

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 175

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 175

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. David F. Subia, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on July 9, 1973. The Claimant was subsequently promoted to the position of Foreman/Flagman and he was occupying that position when he was censured and suspended for five days by the Carrier for his alleged violation of Rule 570 and other rules for his alleged leaving the job without proper authority on August 23, 1993.

The Claimant was censured as a result of an investigation which was held on September 2, 1993 in the Carrier's Conference Room, 3700 Globeville Road, Denver, Colorado. At the investigation the Claimant was represented by the Organization. The Carrier censured and suspended the Claimant based upon its findings that he had violated Rule 570 and other rules in connection with his "leaving the job without proper authority and leaving unsafe

conditions while working as flagman foreman, August 23, 1993, at about 1:00 p.m."

Findings and Opinion

Roadmaster Michael Theret testified that on August 23, 1993 the Claimant was assigned as a Foreman/Flagman and that he turned in a timeroll which reflected that he had only worked 6.5 hours that day.

Roadmaster Theret testified that on the day in question he and his clerk, Mr. Gene Smith, had driven to the work site to "check on some material", and that while they were there they "looked for Dave Subia between 12:15 and 12:30" and could not find him or contact him by radio. Roadmaster Theret testified that he spoke with the Claimant's fellow flagman, Mr. George Patton, who told him that the Claimant was "Down there flagging." Roadmaster Theret testified that at approximately 12:50 p.m. "I went around again to see if Dave was there" and that he also asked Mr. Patton to "try to get ahold of him [the Claimant] on the radio, and no Mr. Subia". Roadmaster Theret testified that he remained at the work site until 1:20 p.m. with Flagman Patton, and that he told Flagman Patton "If Dave comes back have him immediately get ahold of me".

Roadmaster Theret testified that at this time he also asked Mr. Patton if he knew where the Claimant was, and that Mr. Patton told him that "in the morning" the Claimant had advised him, Mr. Patton, that he, the Claimant, "would have to leave early to do some mortgage business with selling a house or something like that"; and in response to another question from Roadmaster Theret, Mr. Patton said that the Claimant had asked Mr. Patton "to cover for him".

Roadmaster's Clerk Gene Smith essentially and relevantly corroborated Roadmaster Theret's rendition of the facts.

Foreman/Flagman Patton testified, relevantly, that the Claimant notified him that he, the Claimant, "was going to have to leave [early] for something to do about a mortgage"; and although he could not recall with specificity at what time he was so advised by the Claimant, Mr. Patton stated "It could have been anywhere between 9 to 11 or even later". Mr. Patton acknowledged that he was not "proper authority" from whom the Claimant could obtain permission to leave the work site early.

The Claimant testified that he left the work site early on August 23, 1993 at "exactly, 1:15 [p.m.]"; because he had made a

telephone call and "found out, I had to come up with more money for closing". The Claimant testified that "I tried to get ahold of Mike [Theret] and nobody was at the office", and that he was also unsuccessful in attempting to contact Roadmaster Theret by radio/intercom. The Claimant testified that he attempted to contact Roadmaster Theret "a couple of times", and that he was also unsuccessful in attempting to contact Roadmaster's Clerk Smith or a Mr. Breedlove.

The Claimant testified that he discovered that he had to "leave the job" at approximately 12:20 p.m., and that as he was scheduled for jury duty the following day "I knew I had to take care of it [the extra money for closing] that afternoon".

There is no question that the Claimant left the work site prior to the conclusion of his scheduled shift. There is no question that the Claimant did not have authorization from proper supervisory authority to leave early. There is no question that a flagman's responsibilities are critical in protecting traffic and equipment on the lines over which he is responsible, even if for a period of time there are no train movements or work being performed in the area.

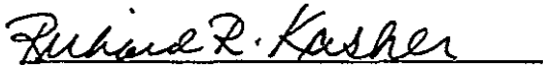
There is a substantial question as to whether the Claimant exercised due diligence when he failed to ensure that the Carrier had notice that he had to leave the work site, for reasons that he considered to be of an "emergency nature". Had the Claimant properly sought permission, the Carrier might have concluded that (1) it could not spare him, or (2) a replacement employee could be found or (3) due to the light nature of the train movements and/or work being performed on the track Foreman/Flagman Patton could assume responsibility for the entire area. While the evidence seems to support the fact that the Claimant made several efforts, while in the welding shed, to contact Roadmaster Theret by telephone and was unsuccessful, the record also reveals that Roadmaster Theret was in the vicinity of the work site for some substantial period of time prior to 1:15 p.m., when the Claimant allegedly left the work site, and could not find the Claimant in his assigned area.

There is also a substantial question as to whether the Claimant had to leave the work site when he did because he could make no alternative arrangements to obtain a cashier's check. The Claimant, by implication, has contended that he had to leave work early, without obtaining proper authority to do so, because his circumstances represented an "emergency" which had to be attended to by him immediately.

When "emergency conditions" are asserted as the basis for violating a rule or not following established procedures, the party asserting such emergency has the burden of proving that the conditions did not permit any other action. In this case, the Claimant has failed to establish by preponderant evidence that the need to obtain a cashier's check could not have been satisfied through any other means except by his leaving work at the time that he did. Accordingly, the Board cannot construe the conditions as constituting an "emergency", and therefore cannot excuse the violation of the rule.

Based upon the foregoing findings and opinion, the claim will be denied.

Award: The claim is denied. This Award was signed this 20th day of March, 1994.



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