

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY . *

- and - *

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES *

CASE NO. 36

AWARD NO. 36

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. Johnnie Ray Hanson, hereinafter the Claimant, entered the Carrier's service as a Sectionman on June 19, 1972. He was subsequently promoted to the position of Track Inspector, and he was occupying this position when he was dismissed from the Carrier's service effective August 1, 1986. The Claimant was dismissed as the result of an investigation which was held on July 23, 1986 at Jamestown, North Dakota. At the investigation the Claimant was represented by the Organization. The Conducting Officer at the investigation was Roadmaster C.L. Brotherton. The Carrier dismissed the Claimant based upon its findings that he had violated Rule 530(A) for failing to factually report timeroll entry for June 15, 1986, and failure to make the proper correction on the subsequent payroll, thereby falsifying the timeroll.

Findings and Opinion

The Claimant's regular days of assignment are Sunday through Thursday, with Friday and Saturday designated as his rest days. As part of his duties as a Track Inspector, the Claimant completes the payroll records for himself and the Relief Track Inspector. Under instructions from his supervisor, Roadmaster Clyde Staus, the Claimant is required to submit his timerolls no later than one working day prior to the end of the pay period. The timeroll

in question covered the period of June 1 through June 15, 1986. The testimony of the Claimant establishes that he filled out this form in advance and submitted it to the Roadmaster's office on June 12, 1986. Pursuant to proper instruction, he showed himself working eight (8) hours on June 15, 1986.

The Claimant became ill and did not report for work on June 15, 1986. The un rebutted testimony of retired Roadmaster Clarence Hanson (the Claimant's father), establishes that he, Roadmaster Hanson, called Roadmaster Brotherton, at his home, on Saturday, June 14, 1986 to report that the Claimant would not be in to work on Sunday, June 15, 1986. While the testimony of Ms Kim Kiefer (a friend of the Claimant), establishes that she called the Roadmaster's office on June 16, 1986 to advise them that the Claimant was still ill and would not be in to work on Monday, June 16, 1986.

On or about July 2, 1986, Roadmaster Staus reviewed the timeroll records for the month of June and noted that the Claimant had shown himself working a full day on June 15, 1986.

At the investigation regarding the Claimant's alleged wrongdoing, which was held on July 23, 1986 in the Roadmaster's office in Jamestown, North Dakota, the Conducting Officer was Roadmaster C.L. Brotherton. On several occasions during the course of the investigation, the Organization Representative requested that Roadmaster Brotherton excuse himself as Conducting Officer and take the witness stand to testify regarding the conversation he, Roadmaster Brotherton, had with the Claimant's father on June 14, 1986. Roadmaster Brotherton refused to either excuse himself as Conducting Officer or to testify regarding the testimony of retired Roadmaster Hanson.

This Arbitrator has, on a number of occasions, rejected procedural objections by organization representatives where the claim has been that a conducting officer, by having some involvement in the events leading to the investigation, should have been disqualified because he/she could not conduct a full and fair investigation as specified by the rules and/or meet the basic requirement of procedural due process. In the cases where we have rejected such objections, while the conducting officers had some knowledge of the events, they did not possess information materially relevant to the proper evaluation of the evidence in the record, which they suppressed.

In the instant case, Conducting Officer Brotherton was, allegedly, party to a critically relevant phone conversation on June 14, 1986. He was required, in this Board's opinion, to take the witness stand and to make us privy to what was said in that conversation or to deny that any such conversation took place.

The Organization made several proper and reasonable requests to have the Conducting Officer "appear as a witness". By refusing to testify regarding the events of June 14, 1986 in which he was allegedly involved, Conducting Officer Brotherton deprived the Claimant of a fair and impartial investigation as required by Schedule Rule 40A.

Accordingly, this Board need not address the merits of the claim, since the Carrier committed a fatal procedural error in the manner in which it conducted the investigation. On this basis, the claim will be sustained.

Award

The claim is sustained. The Carrier is directed, within fifteen (15) days of the receipt of this Award to restore the Claimant to service, with seniority unimpaired and with full back pay and restoration of benefits for the period of time that he was improperly held out of service. The Carrier is further directed to remove any reference to this discipline from the Claimant's Employee Personal Record.

Richard R. Kasher

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