

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. 63

AWARD NO. 63

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. James M. Moore, hereinafter the Claimant, entered the Carrier's service as a Laborer on April 13, 1976. The Claimant was subsequently promoted to the position of Truck Driver and he was occupying that position when he was censured by the Carrier on October 6, 1988.

The Claimant was censured as a result of an investigation which was held on September 6, 1988 in the Burlington Northern Yard Office in St. Joseph, Missouri. At the investigation the Claimant was represented by the Organization. The Carrier issued the censure to the Claimant based upon its findings that he had violated Rule 570 by absenting himself from duty without proper authority on Tuesday, August 9, 1988.

Findings and Opinion

On or about August 4, 1988 the Claimant suffered an injury to his right hand and wrist while he was in the process of using a wrench and snapping on anchors.

He was seen by a Carrier physician on that date who noted that the Claimant had suffered a severe sprain to his right hand, that he was unable to return to work and that he should be rechecked on August 8, 1988. The Claimant was given a prescription for Motrin and directed to take one tablet three times a day with food or milk. The Claimant was, in fact, seen again on August 8, 1988, and, apparently, he was released to return to service to perform "light duty" only, to continue Motrin and to be rechecked by the Carrier's physician on August 13, 1988.

After being rechecked by the Carrier's physician on August 8, 1988, the Claimant met with Roadmaster Brian Chatten at approximately 1:00 p.m. in Mr. Chatten's office and told Mr. Chatten that he was unable to return to work that day because he was not properly attired. Mr. Chatten testified that he recalled the Claimant's saying that he was not prepared to do light duty work such as cutting and spraying weeds or picking up trash because that was "deplorable or lowering his standards".

Mr. Chatten further testified that he received a phone call on the morning of August 9, 1988 at approximately 9:30 a.m. and that the Claimant, who had been scheduled to report for duty at 6:30 a.m. on that date told him, Chatten, that he would not be in that morning because the medication he was taking "caused him to be sleepy and drowsy".

The censure of the Claimant was issued due to his alleged failure to appear for duty and, apparently, because he did not "call off" in a timely manner.

The Claimant testified that the medication he was using caused him to experience certain negative side effects and that he attempted to contact Roadmaster Chatten as close to his starting time on August 9, 1988 as he could. The Claimant specifically testified that he would be sound asleep approximately thirty minutes after taking the medication.

The Carrier concluded that the Claimant had violated Rule 570 because he absented himself from duty without proper authority.

The Organization argued that the Claimant acted properly and in accordance with Rule G when he called off from duty as soon as he

knew that he could not perform safely. The Organization also entered evidence in the record to establish that Motrin, a brand name for Ibuprofen, can cause side effects such as stomach upset, dizziness, drowsiness and blurred vision. The Organization also entered evidence in the record to establish that a phone call was made to the Roadmaster's office by the Claimant at 7:19 a.m. on August 9, 1988.

This Board finds, for a variety of diverse reasons, that the claim should be sustained and that the censure should be removed from the Claimant's Personal Record.

First, we should note that the transcript of the investigation contains a number of significant gaps where responses were either "inaudible" or left blank. Additionally, there were a number of documents introduced into the record that contained notations from the physicians who examined the Claimant, and those writings were either non-understandable because of the medical abbreviations used, or those documents raised more questions than they answered.

Specifically, we reference Exhibit K, a memorandum from the clinic where the Claimant was examined on August 8, 1988. The typewritten portion of that memorandum is understandable. The Claimant was released to return to work "today", August 8, 1988, and restricted to light duty. He was to wear a wrist splint when at work and to begin "warm soaks" with gentle "ROM", range of movement, exercises. The Claimant was scheduled to be rechecked on August 13, 1988 and directed to "continue Motrin". Below this typewritten portion of the report is a handwritten notation with the initials that appear to be "SR", an individual who was unidentified in the record. In that handwritten notation, dated 8-12-88, SR states that the Claimant had not been to work since 8-8-88 due to drowsiness, and that a supervisor, apparently the Claimant's supervisor, was advised that "Motrin does not cause drowsiness per DWC". This Board must reasonably assume that this note of August 12, 1988 reflects that the Carrier had been advised by the Claimant that the Motrin was causing him to be drowsy and that the Carrier, doubting the Claimant's statement, conferred with its physician, concluded generally that the medication was not an excuse for the Claimant's failure to appear for work and issued the notice of investigation four days later on August 16, 1988.

The Organization introduced evidence into the record from a pharmaceutical manual to the effect that one of the most frequent adverse side effects from Motrin is "dizziness" or "drowsiness". This Board is of the firm opinion that the Carrier charged the Claimant with an offense under Rule 570 because it disbelieved his excuse and because the Carrier concluded that the Claimant was a malingerer. There is no reliable evidence in the record to support

these assumptions or conclusions by the Carrier. In fact, the Claimant has an unblemished twelve (12) year Personal Record, and his actions on the day in question do not raise a presumption of guilt.

A second element that causes us to doubt the reliability of the evidence submitted by the Carrier was Mr. Chatten's original testimony that the Claimant did not call off until 9:30 a.m. on August 9, 1988. When confronted with the telephone log which indicated that the Claimant had called his office at 7:19 a.m. on that date, Mr. Chatten could not deny that the call was made at that time. Nor has the Carrier been able to refute evidence in the record that the single telephone line to the Roadmaster's office, (816) 233-4018, is usually busy and that employees have great difficulty in reaching the Roadmaster's office prior to 6:30 a.m., as the Claimant testified.

It is this Board's opinion that the Carrier has failed to present substantial and convincing evidence that the Claimant improperly absented himself from duty on August 9, 1988. There is substantial merit in the Organization's contention that the Claimant acted properly and in accordance with Rule G by not appearing for work that day while taking his prescribed medication. Rule G provides in relevant part that "Employees must not report for duty or perform service under the influence or impaired by prescription drugs, medications or other substances that may in any way adversely affect their alertness, coordination, reaction, response or safety".

If the Carrier felt that the Claimant was malingering or inventing his claim regarding drowsiness caused by the Motrin, then the Carrier should have directed the Claimant to appear for a further medical examination; and the Carrier should have become involved in that examination so that it could provide the Board with substantial evidence of malingering if any such evidence existed. It did not, and therefore the only evidence in the record establishes that the Claimant did not act improperly when he called off as soon as he could on August 9, 1988.

Award: The claim is sustained. The Carrier is directed to expunge the censure from the Claimant's Personal Record immediately.

This Award was signed this 5th day of December 1988 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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