

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 36

Carrier File No. 4MWB 90-04-30

Organization File No. T-M-709-G

STATEMENT OF CLAIM

1. The dismissal of Laborer N. Hopkins for alleged "Violation of Rule G and Rule 532(B) of the Rules of the Maintenance of Way, Form 15125, on or about 4:15 PM, September 12, 1989 at Bridal Veil, Minneapolis, Minnesota as disclosed by testimonies offered at investigation accorded you on October 9, 1989", and for alleged "Violation of Rule 532(B) and Rule 537 of the Rules of the Maintenance of Way, Form 15125, on or about 3:10 PM, September 12, 1989 at Bridal Veil, Minneapolis, Minnesota as disclosed by testimonies offered at investigation accorded you on October 20, 1989" was arbitrary, excessive and in violation of the Agreement.

2. The Claimant shall be reinstated with seniority and all other rights unimpaired, his record cleared of the charges leveled against him, and he shall be compensated for all wage loss suffered.

F I N D I N G S

As a result of an incident on September 12, 1989, the Claimant was subject to two investigative hearings. The first concerned his actions while returning from work on a bus with 13 other crew members. The Claimant took a wooden pick handle from the tool box and struck two employees, seriously injuring them. The second

concerns his refusal, shortly thereafter, to follow specific direction to undergo a urine test for drugs or alcohol. He had been advised that such refusal was considered by the Carrier to be a violation of Rule G and Rule 523(B), which reads: "Employees must comply with instructions from proper authorities."

The Carrier found the Claimant guilty of the charges stemming from both hearings, and the Claimant was dismissed from service. Without more, there would be no basis for the Board to disturb the Carrier's disciplinary action. There are, however, other considerations.

The Claimant was the only black person among the 14-person crew. He testified to disparaging remarks by several employees, including the use of the word "nigger", both on the bus trip to the work assignment and on the return trip. His account is disputed by other employees who testified at the hearing, but the Board is persuaded that there was at least sufficient talk to irritate the Claimant.

In addition, there is another background aspect. This is summarized in Special Board of Adjustment No. 925, Award No. 83 (Kasher), which reviewed the same hearing record but in relation to one of the other employees. That Award stated:

As a result of the recent tragic loss of his five year old son by motor vehicle accident, Mr. Hopkins [the Claimant] was, apparently, in an emotionally distressed state. A document in evidence entered on Mr. Hopkins' behalf and authored by the physician who was treating him for his mental health problem, stated that "[the incident on the bus] would not have happened but for the stress that he [Hopkins] was going through".

While this written statement alone does not support a finding that Mr. Hopkins was suffering from diminished capacity, the testimony of other witnesses to the effect that Mr. Hopkins seemed to be "confused" and acting "out of character", as well as Mr. Hopkins' testimony to the effect that he did not recall striking two (2) fellow employes, supports this Board's conclusion that it was Mr. Hopkins' condition that was the cause of the incident.

There can, obviously, be no defense for the use of physical force upon a fellow employee, even in the face of severe verbal provocation, as perceived by the Claimant. The account related above is, however, some explanation of the erratic and dangerous conduct. This deserves some consideration.

There are also some special circumstances involved in the other charge which, as stated in the hearing notice, was confined to "alleged violation of Rule G". The Board does not fault Carrier representatives' decision to subject the Claimant to a urine test, based on his aberrant behavior. The circumstances which followed, however, are not those normally found when an employee is directed to undergo a "reasonable cause" drug and alcohol test. The Claimant was approached concerning the test while he was in police custody, hardly a moment when the Claimant could be expected to respond as rationally as in other circumstances. He indicated his consent on condition that other employees involved also be tested. He was, of course, not in a position to impose such condition and continued to refuse. According to Carrier testimony, he had been advised that refusal to take the test would be "considered" violation of both Rule G and Rule 532(B). There was, however, no finding of actual violation of Rule G.

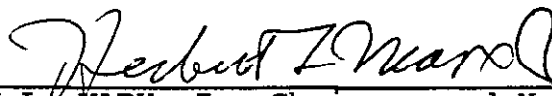
The Board finds no fault with the Carrier's resolution that the Claimant was guilty of the charges in both hearings. Under all the circumstances, however, the penalty of final dismissal from service is unwarranted. These circumstances include provocation combined with the Claimant's stressful mental state. Based on an extensive suspension, which will remain on the Claimant's record, there is no basis to believe that such corrective disciplinary action will be ineffective as to future conduct.

The Board notes that the Organization raised a procedural issue during the claim handling process as to the timeliness of a Carrier appeal response. Since this was not pursued before the Board, the Board will make no finding in this respect.

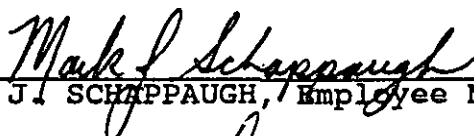
The Award will find that the Claimant shall be offered reinstatement to service with seniority unimpaired but without back pay or retroactive benefits. Time out of service shall be recorded as a disciplinary suspension.

A W A R D


Claim sustained to the extent provided in the Findings. The Carrier is directed to place this Award into effect within 30 days of the date of this Award.



HERBERT L. MARX, Jr, Chairman and Neutral Member



MARK J. SCHAPPAUGH, Employee Member



D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED: 12/4/92