

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 925

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BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 20

AWARD NO. 20

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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 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 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 are dismissed from the Carrier's service may chose to appeal their dismissals to this Board. They have a sixty (60) day period from the date of their dismissals to elect to handle their appeals through the usual channels (Schedule Rule 40) or to submit their appeals directly to this Board in anticipation of receiving expedited decisions. An employee who is dismissed 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 dismissed 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 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, 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 excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

Mr. John T. Strong, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on August 10, 1978. The Claimant was subsequently promoted to the position of Welding Foreman, and he was occupying this position when he was dismissed from the Carrier's service effective July 31, 1985. The Claimant was dismissed as the result of an investigation which was held on July 26, 1985 in North Kansas City, Missouri. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rule 570 of the Carrier's Safety and General Rules, by having allegedly performed personal business on Company time on July 12, 1985.

#### Findings and Opinion

On July 12, 1985 the Claimant was working as a Welding Foreman on Regional Gang No. 1 in the vicinity of Galesburg, Illinois. During the course of his workday the Claimant approached the Carrier's System Material Manager, a Mr. H.C. Turman, in Mr Turman's office, sometime between the hours of 9:30 a.m. and 11:00 a.m. The Claimant spoke with Mr Turman for approximately 15-20 minutes and inquired about the purchase of ties/timbers. The Claimant was advised that he would have to obtain a proper release from authorized Carrier personnel before he would be permitted to purchase used Carrier property. Later in the day, at approximately twelve noon, the Claimant entered the office of Mr. Richard K. Russell, the Carrier's Manager of Regional Gangs in Galesburg, Illinois. The Claimant discussed his desire to purchase bridge timbers from the bridge at Crawford, Wisconsin. This conversation took place in the presence of both Mr. Russell and a Mr. L. Fielding, a B&B Supervisor.

When the Carrier subsequently determined that the Claimant had claimed that he had worked a full tour of duty and had not "charged himself with being off the clock" for the periods of time that he was discussing the purchase of Company property, a notice of charge was sent to the Claimant which alleged that he had performed personal business on Company time "while requesting to buy Company material from the Material Department at or about 10:30 a.m., July 12, 1985 during scheduled working hours".

After thoroughly reviewing the record, this Board concludes that the Carrier has failed to present substantial or convincing evidence that the Claimant violated Carrier rules.

While the record contains argument and facts regarding the question of whether the purchase of used Company material by employees represents a benefit to the Company and therefore could be considered as "Company business", that question, in this Board's view, is not central to the proper resolution of this claim. The Claimant and his Organization Representative have raised a significant question regarding the usual and customary manner by which employees purchase used materials from the Carrier. The Claimant testified, without contradiction, that on a number of occasions in the past he had purchased used materials from the Carrier, and that these transactions had been initiated and completed during his regularly scheduled working hours. Additionally, the testimony by the Carrier's witnesses appears to indirectly support the Claimant's contention that employees ordinarily conduct the business referred to above during working hours and while on the clock.

Secondly, and more importantly, it is clear to this Board that the Claimant acted honestly and openly with the Carrier. He made no effort to hide the fact that he was seeking to purchase the timbers, nor do we find that he misrepresented his activities when he spoke with Messrs. Russell and Fielding after he had conducted his business with Mr. Turman.

There are also statements in the record which allege that many employees throughout the Carrier's system have engaged in activity identical to that for which the Claimant was charged and no discipline was taken against them. The Carrier has not contradicted these statements and thus this Board must conclude, at least, that the Claimant was treated disparately.

This Board does not disagree with the Carrier's general premise that the purchase of used materials by employees is properly considered to be "personal business". On the other hand, if, as the record shows, many employees including the Claimant have customarily conducted this business during working hours, then the Carrier was obligated to give employees, including the Claimant, clear and unequivocal notice that such activities were prohibited and would subject violators to discipline. The Carrier failed to do this, and thus it can not presume that the Claimant knew or should have known that his conduct on July 12, 1985 was improper.

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In the context of the above findings this Board directs that the Claimant be restored to service with back pay for all lost time, less outside earnings, and with seniority unimpaired. The Carrier is further directed to remove the charge from the Claimant's record.

Award: Claim sustained in accordance with the above findings.

This Award was signed this 4th day of October 1985 in Bryn Mawr, Pennsylvania.

*Richard R. Kasher*  
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Richard R. Kasher  
Chairman and Neutral Member  
Special Board of Adjustment 925