concludes that the Carrier has proven by substantial and convincing evidence that the Claimant violated Rule 337. This Board further concludes that the Claimant's violation of the rule on three separate documented dates as well as the fact that he had notice, as the result of a prior censure for using a "company vehicle without authority", that authorization for such use was required militates against any claim that the discipline was arbitrary or excessive. Therefore the claim will be denied.

Award: The claim is denied. This Award was signed this 10th day of March, 1994.



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