

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

<u>BURLINGTON NORTHERN RAILROAD COMPANY</u>	*	
	*	
-and-	*	CASE NO. 7
	*	AWARD NO. 7
<u>BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES</u>	*	

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 Section 3 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 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 choose to appeal their dismissals to this Board, and they have a sixty (60) day period from the date of their dismissals to elect to handle their appeals through the usual appeal channels, under Schedule Rule 40, or to submit their appeals directly to this Board in anticipation of receiving expedited decisions. The employee who is dismissed may elect either option, but 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's written notification of his/her desire for expedited handling of his/her appeal is received by the Carrier Member of the Board, that said 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 had the option to request the parties to furnish additional data regarding the appeal, in terms of argument, evidence, and awards, prior to rendering a final and binding decision in the instant case. 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 excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

Under paragraph 5 of the May 13, 1983 agreement the Referee must agree, as a condition of the assignment, to render an award in each dispute submitted within sixty (60) days of the date the documents specified above are received. The sixty (60) day period may be extended when funding of the dispute resolution procedures under Section 3 of the Railway Labor Act are suspended.

Mr. Richard D. Kuta, the Claimant, was dismissed from service on September 26, 1983 as the result of an investigation held on September 9, 1983. The documents of record, including a twenty-nine (29) page transcript, were received by the Referee on December 10, 1983, and this Award was rendered on December 22, 1983.

Finding and Award

The investigation in this case was called in order to determine the Claimant's responsibility regarding an allegation that he had violated Rule G (drinking/intoxication), and further to determine whether the Claimant had failed to comply with instructions from proper authority at approximately 8 A.M. on September 2, 1983 at Lyndale Junction, Minneapolis, Minnesota.

The investigation was scheduled for 9 A.M. on September 9, 1983 and commenced at approximately 9:10 A.M. The Claimant was not present. The conducting officer allowed several recesses while the Claimant's representative attempted to locate the Claimant, as well as to have certain witnesses appear in the Claimant's behalf.

When the Claimant could not be located the investigation continued. The Claimant was in absentia.

The substantial and preponderant evidence of record establishes that on September 2, 1983 the Claimant was observed by both the Roadmaster and the Assistant Roadmaster at Lyndale Junction, and these Carrier officials concluded that the Claimant was under the influence of alcohol while on duty. The two Carrier representatives were in close proximity to the Claimant when they smelled alcohol on his breath and observed his mannerisms, including his unusual pattern of speech and activities, which lead to their concluding that he was intoxicated. They also concluded that he was offensive, argumentative, and boisterous and that he unilaterally left the property after being directed to remain at his post of duty while the Carrier's representatives determined whether there was a facility for obtaining a blood test.

None of this evidence in the record is controverted. The Organization has contended that the Carrier failed to provide the Claimant with required written notification of the September 9, 1983 investigation five days prior to said investigation as is required by Rule 40 (C). The Organization additionally argues that the Carrier intimidated two witnesses who would have appeared at the investigation and testified on behalf of the Claimant had they not feared that they would be disciplined as a result of participating in the investigation.

The record before this Board indicates that the Carrier made significant efforts to provide the Claimant with written notification within the time frame specified under Rule 40, but that the failure of the Claimant to receive notice was not the fault of the Carrier. The Claimant was verbally advised that a notice was going to be delivered to him at his home, and through the Claimant's own dereliction he was not available for service. This Board would have been better satisfied that the Carrier had made every conceivable effort to deliver the notice had a copy of the notice been left at the Claimant's residence, and/or had the Claimant been verbally notified of the contents of the notice when he was contacted by phone. However, in the circumstances of this case, we find that the Claimant was advised five days prior to the setting of the investigation that he would be receiving some notice from the Carrier in writing at his residence. The Claimant was unavailable for service of this notice, and the Carrier

cannot be held responsible for the failure to serve within the five days.

This Board also finds that the Organization and the Claimant were afforded proper opportunity to present witnesses in the Claimant's behalf, and that the failure of the witnesses to attend the investigation was not attributable to any actions by the Carrier.

In these circumstances, this Board finds that the claim should be denied.

AWARD: Claim denied.

This Award was signed on the 22nd day of December, 1983 in Bryn Mawr, Pennsylvania.

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