

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. 89
AWARD NO. 89

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. Daniel C. Gonzales, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on June 10, 1977. The Claimant was occupying that position when he was dismissed by the Carrier on September 7, 1990.

The Claimant was dismissed from the Carrier's service as a result of an investigation which was held on August 13, 1990 in the Burlington Northern 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 Rule 2 and Rule 564 by failing to provide factual information to the Railroad Retirement Board which resulted in his being paid for claims not due on June 4, 5, 6, 7 and 8, 1990, when he was working for the Carrier.

Findings and Opinion

Roadmaster G.R. Douthit testified that the Claimant was working for him on June 4, 5, 6, 7, and 8, 1990. Roadmaster Douthit also testified that the Claimant filed for unemployment benefits from the Railroad Retirement Board for those same dates.

The Claimant testified that he received compensation from the Railroad Retirement Board for the dates of June 4, 5, 6, 7, and 8, 1990 and that he also received compensation from the Carrier for working on those dates. The Claimant testified that he was on medical leave and that he had completed and mailed the application for unemployment benefits prior to the dates in question. The Claimant testified that he assumed that when he reported for work on those days that the Carrier would send him home as they had done on two prior occasions.

The Claimant also testified that he had previously received Railroad Unemployment benefits when he was working at the same time and that he had had to repay the Railroad Retirement Board for these overpayments. The Claimant testified that on those prior occasions the Railroad Retirement Board had sent him a letter requesting repayment.

The Carrier has dismissed the Claimant from service based upon its findings that he violated Rule 2 and Rule 564. Those rules read as follows:

"2. Knowledge of and obedience to the rules is essential to safety. The fact that an employee may not have been examined on certain rules or regulations will not be accepted as cause for failure to be familiar with them. the railroad reserve the right to examine its employees on any portion or all of the rules at any time. If in doubt as to the meaning of these rules, employees must apply to the proper authority of the railroad for an explanation. Any violation of the rules must be reported promptly to the proper authority."

"564. Employees will not be retained in the service who are careless of the safety of themselves or others, disloyal, insubordinate, dishonest, immoral, quarrelsome or otherwise vicious, or who conduct themselves in such a manner that the railroad will be subjected to criticism and loss of good will."

In reviewing the language of Rule 2 this Board must assume, since Conducting Officer E.C. Gallagher did not pursue a relevant line of questioning, that the Carrier has found the Claimant to be guilty of a lack of knowledge of Booklet UB-10, which booklet,

apparently, explains the proper method for completing an application for unemployment benefits.

However, the Carrier has failed to develop a record which contains sufficient evidence upon which this Board may rely to establish that the Claimant, in fact, violated Railroad Retirement Board and/or Carrier procedures concerning the manner in which unemployment benefits are to be claimed and received. Although the Organization elicited testimony from Ms. Dianne Scott, the Roadmaster's Clerk at Denver designated by the Carrier for the processing of unemployment claim forms, her testimony does not establish, with any certainty, that the Claimant was engaged in a practice prohibited by the Railroad Retirement Board and/or the Carrier.

This Board does not intend to imply that an employee acts properly when he/she knowingly claims unemployment compensation for days upon which he/she receives compensation from the Carrier. However, as noted above, in order for this Board to sustain a disciplinary action the record established by the Carrier must contain clear and convincing evidence that a violation occurred. The Carrier's failure to produce a witness from the Railroad Retirement Board and/or to establish through the testimony of Roadmaster's Clerk Scott that the Claimant engaged in improper behavior, regarding the application and implementation of the Retirement Board's unemployment compensation rules, must result in this Board's finding that the Carrier has failed to meet its burden of proof.

The Claimant was also charged under Rule 564, presumably for his alleged dishonest or immoral conduct. Absent evidence in the record to establish that the Claimant's conduct was violative of existing rules and procedures promulgated by the Railroad Retirement Board and implemented by the Carrier, this Board finds insufficient evidence to conclude that the Claimant was properly subject to discipline.

Based upon the foregoing findings, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to reinstate the Claimant with full back pay and benefits and with seniority unimpaired. The Carrier is further directed to physically expunge all reference to this discipline from the Claimant's Personal Record.

This Award was signed this 15th day of December 1990.

Richard R. Kasher

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