

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 925  
Case/Award No. 171

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Case/Award No. 171

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. Robert J. Lynn, Jr., hereinafter the Claimant, entered the Carrier's service as a Track Laborer on September 28, 1992 and he was occupying that position when he was dismissed from the Carrier's service on June 28, 1993 for his alleged violation of Carrier rules regarding reporting for duty and failure to conduct himself in a manner that would not subject the Carrier to criticism and loss of goodwill.

The Claimant was dismissed as a result of an investigation which was held on June 18, 1993 in the Middle Conference Room, Alliance Mechanical Facility in Alliance, Nebraska. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had failed to report for duty at the designated time and place on March 11 and 12, 1993 because he was incarcerated as a result of being charged with first degree sexual assault, which the Carrier stated was a violation of Rule 570.

### Findings and Opinion

At the Organization's request the investigation was bifurcated; so that first issue addressed in its entirety was whether the Claimant failed to report for duty and/or whether he properly called off on Thursday and Friday, March 11 and 12, 1993; days of his regular assignment.

The record regarding this charge, established primarily through the testimony of B&B Foreman William J. Smith, who was the Claimant's Foreman on the midnight shift (11:30 p.m. to 7:30 a.m.) on the dates in question, substantiates that the Claimant, because he was incarcerated, did not directly notify any member of Carrier management that he would not be appearing for work on the two nights in question.

The Claimant's defense for his failure to properly "call off" is that he notified his sister of his inability to appear for work and had her call Foreman Smith at home. The Claimant stated that his sister left a message to the effect that he would not be able to appear for work on Foreman Smith's home answering machine.

Foreman Smith testified that he received no such message, and that although some employees have, in the past, called him at home when they needed to "mark off", the usual procedure was for employees to call the shop or the office to notify the Carrier when they could not appear for work.

The Claimant acknowledged that he understood the rule requiring that he properly report off when he would not be able to appear for work. The Claimant testified as follows:

Q. Now, does your sister understand the importance of notifying the railroad supervisors in case of an absence?

A. Yes.

Q. Why does she know that?

A. Because she's married to a railroader that works on track for ten years, and she knows that if you don't get called in that you can lose your job over it.

Q. So, she is then both familiar with the railroad industry and the request for absence procedure on the railroad.

A. Yes, sir.

The above dialogue establishes, to this Board's satisfaction, that the Claimant and his messenger understood the necessity and importance of making known to management when he would not be able to appear for work. There is no proof that a message was left on Foreman Smith's home answering machine. In any event, the Claimant and his messenger were obligated to ensure that someone with the Carrier in a position of authority knew that the Claimant was unable to appear for work on March 11 and 12, 1993. They failed to do so.

As the Claimant failed to meet his responsibilities under the rule, the Carrier was justified in imposing discipline.

Insofar as the second part of the investigation is concerned, that is, the question of whether the Claimant violated rules regarding "unbecoming conduct" which would cause the Carrier to suffer "criticism" or the "loss of goodwill", that charge was apparently found not to be substantiated in the record and the Claimant was not disciplined for any such alleged infraction.

Based upon the record in this case and the fact that the Claimant understood the severe consequences of not properly reporting off, and in view of the Claimant's short term of employment, this Board finds that the Carrier did not act arbitrarily or in an overly severe manner when it dismissed the Claimant from employment. Accordingly, the claim will be denied.

Award: The claim is denied. This Award was signed this 22nd day of December, 1993.

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