

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 183

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 183

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. Ivan J. Hunter, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on June 28, 1990 and he was occupying that position when he was suspended for forty-five days from the Carrier's service on December 27, 1993 for his alleged violation of Rules 532, 568 and 570.

The Claimant was suspended as a result of an investigation which was held on December 13, 1993 in the Conference Room, 28th Yard Office at Superior, Wisconsin. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant for forty-five days based upon its findings that he had violated Rules 532, 568 and 570 for his failure to comply with all warnings given verbally, in writing, by bulletin or notice, or by signs; and absenteeism without proper authority from November 22, 1993 until December 13, 1993.

Findings and Opinion

Mr. J.L. Renschler, B&B Supervisor with responsibility for the Claimant, testified that he had spoken with the Claimant's Foreman on September 20, 1993 and been advised that the Claimant had requested of Foreman Nelson and been granted the authority to take a two week leave of absence. Mr. Renschler testified that Foreman Nelson did not have the authority to grant such a leave of absence, and so he wrote to the Claimant and advised him that he was to report to duty at Allouez, Wisconsin on November 22, 1993 at 7:00 a.m. Mr. Renschler testified that the Claimant did not appear for duty on that day.

Mr. Renschler testified that he spoke with the Claimant on October 3, 1993 and that the Claimant, who was in Louisville, Kentucky, attending a religious ceremony, in which he was participating, as a member of his Native American Indian Tribe requested a thirty day leave of absence because he was "having personal problems". Mr. Renschler testified that as it was not possible for the Claimant to be back at work on October 4, 1993, he wrote to the Claimant and "instructed him to be back at work on Monday, October 11, at Allouez, and he was not there". Mr. Renschler testified that as a result of the Claimant's non-appearance at work on November 22, 1993 the instant investigation was scheduled.

Mr. Renschler sponsored a letter dated June 19, 1992 written to the Claimant by Manager of B&B D.A. Douglas, which letter reads as follows:

Mr. Hunter,

I have received a letter dated June 9, 1992, from Rayna Mattinas, Director of Human Resources for the Grand Casino in Hinckley, MN, that was written in your behalf. The letter states you have been providing consulting services for the Mille Lacs Band's First Annual Celebration pow wow which was held May 29 to 31, 1992.

It is now June and you continue to absent yourself from your duties as a B&B Carpenter. Our records indicate, since the beginning of 1992, you have absented yourself in excess of 42% of your assigned work days. This is certainly excessive.

We want to continue to honor your commitments and involvements in your ethnic heritage. However, your above cited frequency of absences cannot and will not be condoned or approved.

You need to decide whether you wish to continue your employment with Burlington Northern. If you wish to work for the Grand Casino, that is certainly your decision to make.

We expect you to report to work immediately. Future absences will be granted by approval of B&B Supervisor Jim Renschler only.

The record is clear in supporting the Carrier's conclusion that the Claimant was scheduled to be at work on November 22, 1993, that he had notice of this obligation, that he had not obtained permission to be absent from work on that date and that he was, in fact, absent without authority.

In the Claimant's defense the Organization introduced documentation supporting the Claimant's position that he was absent from work because of obligations he undertook to fulfill responsibilities to his Native American religion and community. The Organization introduced an October 11, 1993 letter written by the Claimant in which he stated, inter alia, that he was requesting "additional personal leave to do, and also attend tribal sacred ceremonies at this time". The Organization also introduced an October 5, 1993 letter written by Hazel Dean-John, the Longhouse Faithkeeper-Seneca, of the Iroquois Nation to the Carrier in which Dr. Dean-John stated, inter alia, that the Claimant's religious rights were protected by the "American Indian Religious Freedom Act" signed by President Carter on September 18, 1978; and that in the context of the religious ceremonies in which the Claimant would participate "even our Elders do not know in advance of dates for even annual ceremonies until sometimes 10 days prior to the beginning of them". Dr. Dean-John further stated that "In Mr. Hunter's case, . . . his services are requested from New York to Washington State and Canada to Texas" and that "if something were to happen to him, there would be ceremonies for him in all parts of the U.S. and Canada." The Organization also introduced a February 22, 1993 letter written by Vice Chairman Roger L. Bobby to the Carrier's Director of Human Resources in which the Organization stated that as the result of an investigation it was established that the Claimant was a Native American and a Sun Dancer "as it pertains to his cultural heritage", and that his status "requires him to perform ceremonies as needed by his tribe, and results in him being off work for these purposes".

