

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 173

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 173

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. James B. Billingsley, hereinafter the Claimant, entered the Carrier's service as a Sectionman on April 4, 1991 and he was occupying that position when he was dismissed from the Carrier's service on September 8, 1993 for his alleged violation of Carrier rules regarding reporting for duty.

The Claimant was dismissed as a result of four investigations which were held on August 11, 12 and 13, 1993 in the Keane Conference Room, Burlington Northern Office Building in Alliance, Nebraska. At the investigations 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 July 29 and 30, and August 2, 3, and 4, 1993.

Findings and Opinion

Each of the four investigations contains virtually identical evidence. In each investigation Carrier Representatives, among them Foreman T.L. Cordell and Roadmaster John Powers, testified that the Claimant did not report for duty, that he did not have permission to be absent from duty and that he did not properly "call off" in accordance with established rules and practices.

The Claimant did not deny that he was derelict in his responsibility to appear for duty and/or to notify supervision that he would not be available for work on July 29 and 30 and August 2, 3, and 4, 1993.

The Claimant, by his candid acknowledgment that he understood his responsibilities to report for duty and/or to call off and/or obtain permission from supervision to be absent, has made the Carrier's case.

In explaining the reason for his absences and failure to report off, the Claimant explained that he was "going through a divorce right now", that "My mind was all bent out of shape and that's why I didn't show up", and that "my priority was my family and I took that and was devoting my whole time to it". The Claimant also testified that, in his opinion, he could not have worked safely, because his mind was distracted, had he reported for duty.

The Claimant stated that he hoped that the Carrier would "have the courtesy to have a little compassion on this deal, because I do like working for the railroad".

The Organization Representative, in a well-articulated and impassioned plea on behalf of the Claimant, also requested that the Carrier exercise compassion and sympathy because of the Claimant's marital problems and because the Claimant was seeking help through the Employee Assistance Program.

This Board's jurisdiction is limited. It is the Carrier, and not the Board, that determines whether leniency or compassion should be extended in a case where the proof clearly establishes, and the proof is overwhelming in this case, that an employee has violated established rules.

The Claimant has not shown that there were any mitigating circumstances which prohibited him from contacting Carrier supervision and advising of his status. In the opinion of the Board, the Claimant would not have been violating his sense that his family was priority number one had he taken a minute or two,

at any time during the relevant period, to contact supervision and advise of his situation.

If, because of the Claimant's mental state, the Carrier believed that he could not safely perform service, then it was the Carrier who should have made this decision and not the Claimant.

The Claimant has asked that the Carrier take into consideration his personal problems. This Board does not have the ability to determine whether the Claimant's personal problems were more intense than those of any of his other fellow employees. Accordingly, as noted above, it is the Carrier's right to determine whether leniency or compassion should be extended to the Claimant in the circumstances of this case.

Based upon the foregoing facts and findings, this Board concludes that the Claimant violated the rules regarding reporting for duty and that the Carrier did not act in an arbitrary or overly severe manner when it dismissed him from service. 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