

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. 81

AWARD NO. 81

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. Wade D. Camp, hereinafter the Claimant, entered the Carrier's service as a Laborer on April 18, 1977. The Claimant was subsequently promoted to the position of Machine Operator and he was occupying that position when he was dismissed by the Carrier on October 26, 1989.

The Claimant was dismissed as a result of an investigation which was held on September 28, 1989 in the Roadmaster's Office in Forsyth, Montana. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rule 532 of the Maintenance of Way Department for his allegedly being absent from work without proper authority on September 7 and 8, 1989.

Findings and Opinion

The record in this case establishes that a number of Carrier supervisory personnel and Maintenance of Way foreman, all of whom had some reason to be aware of the Claimant's presence on particular work gangs between the months of June through the first week of September 1989, were not able to account for his whereabouts.

Foreman G.J. Bogunovich, who was the Surfacing Crew Foreman of Gang No. 553983 between the dates of July 17, 1989 through September 8, 1989, testified that he knew the Claimant and that the Claimant had not been available to work on his gang between the dates of July 17 through September 8, 1989.

Maintenance Gang Foreman Doug Jensen, who was the Foreman assigned to Gang No. 553983, prior to Foreman Bogunovich's assuming responsibility for the gang, testified that his tenure as gang foreman ran between the dates of June 22 until July 17, 1989; and that the Claimant was, apparently, assigned to his gang as of the date of June 22, 1989. Mr. Jensen testified that "When I first got to the gang to fill out the payroll, there was information left on the envelope to pay Mr. Camp eight hours of vacation for June 16". Foreman Jensen testified that the Claimant was "apparently" assigned to his gang, but that the Claimant did not appear for work.

During the course of the testimony of Foremen Bogunovich and Jensen, the Organization Representative repeatedly objected to questions from the Conducting Officer regarding the Claimant's alleged failure to appear at work on any days other than those specified in the notice, i.e. September 7 and 8, 1989, as the Organization contended that such questions violated the letter and spirit of Schedule Rule 40(C), which establishes that the notice of investigation must be specific.

Track Inspector Donald Anderson, who was the Foreman of Gang 553983 prior to Foreman Jensen's assuming responsibility as foreman for that gang, testified that the Claimant was assigned to his gang as a Regulator Operator, and that the Claimant requested and was granted vacation beginning on May 29, 1989. Mr. Anderson testified that the Claimant was not displaced from his position on the gang during the period of his vacation nor was he furloughed. Mr. Anderson testified that there was "nothing to my knowledge" which prohibited the Claimant or relieved the Claimant from returning to his assignment after his vacation was completed.

Roadmaster Yauney testified that the Claimant's last day of compensated service was May 26, 1989; that when the Claimant began his vacation on May 29, 1989 his job was filled in accordance with Rule 19(A); that the Claimant was not displaced from his crew; that

a review of Carrier records reflected no evidence that the Claimant had been given a leave of absence; and, that the Claimant, as the result of a prior investigation, had been suspended from service on August 28, 1989 until September 6, 1989, a period of ten (10) days, for violation of Rule 532, which requires employees not to absent themselves from service without permission.

The investigation was conducted with the Claimant in absentia. The investigation was first scheduled to be held on September 21, 1989, but was postponed at the request of the Organization.

The evidence of record establishes that the Carrier attempted to effect personal service of the notice of investigation upon the Claimant by sending registered mail to the Claimant's last known address of record. The registered mail was received by individuals at that address, and the Board is satisfied that the Carrier complied with its obligation in terms of delivering the notice to the Claimant's last address of record on file with the Carrier.

The Board is also satisfied that the Carrier did not violate the letter, the spirit or the intent of Schedule Rule 40(C) when it questioned foremen regarding the Claimant's whereabouts on days other than September 7 and 8, 1989. It is clear that the Carrier sought to establish some factual linkage which would demonstrate that the Claimant absented himself from service for a prolonged period of time; and that when this period of absence continued through the dates of September 7 and 8, 1989, a decision was made to investigate the reasons for the Claimant's absence.

There is evidence in the record that the Claimant, for some unspecified personal reason(s), was desirous of obtaining a leave of absence from the Carrier's service for some unspecified period of time; and, apparently, the leave of absence request was not filed or, if it was filed, it was not granted.

There is also uncontradicted and unrebutted evidence in the record which establishes that the Claimant was not on the Carrier's premises in active service, as a Regulator Operator on Gang No. 553983 or in any other position, on the dates of September 7 and 8, 1989, when he was obligated to be present.

The Organization has attempted, valiantly, to create a defense which would excuse the Claimant's absence because he might have been "displaced" or "bumped" from his position on Gang No. 553983. However, there is no documentation before this Board to establish that the Claimant had been displaced, or that he had permission to be absent or that his absence was due to circumstances beyond his control.


Based upon the foregoing findings, this Board concludes that the Claimant was afforded proper notice of the investigation, and that the Carrier proved by substantial and convincing evidence that the Claimant absented himself from duty without proper authority on September 7 and 8, 1989.

The Claimant's personal record reflects that, immediately prior to the dismissal, he was suspended from service on or about August 28, 1989 through September 6, 1989 for his failure to report to duty at Miles City, Montana between the dates of June 23 through June 29, 1989.

Based upon this record, the Board concludes that the Carrier did not act arbitrarily or in an overly harsh manner when it dismissed the Claimant from service.

Accordingly, the claim will be denied.

Award The claim is denied. This Award was signed this 10th day of March 1990.


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