File: BMWB 82-12-16
B-RM-239C

Public Law Board No. 4161

Parties to Dispute

Brotherhood of Maintenance of Way Employees )
)
vs )
)
Burlington Northern Railroad )

Case No. 22

Award No. 33

STATEMENT OF CLAIM

1. The dismissal of K. Knutson and J. N. Brilz for alleged violation of Rule 702(B) was unwarranted and an abuse of the Carrier's discretion.

2. The dismissal of any others of the eighteen (18) members of Carrier's Tie Gang No. 964 who were dismissed by the Carrier on July 17, 1982 and who have not been reinstated on leniency basis was unwarranted and an abuse of the Carrier's discretion.

3. That all Claimants included in (1.) and (2.) above be reinstated to service with seniority and all other benefits unimpaired, their records cleared of the charges leveled against them, and they be compensated for all wage loss suffered.

BACKGROUND

The Claimants were part of a forty-three (43) person tie gang, referred to in the record as Billings Region Tie Gang No. 964, who were assigned to a work site at Trident, Montana on the morning of June 8, 1982. The work day began at 6:00 AM and after boarding a Carrier bus and van the gang arrived on site at approximately 6:20 AM. The tie gang was headquartered in camp cars at Logan, Montana. Because it had been raining throughout the night and because of continuing work conditions which they deemed unsafe Claimants Knutson and Brilz as well as sixteen (16) co-workers refused to begin working immediately. They were subsequently cited for insubordination and requested to attend an investigation on June 22, 1982. After the investigation was held

the eighteen (18) laborers were discharged by letters dated July 17, 1982. According to the record a majority of the discharged employees who had been members of Tie Gang No. 964 were returned to work on leniency basis on various dates which included October 4, 1982, April 25, 1983, May 4, 1983 and May 26, 1983. Those who were not returned on leniency basis are party to this case. The claims at bar have been progressed on property in the normal manner up to and including the highest Carrier designated to hear such before this dispute was docketed before this Public Law Board for final adjudication.

Rules and Agreement Provisions

In its discharge letter to the members of Tie Gang No. 964 in question the Carrier stated that they were discharged for violation of Rule 702(B). This Rule reads:

(E)mployees must comply with instructions from proper authority.

During the investigation the Vice General Chairman of the Organization introduced into the record the Carrier's Safety Policy from Form 15001 (8-81) which states, in pertinent part, the following:

> (S)afety is essential for efficient transportation. Managerial concern for accident prevention shall manifest itself throughout the company. (T)o this end the management of the Company is dedicated...
>
> ...(T)he policy of the Burlington Northern is to provide a sufficient, efficient, safe transportation service with personal safety as an absolute requirement in all activities.

It has been the position of the Claimants throughout the handling of this case that the Carrier was in violation of various Rules of the Agreement when it discharged them. Of particular pertinence, which is cited in the record, is Agreement Rule 25(E) which reads, in part:

> ...(E)xcept in an emergency and when required to patrol track during heavy rains, employees reporting will not be required to work in the rain for the sole purpose of receiving payment under this Section.

FINDINGS

The instant case centers on the proper interpretation of the Agreement's rain provision which is found in Rule 25 and this provision's relationship to the Carrier's policies related to safety. Because of the nature of the dispute at bar these two issues are inseparably intertwined. Also tangential to these issues is the question of management rights under Carrier's Rule 702.

The testimony given at the investigation by the Manager of Regional Gangs establishes two points. First of all, it was his operational policy that track gangs work under all conditions except when there was an "...outright downpour" and/or when there was lightning. As he states in the record, these were his "...absolute instructions". The second point underlined by this same Manager at the investigation was that on the morning of June 8, 1982 there was no downpour. But was there rain? The transcript of the investigation shows with sufficient substantial evidence, from the testimony by the Manager himself, that it was raining. Substantial evidence has been defined as such "...relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229). At one point in his testimony the Manager states that it was raining but "...not...enough" not to work; at another point he states that there was no downpour but that "...moisture was falling". As corraborating evidence the record also shows that the Manager was wearing his rain jacket when he instructed members of Gang No. 964 to start track work at 6:20 AM on June 8, 1982 and that he told members of this gang, while they were on the bus, that they should have had their rain gear. Evidently, the members of the gang would not have needed rain gear if it was not raining. The Manager also testified that, in his estimation, trackmen "...have to be prepared to work in any type of condition out there". Undoubtedly it was raining on the morning of June 8th when the laborers were ordered off the bus in order to begin work. Such conclusion is corraborated also by testimony given at the investigation by the employee spokesmen of the eighteen (18) laborers.

These witnesses described the weather conditions on the morning of June 8, 1982 as a "...slow steady rain", or as a "...steady rain". An additional witness for the Claimants testified that at 6:20 AM on the morning in question there was a "...hard steady rain" and that the Gang Foreman and the Manager of Regional Gangs himself were both wet from "...the shoulders down" from standing in the rain for from five to ten minutes. The record sufficiently establishes, therefore, that it was raining fairly hard on the morning of June 8, 1982 in and around the environs where Carrier's Gang No. 964 was scheduled to start work.

Throughout the handling of this case Carrier's officers have consistently and persistently emphasized their management rights under Rule 702(B). Evidently, however, this Rule must be reasonably understood and implemented in terms of its relationship to other Carrier Rules, other statements of Carrier policy, and the labor Agreement between the parties.

