NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY	
and	CASE NO. 94
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	AWARD NO. 94

On May 13, 1983 the Brotherhood of Maintenance of Way Employes (hereinafter the "Carrier") 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 (3) 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 procedures.

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. Gerald K. Stluka, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on April 27, 1971. The Claimant was subsequently promoted to the position of Machine Operator and he was occupying that position when he was censured by the Carrier on November 6, 1990.

The Claimant was disciplined as a result of an investigation which was held on October 8, 1990 in the Carrier's depot in Gillette, Wyoming. At the investigation the Claimant was represented by the Organization. The Carrier disciplined the Claimant based upon its findings that he had violated Rules 564 and 574 by falsifying payroll numbers 553-812 (Fargo Division) and 713-186 (Denver Division) which payrolls closed on July 31, 1990.

Findings of the Board

The Claimant, who was working as a Machine Operator on the Fargo Division during the month of July 1990, was responsible, as were numerous employees similarly situated, for completing his own payroll documentation.

The Claimant completed a Carrier generated payroll form, Payroll #553-838, for 32 hours straight time wages for the dates

of July 16, 18, 19, and 20, 1990. There is no dispute regarding the propriety of the submission of this payroll form or the Claimant's receipt of pay for these days. This form was submitted to the Fargo Division payroll office.

The record reveals that the 553 prefix on Carrier generated payroll forms results in the processing of such forms by Fargo Division payroll personnel; while the 713 prefix on Carrier generated payroll forms results in the processing of such forms by Denver Division payroll personnel.

The Claimant was disciplined because he allegedly submitted two (2) payroll forms for the same time worked during the last week of the month of July 1990. Specifically, the Claimant was alleged to have filed payroll form 553-812 with the Fargo Division and payroll form 713-186 with the Denver Division for the same work he performed on the dates of July 23, 24, 25, 26, 27, 30, and 31, 1990.

In concluding that the Claimant falsified the above referenced payroll forms, the Carrier relied upon the testimony of Roadmaster L.R. Ross, Denver Payroll Manager R.S. Wells and Supervisor of Payroll and Personnel in Fargo Mr. N.C. Nitskowski. Their testimony established that the two (2) payroll forms for the same dates were processed by the Fargo and Denver Divisions and that the Claimant was overpaid for the month of July 1990 in the amount of $758.64. Their testimony further established that that amount of overpayment was recovered when the Carrier discovered the discrepancy and deducted the appropriate amount from the Claimant's paycheck for the period ending October 15, 1990.

The Claimant testified that he did, in fact, submit two (2) payroll forms for the same time frame. However, the Claimant testified that after submitting the first payroll form, #553-812, he discovered that he had failed to include a fellow worker's time on the form. The Claimant testified that he then spoke with payroll personnel in the Fargo division payroll office regarding how he should correct the error; and that based upon their advice he resubmitted the payroll form which eventually was processed by the Denver Division payroll office.

The documentation and the testimony in the record before the Board is confusing, at best. It is clear that the second payroll form, which bore a prefix of 713 and therefore was a form properly processed by the Denver Division payroll office, bore the preprinted name of the Claimant with his employee number. It is conceivable that the Claimant had this form in his possession as the result of previous service on the Denver Division, and it is arguable that he attempted to use this form to draw "double payment" from the Carrier for the same dates of service. On the other hand, it is conceivable, as the Claimant has testified, that the Claimant struck out the word

"Denver" in the timeroll title box on the payroll form as he intended to have the Fargo Division payroll personnel correct, amend or replace payroll #553-812 which he had previously submitted.

In order to sustain the imposition of discipline, the Carrier is required to present substantial and convincing evidence that an employee violated, or in this case intended to violate, established rules. In the instant case, the Carrier has failed to present such evidence. While there is reason to believe that the Claimant may have engaged in a scheme to have two (2) different payroll divisions pay him for the same time worked, the Carrier's case is essentially based upon suspicion and conjecture.

The supervisory payroll personnel who testified conceded that the Claimant may, in fact, have spoken with payroll personnel regarding the method by which he should resubmit a payroll form for the dates of July 23, 24, 25, 26, 27, 30, and 31, 1990. The Organization properly argued that the Carrier's failure to present witnesses who may have spoken with the Claimant regarding the manner in which the payroll form could have been amended or replaced undercuts the reliability of the Carrier's contention that the Claimant intended to defraud his employer.

In further support of its claim that the Claimant falsified payroll submissions, the Carrier relies upon the fact that the Claimant did not, of his own volition, seek to return the excess payment of approximately $750.00 which he received for the July 1990 payroll period. The Board finds it unlikely that the Claimant would not have recognized that he was substantially overpaid for the period ending July 1990; and the Board finds little reason to credit the Claimant's statement that he did not consider $750.00 as an overpayment because the increased compensation may have been due to receipt of an old "time claim". The Claimant has failed to identify any specific time claim or claims he had pending during the relevant time frame; and thus, the Board is better persuaded that the Claimant sought, by his silence, to profit from the Carrier's error.

However, in spite of the above conclusion, the evidence presented by the Carrier does not support a finding that the Claimant falsified or intended to falsify the two (2) payroll forms submitted for the dates in question. Accordingly, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to physically expunge the censure and any reference to this discipline from the Claimant's Personal Record. This Award was signed this 5th day of February 1991.

Richard R. Kasher

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