

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

-and-

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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* CASE NO. 17
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* AWARD NO. 17
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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 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.

Mr. Terry R. Holbert, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on August 28, 1979. The Claimant was dismissed from service on August 27, 1984 as the result of an investigation held on August 3, 1984 regarding his alleged failure to devote himself exclusively to the Company's service and conduct unbecoming an employee by engaging in sexual activity with Jack Johnson while on duty and on Company property commencing about late 1979 or early 1980 and continuing thereafter. At the time of his dismissal, the Claimant was employed as a Truck Driver assigned to service at or near Aurora, Colorado.

Findings and Opinion

Although this case is not a "companion" to Case and Award No. 16, decided contemporaneously this date, there is an inextricable factual connection between the two cases.

As this Board decided in Case/Award No. 16, the Carrier in that case was not dilatory in bringing charges against the foreman who was a participant in acts of sexual harassment and coercion. The investigation in Case No. 16 resulted in the Carrier determining to charge the Claimant here with the violation of Safety Rule 570 by his alleged failure to devote himself exclusively to the Carrier's service and with conduct unbecoming an employee by engaging in sexual activity with Mr. Jack Johnson.

This Board should first observe that the charge relating to conduct unbecoming an employee because of the alleged homosexual activity is one which we find to be unsupported in terms of an alleged rules violation. There is no evi-

dence in the record that an employee's sexual preference has been or should be the basis for disciplinary action under the terms of the collective bargaining agreement.

On the other hand, any employee, whether he/she has heterosexual or homosexual preferences, would be properly subject to discipline if that employee absented himself/herself during duty hours in order to engage in any activity, sexual or nonsexual, while he/she was assigned to service and responsible for performing duties for the Carrier's benefit for which that employee was being paid.

It is clear from a reading of the record in the instant case, as well as a reading of the record in Case No. 16, that the Claimant was regularly engaged in non-employment activities during working hours over a sustained and substantial period of time while the Claimant was on duty and subject to pay.

This Board further finds that the charge in this case arose as the result of the Carrier's discovering at the investigation in Case No. 16 that the Claimant had regularly absented himself from employment duties while he was engaged in personal activities. Accordingly, we find that the Carrier was not dilatory in bringing the charges, as it did not have information or evidence regarding the Claimant's alleged improperly absenting himself from duty until the Claimant, who instigated the charges against Foreman Jackson, admitted to his being off Carrier premises and away from his work location on a continuing and regular basis for several years.

The Organization has argued that Carrier representatives, specifically Mssrs. McCoy and Schindler, management representatives, were aware for some time of the Claimant's alleged improper conduct and yet did not bring charges against the Claimant in a timely fashion.

This Board finds no merit in that contention. In our view, the record reflects that the Claimant brought his complaints regarding sexual harassment and threatening actions to the attention of Carrier supervision and named Mr. Jackson as the offender. Carrier supervisors were justified in not charging the Claimant with improper activity as it was the Claimant who was contending that the only improper actions that had occurred were directed toward him by Jackson. Additionally, the Carrier was circumspect and not dilatory when it proceeded cautiously in attempting to determine the extent of the activities involving the two

employees. The nature of the activities of these two employees was such that the Carrier could be justifiably concerned that it not react in a "knee jerk" manner and charge employees because of their alleged sexual preference. The Carrier proceeded cautiously and did not charge Foreman Jackson until it felt that it had evidence regarding the harassment and threats which the Claimant in this case had alleged. As we have found that the charge of engaging in sexual activity, standing alone, is not a supported one, the Carrier, although it had knowledge of this charge some time in advance of its presenting such charge, cannot be found to have violated Rule 40 as the charge has been found lacking in merit by this Board.


However, we do find that the Carrier had substantial and probative evidence available to it which established that the Claimant absented himself from duty without Carrier permission for an extended period of time, and thus he was in violation of Safety Rule 570.

There is no showing that the Claimant was "forced" to leave Carrier premises and/or to leave his work location and to engage in sexual activity on Carrier time. The evidence establishes, to this Board's satisfaction, that when the Carrier had proper notice and sufficient evidence to conclude that the Claimant had absented himself from duty without permission that the Carrier promptly issued charges to that effect and conducted a full and fair investigation regarding those charges. The evidence also establishes that the Claimant, although he equivocated at his own investigation, admitted in substantial part to the charges regarding his being absent from duty without permission.

Accordingly, we find that the Carrier was justified in disciplining the Claimant, and that in the circumstances of this case the discipline of dismissal was not an arbitrary or capricious penalty. Therefore, the claim will be denied.

Award: The claim is denied.

This Award was signed this 1st day of February 1985 in Bryn Mawr, Pennsylvania.


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