

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. 43

AWARD NO. 43

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. Eleuterio H. Zizumbo, hereinafter the Claimant, entered the Carrier's service as a Laborer on April 18, 1972. He was occupying this position when he was dismissed from the Carrier's service effective August 21, 1987. The Claimant was dismissed as a result of an investigation which was held on August 13, 1987 in Cicero, Illinois. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rule G while assigned as a Laborer working at Oregon, Illinois.

Findings of the Board

Carrier Patrolman T.E. Schiltz received a call from the Western Avenue (Chicago, Illinois) Yardmaster in the early morning hours of August 3, 1987 reporting that a car had been found parked just east of the Western Avenue Yard Office and that there was an individual in the car.

When Patrolman Schiltz arrived on the scene at approximately 2:30 a.m., he found the Claimant asleep in his car. It took

Patrolman Schiltz several minutes to awaken the Claimant, and when he did, it was clear that the Claimant, who spoke Spanish as a first language, had significant difficulty communicating in English. It was also quite apparent that the Claimant was extremely intoxicated. Patrolman Schiltz observed and testified regarding many of the standard indicia of alcoholic intoxication; i.e. the strong smell of alcohol, the Claimant's bloodshot eyes, the Claimant's disheveled state, the Claimant's inability to walk without difficulty, and, the Claimant's near falling down condition. Patrolman Schiltz was accompanied by, and had his testimony verified by, Carrier Patrolman F.L. Cadle and Carrier Special Agent L.C. Wolfe. Special Agent Wolfe was able to determine that the Claimant was a Carrier employee (he was wearing a BN hardhat) and that he was waiting for a ride to Oregon, Illinois to fulfill an assignment scheduled to begin at 6:00 a.m. that morning.

Patrolman Cadle testified that during one point of conversation with the Claimant that the Claimant stated that he had consumed five beers at approximately 11:00 p.m. that evening.

Although the Claimant testified, through an interpreter, that (1) he was not intoxicated, (2) he was not given the opportunity to verify his condition through a blood or urine analysis and (3) he did not admit to drinking beers prior to being found in his automobile, this Board is overwhelmingly convinced that the Claimant was, in fact, found upon the Carrier's property in a state of obvious intoxication.

We would also infer from the fact that the Claimant was wearing a dress shirt and dress pants and that he told Patrolman Cadle that he was "down at a festival" that the Claimant had had "one old high time" before he showed up at the Western Avenue Yard for his ride to his assignment at Oregon, Illinois that morning.

It is unfortunate that the Claimant did not call in sick, because he certainly was under the weather. If anything, he showed extreme devotion to duty; although it is doubtful that he could have performed any.

The Carrier had the right to ensure that the Claimant did not report for duty on the morning of August 3, 1987 and to impose discipline for his Rule G violation.

However, since the Claimant was not on duty at the time of his being intoxicated, although he was on Carrier property, and since a review of the Claimant's fifteen (15) year service record reflects no violations of any of the Carrier's Rules, this Board believes that discharge is an overly severe punishment for the infraction.

Accordingly, we shall convert the dismissal from service to a disciplinary suspension and direct that the Claimant be reinstated.

Award The claim is denied. However, the Carrier is directed to reinstate the Claimant to service with seniority unimpaired but without back pay. The Claimant's Personal Record should reflect a disciplinary suspension for this Rule violation, and the Carrier is directed to reinstate the Claimant within ten (10) days of the receipt of this Award.

This Award was signed this 25th day of September 1987 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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