NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	
- and -	CASE NO. 80
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	AWARD NO. 80

On May 13, 1983 the Brotherhood of Maintenance of Way Employes (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. Ashimiyu Alowonle, hereinafter the Claimant, entered the Carrier's service as a B & B Helper on June 14, 1989. The Claimant was working as a Carpenter when he was dismissed by the Carrier on December 4, 1989.

The Claimant was dismissed as a result of an investigation which was held on November 28, 1989 in the Trainmaster's Conference Room in Minneapolis, Minnesota. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Safety Rules and General Rules 564 and 574 of the Maintenance of Way Department for his allegedly being "dishonest and withholding information and failing to give factual report on your Application for Employment and Physical Application for Employment, and for false or omitting information on your Application for Employment and Physical Examination of Application for Employment set forth in your Employment Agreement with the Burlington Northern Railroad".

Findings and Opinion

The Claimant testified that he had been employed as a packager by the Waldorf Corporation between the dates of April 4, 1982 and June 13, 1989, and that he had suffered an off-the-job injury to his back, during his employment by Waldorf, while sweeping, which resulted in his receipt of "disability compensation".

Mr. Mark Hojnacki, a Carrier Claims Agent, testified concerning his being contacted by a private investigator for Waldorf regarding the Claimant's receipt of long term disability benefits from Waldorf. Mr. Hojnacki testified that he conducted an investigation and formed the opinion that there were discrepancies in the Claimant's employment application, because the Claimant had written "not applicable" when asked when he was last unable to work because of an injury and because the Claimant had written "no" when asked "Have you ever received compensation for military or any other disability?" Mr. Hojnacki further testified that the Claimant failed to note on his employment application that he had ever worked for Waldorf. Mr. Hojnacki testified that he first became aware of the discrepancies in the Claimant's employment application on November 15, 1989 when he received a copy of that document. Mr. Hojnacki testified that, in his opinion, there was nothing "false or omitted" on the F-27 (the Carrier's injury claim form) which the Claimant had filed with the Carrier concerning an alleged on the job injury.

The Claimant testified that he did not list Waldorf Corporation as a previous employer on his employment application, and that he omitted listing injuries he had previously suffered. The Claimant testified that he was not aware of the existence or substance of Rules 564 and 574 at the time he filled out his employment application.

The Carrier's dismissal of the Claimant is based upon its belief that he knowingly and deliberately falsified his employment application and physical application for employment when he stated that he had not suffered injuries in previous employment and when he failed to divulge that he had previously worked for the Waldorf Corporation. The Carrier submits that these omissions/falsifications violate Rules 564 and 574, which require that employees not withhold information and not be dishonest.

The Organization contends (1) that the Carrier failed to give the Claimant adequate and/or specific notice regarding the charges against him and failed to cite any Rules in the investigation notice which the Claimant allegedly violated, (2) that the Carrier failed to police the sequestration order at the investigation, (3) that the Conducting Officer erred when he required the Claimant to testify before presenting "the Carrier's case", (4) that the November 28, 1989 investigation was untimely, as the Carrier had reason to

believe, as early as November 6, 1989, that there were alleged discrepancies in the employment applications, and (5) that the Carrier failed to show any falsification or misrepresentation by the Claimant on the F-27. For these reasons, the Organization requests that the claim be sustained and that the Claimant be reinstated with seniority unimpaired and be made whole for lost wages and benefits.

In this Board's opinion, the November 17, 1989 notice of investigation was sufficiently precise, and the Claimant was able to adequately prepare to answer questions regarding his failing to disclose certain information on his employment and physical examination applications. The fact that the Carrier did not cite specific rules in the notice of investigation does not violate the letter, spirit or intent of Schedule Rule 40. The Claimant knew what the charges against him consisted of, and he was not deprived of any rights of procedural due process because of the wording of the notice.

Neither was the Claimant prejudiced because he was called as the first witness in the investigation to answer certain preliminary questions regarding his employment with the Carrier and the Waldorf Corporation.

The Organization's contention that the Conducting Officer failed to enforce the sequestration rule is also found by this Board to be lacking in merit. This case does not involve eyewitnesses to a disputed event; in fact, this is a case where the evidence consists entirely of verifying paper entries and transactions. Finally, the record does not reflect that the off-the-record conversation, during a recess, involved the subject matter of the investigation.

This Board also rejects the Organization's argument that the notice of investigation was untimely issued. When Claims Agent Hojnacki first heard from the Waldorf Corporation's private investigator that an inquiry was being made regarding a disability claim of the Claimant, Mr. Hojnacki had no reason, other than pure speculation or suspicion, to conclude that the Claimant had falsified his employment and/or physical examination applications. It was not until November 15, 1989, when Hojnacki received a copy of the Claimant's employment application, that he had any reliable reason to conclude that the Claimant omitted or falsified information. Accordingly, this Board finds that the Carrier did not violate the time limits in Schedule Rule 40 by its issuance of the notice of investigation on November 17, 1989.

Finally, the Carrier did not charge the Claimant, in the notice of dismissal, with falsification of the F-27; as the investigation was not concerned with the question of whether the Claimant filed a false injury claim against the Carrier.

The merits of this case present little difficulty; the Claimant repeatedly admitted that he failed to properly complete his employment and physical examination applications. The Claimant conceded that he omitted information (the name of his immediate previous employer) and that he misrepresented other information (stating he had no injuries for which he received disability payments) on his applications with the Carrier.

At the investigation the Claimant testified that he worked for the Waldorf Corporation between the years of 1982 and 1989; yet on his application he shows himself as working for 2 other employers between 1984-86 and 1986-88. The Claimant also shows himself as microbiology graduate (4 years) from the University of Minnesota, and he showed himself to be an intelligent and articulate witness at the investigation. Certainly, he must have understood the meaning and import of the bold-printed notice on the employment application which states "I understand that misrepresentation or omission of facts called for herein will be sufficient cause for cancellation of consideration for any employment or termination of my continued employment whenever such facts are discovered."

Finally, the Claimant, as all applicant employees, must be presumed to understand the Carrier's "need to know" regarding injuries that applicant employeees may have suffered prior to their employment with the Carrier; particularly when the Claimant and other applicants for Maintenance of Way positions know that they are being considered for employment in positions that require regular and significant physical exertion.

Based upon the above findings, this Board must conclude that the Claimant knowingly and wilfully made material misrepresentations on his employment and physical examination applications, which misrepresentations justified the Carrier's dismissing him from service. Accordingly, the claim will be denied.

Award: The claim is denied. This Award was signed this 18th day of January 1990 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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