

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

-and-

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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* CASE NO. 18
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* AWARD NO. 18
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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. Danny Lynn Garner, hereinafter the Claimant, entered the Carrier's service on May 12, 1972 as a Section Laborer. The Claimant was dismissed from service on December 5, 1984 as the result of an investigation held on November 9, 1984. The Claimant was dismissed for allegedly violating Carrier Safety Rules 564 and 574 as it was alleged that he engaged in conduct unbecoming of a Burlington Northern employee and had subjected the Carrier to criticism and loss of good will as a result of his conviction on July 12, 1984 for possession of cocaine with intent to deliver. The Claimant was also charged with alleged misconduct for the manner in which he obtained a work release from the Carrier. At the time of his dismissal the Claimant was assigned as a Foreman on Surfacing Gang RN No. 15 and was working between Lincoln and Aurora, Nebraska.

Findings and Opinion

The record evidence established at the investigation demonstrates clearly that the Claimant was convicted on July 12, 1984 for possession of cocaine with intent to deliver. The record further establishes that the Claimant was incarcerated on October 12, 1984 as a result of the above-referenced conviction.

On or about August 30, 1984 the Claimant's direct supervisor, Mr. Thomas M. Mroczek, a Roadmaster, wrote a letter "of recommendation", at the Claimant's request, to a Mr. Rowoldt an official with the probation department or the court system, in which the Claimant's supervisor Mroczek stated in relevant part as follows:

"Mr. Dan Garner asked me to write to you about his work record, etc.

* * *

Mr. Garner has worked on my territory which is Lincoln to Ravenna for most of his employment with the Burlington Northern Railroad.

During this time he has very good work attendance and has gotten alot of work done for me as Section Foreman and as Extra Gang Foreman on various gangs between Lincoln and Grand Island."

The essence of the Carrier's case against the Claimant involves the contention that the Claimant by his criminal conduct (possession with intent to deliver cocaine in Nebraska is a felony) damaged the reputation and good will of the Carrier and thus the Claimant engaged in conduct unbecoming an employee which violates specified Safety Rules. Secondly, the Carrier dismissed the Claimant for his allegedly obtaining a "letter of recommendation" from Mr. Mroczek under "false pretenses". That is, the Carrier contends that the Claimant did not advise Mr. Mroczek that he was seeking this letter of recommendation due to the fact that he had been convicted of a felony. The Carrier apparently believed that Mr. Mroczek, had he been aware that the letter of recommendation he was writing would have been used by the Claimant in connection with his conviction of a felony, would not have written such a letter.

The essential contention of the Organization is that Carrier officials, including Mr. Mroczek and a Mr. Kinney, another Roadmaster, were fully aware of the Claimant's conviction as well as the Claimant's drug problem far in advance of the Carrier's issuing a notice of investigation for the alleged infractions. The Organization contends that it was common knowledge in the work place that the Claimant had been arrested and convicted of a drug related charge and that the Claimant had a drug problem as far back as July of 1984. The Organization contends that when the Carrier did not issue a notice of investigation until October 26, 1984 that it violated the time requirements in Schedule Rule 40 which requires the issuance of a notice of investigation within 15 days of the date that the Carrier is aware of the alleged violations. Secondly, the Organization contends that the Carrier failed to conduct a full and fair investigation when it refused to recess the proceedings in order that the Organization could obtain the presence of two wit-

nesses who might testify to the fact that Mr. Mroczek was in fact fully aware of the Claimant's situation as far back as July of 1984.

This Board is going to sustain the Organization's claim. We could sustain this claim on both the procedural as well as the substantive contentions raised by the Organization.

First, let us briefly discuss the question of whether the Claimant received a full and fair investigation. At page 16 of the transcript during the Organization's examination of Mr. Mroczek, Mr. Mroczek was asked whether he recalled a conversation between himself and the Claimant regarding the Claimant's conviction for possession of cocaine. Mroczek contended that he did not recall such a conversation and the Organization representative then desired to call two witnesses who were allegedly present during this conversation. The conversation was alleged to have taken place on or about August 10, 1984 approximately 70 to 80 days prior to the Carrier's issuance of the notice of investigation. When Mr. Mroczek could not recall the conversation the Organization representative requested a recess in order that he might have a Mr. Theis and a Mr. Walters who were witnesses to this alleged conversation attend the investigation and testify. The Organization representative indicated that it would take the two gentlemen approximately an hour to reach the site of the investigation. The Organization representative was advised that the investigation would proceed and that he would not be permitted to call additional witnesses as the Claimant had had ample opportunity to notify the witnesses that were necessary.

This ruling by the Conducting Officer was arbitrary, capricious, and denied the Claimant of his rights to a fair and full investigation. The Organization representative conducted himself throughout the course of the proceedings in a most professional and gentlemanly manner; he never engaged in disruptive conduct; he raised few objections, although those that he did raise were well stated; and, his request was a courteous and reasonable one. The investigation commenced at 1:30 p.m. and concluded at 3:45 p.m. At the time that the request for the additional witnesses was made the transcript was approximately half completed. Thus, we would conclude that had the Hearing Officer granted the Organization representative a short recess to call the two witnesses that they would have arrived at or about the time that the hearing was concluding. There is no showing that the request for additional witnesses was unreasonable, would

have unduly delayed the completion of the investigation, or that the Organization had reasonable advance notice that the presence of the two witnesses was necessary.

Therefore, this Board would conclude on the basis of this procedural defect alone, that is, the denial of a full and fair hearing, that the Organization's claim should be sustained and that the Claimant should be reinstated to service with all rights, wages, and benefits unimpaired.

Although we have decided this case on a procedural basis, in our view it is appropriate to review the merits of the case. The evidence of record establishes, as the Organization properly argues, that responsible Carrier representatives in supervisory capacities had full and complete knowledge of the Claimant's situation both in terms of his conviction for the possession of cocaine and his drug related problems. In fact, the record would indicate that the Claimant's drug problems were well-known throughout the territory by both represented and supervisory personnel. The record indicates that the Claimant sometime prior to his being charged with the alleged Rules offenses had communicated facts concerning both his conviction and his drug problems to responsible Carrier personnel, including personnel in the Carrier's Employee Assistance Program. We therefore would have found, had we reached the merits, that the Claimant did not hide his problems including his conviction from the Carrier nor did he intend to elicit a letter of recommendation under false pretenses from Mr. Mroczek.

In all of the above circumstances, this Board concludes that the claim should be sustained.

Award: The claim is sustained. The Carrier is directed to reinstate the Claimant with all benefits, wages, and rights intact and to cleanse his record of the alleged offenses. The Board recognizes that the Claimant may have entered a work release program and/or the Carrier's Employee Assistance Program. If participation in either of these programs resulted in or would have resulted in the Claimant's missing work and/or receiving lesser benefits and/or being withheld from service until he overcame the stated drug related problems, then the monetary benefits of this Award, i.e. back pay, should be adjusted accordingly.

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

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