

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

```
*****
BURLINGTON NORTHERN RAILROAD COMPANY          *
- and -                                         *
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES    *
*****                                         *
                                           CASE NO. 72
                                           AWARD NO. 72
```

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. Denny R. Hope, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on May 22, 1979. The Claimant was occupying that position when he was dismissed by the Carrier on September 12, 1989.

The Claimant was dismissed as a result of an investigation which was held on August 21, 1989 at the Burlington North Yard Office in Denver, Colorado. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rules 564, 575 and 580 of the Burlington Northern Safety Rules and General Rules for unauthorized use of lodging and restaurant charges at the Capitol Inn, Cheyenne, Wyoming between May 24 and June 16, 1989.

Findings and Opinion

At the opening of the August 21, 1989 investigation the Organization Representative requested that the Carrier incorporate a prior investigatory transcript, which had been established on August 4, 1989, into the instant record. The Carrier complied with that request. The August 4, 1989 investigation, which involved the same charge, the Claimant's "alleged unauthorized use of lodging at the Capitol Inn, Cheyenne, Wyoming, while working as Laborer on Lube Gang at Cheyenne, Wyoming between May 24, 1989 and June 16, 1989", had been held ex parte; that is, neither the Claimant nor an Organization Representative had appeared at that investigation.

The evidence suggests that the reason neither the Claimant nor an Organization Representative appeared at the August 4, 1989 investigation was due to the fact that the notice of that investigation was received at the Claimant's address by his sister on or about July 31, 1989, sometime after the Claimant had left for his assignment as a member of Maintenance Gang 996 or 997 at Guernsey, Wyoming. The evidence also suggests that there was some confusion regarding which geographic arm of the Organization was the proper entity to be notified regarding the investigation of the Claimant.

The record further reflects that as the result of dialogue between Organization Representative S.M. McDonald and Conducting Officer E.C. Gallagher, the Conducting Officer determined, after consultation with Carrier Labor Relations personnel, to schedule the second hearing which was held on August 21, 1989.

The thrust of the Carrier's charge in this case is that the Claimant violated Carrier rules, since his signature appeared on a lodging register at the Capitol Inn motel in Cheyenne, Wyoming and that the Claimant had not been authorized to incur lodging and/or meal expenses while on the particular assignment that brought him to Cheyenne, Wyoming.

The Organization has challenged the Carrier's dismissal of the Claimant on two grounds. First, the Organization submits that both investigations conducted by the Carrier violate the timeliness and other procedural requirements of Schedule Rule 40. Secondly, the Organization submits that the Claimant did not violate the rules with which he was cited.

In addressing the procedural objections of the Organization, the Board observes that such objections, in the form of affirmative defenses, place the burden of proof upon the Organization.

The evidence in the record, including the colloquies between

Organization Representative McDonald and Conducting Officer Gallagher, fail to establish, with sufficient probity, a basis for sustaining the Organization's procedural objections. It is obvious that the original notice of the August 4, 1989 investigation was not timely received by the Claimant; however, it is not obvious as to whether the Carrier or the Claimant was responsible for this failure.

Accordingly, the Organization and the Carrier's Labor Relations office, acting in good faith and with appropriate labor relations objectives in mind, concluded that a "second" investigation should be conducted so that a full and fair record might be established. This Board will not undermine those efforts by sustaining the Organization's procedural objections, which, standing on their own, are not supported by sufficient evidence.

Turning to the merits of the claim, there is no dispute that the Claimant was not authorized by either Roadmaster Peterson or Roadmaster Alleman to charge lodging and/or meal expenses to the Carrier while he was on assignment in Cheyenne, Wyoming.

The Claimant testified that when he first arrived at Cheyenne he inquired about lodging and was told by "one of the guys" that he could walk over and stay at the Capitol Inn. The Claimant testified that this was the first time that he had been assigned to Cheyenne, and that he was not familiar with lodging arrangements, since when he had previously worked at Horse Creek he had been accommodated with a bunk car.

The Claimant testified that it was his understanding that he was going to be billed or that he would settle his account with the Capitol Inn directly; and that he did not intend or anticipate that the motel was going to bill the Carrier for his lodging and/or meals. The Claimant testified that he charged his room and meals "to myself"; and that he expected that he would be billed by the motel. The Claimant denied that he had used the Carrier's credit during his assignment at Cheyenne, Wyoming.

Whether it was due to the confusion of the two investigations or whether the Carrier merely failed to present sufficient evidence through necessary witnesses, it is clear that there is no substantial and/or convincing evidence before this Board which establishes that the Claimant violated or intended to violate Carrier rules regarding the improper use of Carrier credit.

There is no evidence in this record, which might have been presented by a Capitol Inn motel clerk or manager, to establish that the Claimant was responsible for the bills for lodging and meals


being sent directly to the Carrier. The record indicates that other Burlington Northern employees, specifically train service employees, are authorized to lodge at the Capitol Inn, and that billings from the motel are then sent directly to the Carrier. Under the circumstances, it is not unreasonable to conclude that management of the motel assumed, incorrectly, that the Carrier would be responsible for the Claimant's charges; and thus the Capitol Inn was responsible for the misdirection of the Claimant's bills.

Based upon the evidence in the record, this Board will not impute an intent to defraud. Therefore, the Board finds insufficient evidence to conclude that the Claimant violated the rules with which he was charged.

Accordingly, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to immediately reinstate the Claimant to service and to make him whole for all lost wages and benefits. The Carrier is further directed to expunge, by physical erasure, any reference to the instant discipline from the Claimant's Personal Record.

This Award was signed on this 12th day of November 1989 in Bryn Mawr, Pennsylvania.



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