The Board notes that Rule 25(E) does not use the term, "downpour", but it uses the term, "rain". Reasonable men of common sense know the difference between what these two terms mean and the Board will not belabor this point. Was Carrier's supervision, basing itself on Rule 702(B), warranted in interpreting the term, "rain" as it is found in Agreement Rule 25(E), as "downpour"? It is the conclusion of the Board that Carrier's supervision was not warranted in doing so unles such interpretation was consistent with the implementation of other Carrier Rules and policy. For example, Safety Policy Form 15001 explicitly places "...accident precaution" and "...personal safety" as an "...absolute requirement" on Carrier's officers. On the other hand there is considerable evidence in the record which is presented by the Organization, none of which is refuted by the Carrier, to show that rain of the type in question on the morning of June 8, 1982 created conditions whereby employees were put at considerable risk if they worked on the tracks. Testimony at the investigation by both the laborers and by an auto spike operator underlined the fact, from experience, that track equipment could not be adequately stopped when the tracks were wet when it was raining.

This was not refuted by the Carrier. Additional testimony was given about accidents themselves which had occured in the past under such rainy conditions. For example, one witness testified that at the Carrier's Reed Point location a man slipped on a tie while it was raining and "... went head over the bank". Another employee was injured in the rain while working with a "...clawbar (and) smashed his hand on the rail". Another witness testified that "...four people got hurt (working) in the rain" in the spring of 1982 prior to the June incident under consideration here. These injuries involved "...knee injuries" and an employee who had a "...plate" dropped on him. None of this is denied by the Carrier in the record. On the other hand where the tracks were wet from rain "... machines that run down the track don't have time to stop because of the slippery rail...", according to one witness. When working in close proximity to a machine under such rainy conditions, or when working between two machines while rails are being lifted or placed and/or when plates are being set such inability to quickly stop in the rain creates "...unsafe working conditions" according to testimony given for the Claimants.

Since this particular case, which is not common, involved for all practical purposes a "class action" levying of discipline by the Carrier's supervision the Board must attempt to understand why the employees, as a group, behaved as they did on the morning of June 8, 1982. There is nothing in the record to support that the Claimants to this case, nor any of their other co-workers who accepted reinstatement on various dates on leniency basis, had a history of insubordination. The record does support these laborers' concern with safety, however, as the foregoing shows. In addition, the record points to one additional point which is of considerable importance to this case and which is also related to the issue of safety. This point has to do with how the track laborers were transported, as a matter of past practice, from their point of disembarkment from the Carrier's bus to the point on tracks where they were working. It is undisputed that the Carrier did not use special equipment to transport the laborers, or "...man carriers" to use the terminology of

record, but that it was the custom by supervision to simply instruct a large number of laborers to "...hang on" a piece of track equipment as it proceeded to the work site. For example, testimony at the investigation shows that on the day before June 8, 1982 the Carrier had some "...twenty men on the back (of the) spiker riding up and down the rail" trying to locate the bus. The record supports the reasonable conclusion that this was the mode of transportation to the work site which the members of Gang No. 964 understood would be used on the morning of June 8, 1982. This particular machine was built to accomodate two (2) passengers. It is an incontestable conclusion of common sense that permitting (or ordering) some twenty (20) employees to ride a machine built to accomodate two (2) would be a dangerous procedure under the best of conditions. All the more so when the machine would be wet and slippery from rain.

The record as a whole supports the conclusion that the Claimants were put in an untenable situation by supervision on the morning of June 8, 1982 when they were ordered to work under the conditions which existed at the time the order was given. On the one hand, they were obliged to obey Rule 702(B) and follow instructions, and on the other hand they were obliged to obey Rules of the Carrier such as Rule 700 which states that they would jeopardize their jobs if they were careless of their own safety or that of others. This Rule reads, for the record, as follows:

> 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 do not conduct themselves in such a manner that the railroad will not be subjected to criticism and loss of good will. (Emphasis added).

Under normal conditions it would have been the obligation of the Claimants to have obeyed the order and to have grieved later. Abundant arbitral precedent establishes the validity of such procedure (Third Division 8712, 15828, 16286, 20030; Public Law Board 3443, Award 17 inter alia.). The record in the instant case shows, however, with sufficient evidence that this was one ofthose extraordinary circumstances wherein the application of the "obey now, grieve later" principle was reasonably

forfeited in favor of the grievants' personal safety. The record as a whole warrants the conclusion that the Carrier officers were in violation of both Agreement Rule 25(E) and the Carrier's own policies, outlined on Safety Policy Form 15001, dealing with safety. The record further supports that supervision attempted to put the Claimants in a position whereby they themselves would potentially have been in violation of Rule 700.

In cases such as this the Carrier, as moving party, must bear the burden of proof that the discipline assessed was warranted and reasonable (Fourth 3379, 3482; Public Law Board 3696, Award 1). On merits that burden has not been met and the claim must be sustained in full.

AWARD

The claim is sustained for Claimants Knutson and Brilz and any and all other Claimants, as outlined in (2.) of the Statement of Claim who have not been reinstated to service on leniency basis as a result of their dismissal on July 17, 1982. Compensation owed to the Claimants shall be paid in accordance with Rule 40(G) of the Agreement and the principles laid down in Award 1 of Public Law Board 4161. The Claimants shall be notified within thirty (30) days of the date of this Award of their rights as stated herein, including rights of reinstatement with seniority unimpaired. The Claimants shall provide the Carrier with documentation relative to earnings during the time-frame of July 17, 1982 until the date of reinstatement. All compensation due to the Claimants shall be minus such earnings.

Edward L. Suntrup, Neutral Member

B. W. Potter, Carrier Member (I dissent)

Karl P. Knutsen, Employee Member

Date: July 28, 1987