

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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CASE NO. 64

AWARD NO. 64

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. Albert J. Alley, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on May 13, 1981. The Claimant was subsequently promoted to the position of Section Foreman and he occupying that position when he was dismissed from the Carrier's service on October 14, 1988.

The Claimant was dismissed as a result of investigations which were held on September 21 and October 11, 1988 in Hannaford, North Dakota. At the investigations the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rules 530B, 533 and 535 of the Maintenance of Way Department and Rule 575 A of the Timetable for using a BN telephone credit card without proper authority for personal use.

Findings and Opinion

On August 25, 1988 Special Agent J.H. Christensen received a request from General Manager Richard Breto to verify the billing on a BN telephone credit card that had been issued to Roadmaster G.J. Odenbach. Photocopies of the previous six month billings for this telephone credit card were sent to Roadmaster Odenbach for his review. On September 13, 1988 Special Agent Christensen issued a report stating in relevant part as follows:

"In reviewing the last month statement, 14 calls, for a total of \$384.78 were placed from telephone (701) --- ----, at Cooperstown, North Dakota. This is the home telephone number of Mr. Albert Alley. In a further review of the past six months billing the total charges against this Burlington Northern Credit card from this particular telephone number is \$3336.76."

On that same date the Claimant was notified to attend an investigation on September 21, 1988 regarding his alleged misuse of the BN telephone credit card.

During that hearing Special Agent Christensen testified that he had reviewed the 244 page document from the telephone company which represented the last six months of charges on Roadmaster Odenbach's BN telephone credit card. Since the Claimant's home telephone number appeared frequently on these bills, Special Agent Christensen checked with Roadmaster Odenbach to verify if the Claimant was authorized to use the telephone credit card. Upon being advised that the Claimant did not have authorization for use of the credit card, Special Agent Christensen issued his report. Special Agent Christensen further testified that the 244 page bill was still being analyzed for possible evidence of further misuse by other employees of the Carrier.

Roadmaster Odenbach testified that he had never given anyone authority to use the BN telephone credit card issued to him unless it involved Carrier business. He further testified that he was advised by Special Agent Christensen, on or about August 25, 1988, that his telephone credit card was being cancelled and that the Carrier was investigating possible misuse of the card. Roadmaster Odenbach testified that he advised the Claimant, on or about August 26, 1988, that if he was using the telephone credit card he should stop because the card had been cancelled and the telephone charges were being investigated.

The Claimant testified that he had used the telephone credit card and that he did not have authorization for such use. He testified that he thought it was a Wats line number and that he did not know that the Carrier was charged for the calls. The Claimant

also stated that since he now knew it was wrong to use the credit card he would be prepared to make restitution.

The Organization has argued that the Carrier violated Rule 40 (A) which requires that an investigation be held within fifteen (15) days from the date that information regarding an employee's alleged rule violation is obtained by an officer of the Company. The Organization argues that because various officers of the Carrier, including Roadmaster Odenbach, knew on August 25, 1988 that the Claimant had been using, without authorization, a Carrier telephone credit card that the investigative hearing on September 21, 1988 fell outside the time limits established in Rule 40. This Board disagrees. We find that the Carrier, on August 25, 1988, was beginning an investigation into possible misuse of the telephone credit card. That investigation was, in fact, still on-going. Once the Carrier had obtained sufficient evidence to warrant an investigative hearing regarding the Claimant's alleged misuse of the credit card, the Carrier acted promptly in notifying the Claimant of its, the Carrier's, intent to hold a hearing on the matter. The Organization has argued that the Carrier should have issued a notice of investigation as soon as the Carrier had "enough information" regarding the "allegations" involving the Claimant on August 25, 1988. In this Board's opinion had the Carrier so acted, it would have done so precipitously and contrary to established principles regarding full and fair investigatory procedures.

The Organization also contended that the claim should be sustained because the Claimant, who had been removed from service on September 13, 1988, was recalled on September 15, 1988 due to an emergency situation. The Organization implies that the Carrier's recall of the Claimant for emergency service somehow indicates that the Carrier condoned the Claimant's alleged misuse of the telephone credit card or indicates that the Carrier did not deem the alleged misuse as being an offense of sufficient magnitude to justify discharge. In this Board's opinion neither assumption by the Organization is correct. The Carrier's recall of the Claimant for brief emergency service does not demonstrate that the Carrier, in any way, waived its right to pursue the charges against the Claimant for the credit card misuse. Had the Carrier handed the Claimant the credit card when he returned for emergency service and told him that he could feel free to use it for personal business, then the Organization's defense might have some merit; the Carrier did no such thing and the Organization's defense must be rejected.

The Organization is, clearly, attempting to make the best of a bad situation. It is apparent from the transcript of the September 21, 1988 hearing that the Claimant was a capable and industrious employee and that he was well-liked by both his co-workers and his supervisors. In spite of this finding this Board concludes that the Claimant's dismissal from the Carrier's service was justified.

During the September 21, 1988 investigation the Claimant essentially admitted that he used a Carrier credit card without authorization and that he used that card to conduct personal business. His statement that he thought the credit card was tied to a Carrier Wats line is immaterial and irrelevant; even if that fact were true it provides no justification for the Claimant's use of the card. It is also obvious based upon the number of calls made over a reasonably brief period of time (six months) and the amount of cost billed to the Carrier for those calls that the Carrier's credit card was not only improperly used but it was abused. In these circumstances we have no reason to find that the Carrier's imposition of the penalty of dismissal was arbitrary or overly severe.

This Board has not overlooked the fact that the Carrier conducted a second investigatory hearing on October 11, 1988 and that the charges that were contained in the notice of investigation for the October 11, 1988 hearing were essentially the same as those that were contained in the notice for September 21, 1988 hearing. The Organization has contended that this second investigatory hearing subjected the Claimant to double jeopardy. The Organization's definition of double jeopardy is not consistent with the one regularly recognized. Double jeopardy occurs, in the industrial setting, when an employee is punished twice for the same offense or where a final and binding decision has been issued clearing an employee of certain charges and the company or the carrier attempts to discipline that employee a second time for the same alleged offense. That is not what occurred in this case. A second investigation was instituted prior to the imposition of any discipline. Conceivably, had the second investigation resulted in some exculpatory evidence regarding the Claimant then he may not have been disciplined at all or he may have received lesser discipline than he eventually did. However, the evidence presented in the second investigation does not, in any way, undercut or vitiate the admission of guilt which the Claimant made at the first investigation. In fact, the Claimant never denied, in either investigation, that he had used the Carrier's telephone credit card without authorization. Accordingly we find no reason to conclude that the second investigation was contractually defective or deprived the Claimant of any of his rights to procedural due process.

Therefore the claim will be denied. *W.R.*

Award: The claim is denied. This Award was signed this 18th day of January 1989 in Bryn Mawr, Pennsylvania.

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