

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

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*****
BURLINGTON NORTHERN RAILROAD COMPANY          *
- and -                                         *
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES    *
*****                                         *
                                           CASE NO. 86
                                           AWARD NO. 86
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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. Randy Harman Drew, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on September 10, 1973. The Claimant was subsequently promoted to the position of Machine Operator and he was occupying that position when he was dismissed from the Carrier's service on June 26, 1990. The Claimant was then returned to service with seniority unimpaired effective August 6, 1990, so the discipline assessed was a suspension without pay for forty-one (41) days.

The Claimant was dismissed from the Carrier's service as a result of an investigation which was held on June 14, 1990 in the Burlington Northern Depot in York, Nebraska. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rule 530(B) of the Maintenance of Way Rules for the theft of ballast from the shoulder of Siding Track at York, Nebraska on May 31, 1990.

Findings and Opinion

On May 31, 1990 the crew members of an east bound coal train reported seeing two individuals loading ballast from the shoulder of a siding track at York, Nebraska into private vehicles. Upon receiving this report, Roadmaster T.M. Mroczek contacted the York police.

At approximately 6:40 p.m. on that same day, Special Agent Walter W. Powell was advised of the incident by the dispatcher in Lincoln, Nebraska.

On June 1, 1990 Special Agent Powell contacted the York Police Officer, R.L. Holmes, who had investigated the complaint. Officer Holmes advised Special Agent Powell that he had spoken to a Mr. Mark Brouillette and the Claimant regarding the removal of the ballast on May 31, 1990. Officer Holmes further advised Special Agent Powell that the Claimant had told the officer that he had permission from his supervisor to take the rock.

On June 3, 1990, Special Agent Powell visited the track site to photograph the areas in which he observed ballast had been removed. On June 4, 1990, Special Agent Powell interviewed Mr. Brouillette who informed Powell that (1) he had helped the Claimant remove the ballast, (2) he had used some of the ballast around his residence, (3) he had offered to pay the Claimant for the ballast and (4) the Claimant had refused to take any money for the ballast.

On June 7, 1990, Special Agent Powell and Special Agent D.A. Hopkins interviewed the Claimant. At that time, the Claimant made the following statement to the Special Agents:

"I picked up rock along right away at York, Nebraska along eastward siding between Blackburn and Delaware Avenue to put along my property. I had permission from section foreman at York. I was careful not to take too much away from shoulder to cause sun kink. While doing so on May 31st someone called in to the York Police and they came out to see what it was about. I explained in detail why I was there and had permission. He seemed that everything was fine."

Special Agent Powell also testified that the Claimant informed him that he was not selling the ballast to Mr. Brouillette.

Section Foreman Leslie Joe Epp testified that he received a telephone call from the Claimant requesting permission to obtain some

red rock for landscaping around his home. Section Foreman Epp testified that he advised the Claimant that he could take the rock provided he, the Claimant, did not remove an excessive amount and cause any possible damage to the road bed.

The Claimant testified that he did, with the assistance of Mr. Brouillette, remove ballast from the siding track between Blackburn and Delaware Avenue. The Claimant testified that as he was removing the ballast he was also shoveling rock into areas where the end of the ties were exposed. The Claimant testified that he had obtained permission from his Section Foreman to take this ballast. The Claimant testified that no money or gifts of any kind were involved in the incident.

The Claimant further testified that he had previously received permission from the Roadmaster at Wymore, Nebraska and the Roadmaster in Aurora, Nebraska to take some ballast. The Claimant testified that on those prior occasions he had once received a written release to take the ballast and once received a verbal release.

The Union has argued that the Claimant had no intent to steal from the Carrier. The Union contended that the Claimant asked for and received permission to remove the ballast, and that the Claimant did not remove the ballast in order to sell it for personal profit.

The Board finds that the facts establish that the Claimant had good cause to understand that he had permission to remove the ballast. The Claimant had, apparently, been removing the ballast over a number of days and had been proceeding in an open and notorious manner. Such action establishes, in this Board's opinion, that the Claimant did not intend to misappropriate the Carrier's property. It is clear from the Claimant's behavior that he understood his actions to be in compliance with Carrier rules.

Accordingly, the Board will sustain the claim.

Award: The claim is sustained. The Carrier is directed to physically expunge any reference to this discipline from the Claimant's Personal Record. The Carrier is further directed to reimburse the Claimant for all lost pay and benefits.

This Award was signed this 10th day of October 1990.

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