The Claimant testified generally regarding his view of his obligation to be faithful to his religion and to attend ceremonies, rites and rituals of his religious faith.

The Claimant testified that he last had worked on Thursday, September 16, 1993 and further testified regarding his absence on November 22, 1993 as follows:

Q. And we're here today to ascertain your alleged failure to report on November 22, 1993, at Allouez, at 7 o'clock in the morning. Did you have permission to be off on that day?

A. Not from the Company, but I had permission from the Creator, God, which I take my direction from. And like I said before, I've asked, I've asked, I've asked for these time off and these happen every year, like next year might be only two or three days, that I don't

know. I can't foretell the future as when these times are off. Like right now, I'm still in the religious ceremonies right now. I also know I do have a, like I say, an obligation to be in, but I also first have an obligation to the Creator. He comes first. I know that.

In further explanation of his obligation to his faith in response to a question from the Organization Representative, the Claimant testified that when he is "off for these religious reasons" that he could not "give the Railroad an exact date that [he] needed to be off".

The Claimant, his wife, Ms. Peggy Hunter, and the Organization Representative each made lengthy statements at the close of the investigation in which they maintained, among other contentions, that the Carrier did not adequately and fairly consider the Claimant's religious rights which should have resulted in the Carrier's granting the Claimant his requested leaves of absence.

The evidence in this case establishes that the Carrier, on several occasions, allowed the Claimant a "leave of absence" for the purpose of his attending and participating in religious ceremonies and events.

There is no evidence in this case that other employees, who practiced a different religious faith than the Claimant, were treated more favorably than the Claimant.

By no stretch of the imagination does this case represent a matter in which the Carrier interfered with the Claimant's religious freedom.

The Claimant made a knowing choice when he decided that attending to his religious obligations superseded the obligations he had to the Carrier to appear when scheduled and to perform his assigned work. The Claimant has that right. The Carrier has the right to expect all of its employees to report when scheduled and to attend to their assigned responsibilities, if they have not received permission to be absent.

This Board recognizes that in scheduling employees who work in a twenty-four hour a day, seven day a week operation certain of those schedules may "interfere" with an employee's personal life. If the employee is unable to accommodate such scheduling, then he/she is free to seek employment in a position where the schedule will be consistent with his/her personal needs.. As noted above, the Claimant has not shown that the Carrier's schedule of Maintenance of Way Employees favors one religious group vis a vis another. Accordingly, this Board cannot conclude that the Carrier acted discriminatorily or arbitrarily when it denied the Claimant's request for a leave of absence.

It should also be noted that the granting of leaves of absence represents a privilege for employees and not a right. The Claimant has further failed to establish that the Carrier has granted leaves of absence more readily to employees of other religious faiths who have sought those leaves to observe their religion.

Accordingly, this Board concludes that the Carrier did not discipline the Claimant based upon any invidiously discriminatory motivation, but assessed the discipline for just cause after providing the Claimant with adequate notice of his responsibility to appear for work when scheduled. If anything, as noted above, it would appear that the Carrier was particularly accommodating to the Claimant insofar as the granting of his requests for leaves of absence for the purpose of attending religious events.

Based upon the foregoing facts and findings, this Board concludes that the claim should be denied.

Award: The claim is denied. This Award was signed this 27th day of May, 1994.

Richard R. Kasher

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