

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 27

AWARD NO. 27

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 arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

Background Facts

Mr. Emmett E. Stiernagle, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on June 9, 1976. He was subsequently promoted to Truck Driver and he was occupying this position when he was dismissed from the Carrier's service effective November 22, 1985. The Claimant was dismissed as the result of an investigation which was held on October 24, 1985 at the Burlington Northern Depot at Craig, Missouri. At the investigation, the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Safety Rules 574, 575 and 580, for his unauthorized removal and sale of Carrier property.

Findings and Opinion

On September 4, 1985, Special Agent Jimmy R. Stanley was contacted by Mr. Gordon Standfield, Signal Foreman at the St. Joseph, Missouri Yard. Mr. Standfield advised Mr. Stanley that approximately 20 to 25 large rolls of No. 8 insulated copper wire was missing from the trailer where it had been stored in the St. Joe Yard. On September 6, 1985 Special Agent Stanley investigated at the Yard and reported the theft to the Police Department in St. Joseph, Missouri.

A police detective contacted the Missouri Iron and Metal Company in St. Joseph to determine if they had recently purchased any large amounts of copper wire. The manager of the Missouri Iron and Metal Company reported that on September 6, 1985, his company had purchased 2,420 pounds of No. 1 copper wire and had issued a check in the amount of \$968.00 to Emmett Stiernagle.

The Claimant was then interviewed on September 9, 1985 by Special Agent Stanley and he admitted selling wire to Missouri Iron on September 6, 1985. The Claimant, however, stated that the wire he had sold was from scraps he had obtained along the road bed, from the scrap bin at the Table Rock Yard in Nebraska, from Carrier poles in Table Rock that had been purchased by Mr. Louis A. McClintock, Section Laborer, from Swan Enterprises and from various abandoned buildings he had demolished.

In all cases involving industrial discipline, the company has the burden of proving by more than a preponderance of the evidence that the employee being disciplined was guilty of the charged infraction. In the instant case this Board must conclude that the Carrier has failed to meet its burden of proof.

The Board should first point out that the investigative transcript, which contains some 64 pages and 7 lettered exhibits, is, at best, extremely confusing and convoluted. Not only was the Claimant charged in this investigation but the Carrier also listed as principals Mr. L.A. McClintock, Laborer, and Mr. J.A. Spaulding, Signal Maintainer. Apparently, although it is difficult to discern, it is the Carrier's position that Messrs. Stiernagle, McClintock and Spaulding conspired in some way to misappropriate Carrier property including wire, ties and poles. Yet the evidence of record is so unconnected and the product of the Special Agents' investigation is so inconclusive that this Board has no option other than to sustain the grievance and restore the Claimant to service with seniority unimpaired. Although there may be some strong grounds for suspecting that the Claimant engaged in questionable activity, discipline is not properly imposed based upon speculation and supposition alone.

After thoroughly reviewing the extensive record, it is the opinion of this Board that the Carrier has presented only two facts which would possibly implicate the Claimant in alleged wrongdoing. First, copper wire was missing from the St. Joseph Missouri Yard and second, the Claimant sold copper wire to the Missouri Iron and Metal Company.

However, the Carrier has presented no proof that the amount or type of wire sold by the Claimant had any relationship to the amount and type of wire that was allegedly stolen from the St. Joe Yard.

This Board is not so naive as to believe that the actions of the Claimant and others are not subject to strong and reasonable suspicion; however as stated above, we cannot sustain discipline merely because of the presence of such suspicion. Had the Carrier supported its supposition with some real and/or circumstantial evidence establishing the Claimant's guilt, this case might have been decided differently.

In the absence of such proof, the claim will be sustained. The Carrier is directed to restore the Claimant to service with backpay for all time lost, less outside earnings. The Claimant's service record is to be cleansed of the charges and his seniority shall be unimpaired.

Award The claim is sustained in accordance with the above findings.

This Award was signed this 3rd day of February 1985 in Bryn Mawr, Pennsylvania.

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