PUBLIC LAW BOARD NO. 5850

Award No. 195
Case No. 195

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes

(The Burlington Northern Santa Fe Railroad (Former
(ATSF Railway Company)

STATEMENT OF CLAIM:

1. The dismissal of Trackman/Truck Driver Alexander G. Schneider September 5, 2000, was in violation of the Agreement, unwarranted and an abuse of discretion.

2. Mr. Schneider's record shall be cleared of all references to this incident and he will be reinstated immediately with all rights restored unimpaired and pay for all time lost.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employes within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

Claimant commenced service with the Carrier in April, 1999.

On June 1, 2000, the Superintendent wrote Claimant advising him of a formal investigation in connection with his:

> "...alleged falsification of an employment application by failing to include information revealing (he) was convicted of a crime...."

The Carrier believed it had met its obligation to furnish substantial evidence of the charges assessed and dismissed Claimant from its service.

More than a few letters exchanged hands between the parties with the Employees protesting the dismissal and the Carrier affirming its findings.

Claimant's "crime" was that in 1995, he had pled guilty to a disorderly conduct charge, a plea bargain that reduced that charge of recklessly handling, displaying or discharging a deadly weapon or dangerous instrument. His sentence was a fine and a probationary period with the understanding that at the conclusion of the probation, the sentence could then be vacated.

This guilty plea to a crime that could have been, and was eventually vacated, became a centerpiece of the Organization's defense during the investigation with references to the Black's Law Dictionary definition of vacated.

Claimant introduced several letters from his attorney who did arrange to vacate the guilty plea, but only after Claimant received the notice of the investigation but prior to the actual Hearing which had been postponed several times.

It is clear from Claimant's attorney that Claimant either misunderstood his attorney's advice or procrastinated on securing the vacate order. This differs somewhat from the findings in Third Division Award 24463 which found that Claimant's attorney did mislead him in believing the conviction would be vacated.

The following question and Claimant's response clearly demonstrates that Claimant was fully cognizant of the plea agreement he entered into in 1995, when he completed his application for employment:

"Q. by Mr. Konecny, A. by Mr. Schneider

124. Q. Were you aware of this plea agreement at the time that you completed your employment application for the BNSF in 1999?

A. Was I aware of it?

125. Q. Yes, sir.
A. Yes, sir."

His defense that he thought the guilty plea was vacated automatically after the one year probationary period does not lessen the seriousness of the charge.

Before ruling on the merits of this case, however, there exists challenges to the procedural handling of this case, any one of which could possibly lead to a ruling that the Carrier failed to provide the Claimant with a fair and impartial hearing.

The first challenge is the claim of an incomplete transcript in that during the testimony of one Carrier witness, whoever transcribed the recording was unable to pick up or hear each and every word, and did insert "inaudible" in each and every instance.

It is somewhat disconcerting when reading the transcript, and an incomplete transcript has, in some instances, resulted in the discipline being overturned. The Organization cited First Division Award 24935, but a review of that Award reveals that the Neutral found, "a large portion of Claimant's testimony and the Conductor's testimony did not appear in the transcript...."

This is not what has occurred here. Most of the inaudibles appear when a Carrier witness was testifying, but in no circumstance can the inaudibles lead one to believe that the omissions were so detrimental to Claimant's right to a fair and impartial Hearing, nor do the inaudibles in any way lessen the fact that Claimant responded negatively to the question, "Have you ever been convicted of a crime?"

It is also noted that the Employees quoted Carrier Witness Williams' testimony, inaudible and all, in its Ex Parte before this Board. At least in this quote used by the Employees to support an argument, it is clear to the Board that the inaudible in no way

left any doubt about the testimony.

Furthermore, when referencing the inaudible, the Employees stated that not only was the transcript incomplete, but it was also altered.

This is a serious challenge to the disciplinary process. It is, however, an affirmative defense that shifts the burden of proof to the shoulders of the party making that defense. Other than saying it happened, they must cite what was omitted and where the omission occurred in the record, that is, to the best of their recollection. This has not been done.

The Carrier did not respond directly to this challenge on the property, but it has included in its letter in the on-property handling the following:

> "The Carrier rejects and denies all of the other objections, arguments and claims raised in the Organization's appeals. Carrier's failure to rebut any assertion by the Organization, or to repeat or elaborate upon any positions taken by the Carrier, shall not be any waiver of our right to do so later, nor shall it be construed as any admission by the Carrier...."

The aforequoted generic rejection and denial is sufficient to overcome any argument that even though they did not respond directly, they did consider the argument and rejected and denied it.

Another challenge was that the Carrier had already prejudged Claimant's fate. They cite the testimony of the Carrier's Director of Human Resources and cited his offer to Claimant of a cash settlement if Claimant would simply resign.

This is not a matter for this Board's consideration in that it was an offer of settlement that was not accepted. Any such offers of settlement not accepted have to be treated as non-existent.

Another challenge to Claimant's right to a fair and impartial Hearing was that no

disciplinary decision was ever rendered directly traceable to the Hearing.

The discipline notice read as follows:

"September 5, 2000
* * * * *
Mr. Alexander G. Schneider
* * * * *
Dear Mr. Schneider:

On the last page of the employment application that you filed with Burlington Northern Santa Fe Railway on January 25, 1999, the following sentence appears in bold letters:

'I UNDERSTAND THAT MISREPRESENTATION OR OMISSION OF FACTS CALLED FOR HEREIN WILL BE SUFFICIENT CAUSE FOR CANCELLATION OF CONSIDERATION OF ANY EMPLOYMENT OR GROUNDS FOR DISMISAL AT ANY TIME REGARDLESS OF WHEN SUCH INFORMATION IS DISCOVERED.'

On May 22, 2000, I, the undersigned operating officer of the Burlington Northern Santa Fe Railway received information that evidences your falsification of your employment application with BNSF RR. This information was discovered in the course of an internal complaint resolution process.

Had BNSF RR been aware that you were convicted of a crime involving a weapons charge and violent behavior, no offer of employment as Maintenance of Way gang laborer would have been made.

Based on your falsification, your employment with Burlington Northern Santa Fe is hereby terminated immediately.

Please relinquish any and all Company property that has been issued to you.

Superintendent"

The Discipline Rule between the parties has only one sentence concerning decisions following the investigation, and that reads:

"...Decisions on investigations will be rendered as promptly as possible...."

The investigation was held August 23, 2000. The decision was rendered September 5,

2000. It did not refer to the August 23, 2000, investigation but it did set forth the discipline and the reason therefore. It also was rendered promptly.

Insomuch as there does not exist a violation of the agreed to Discipline Rule in that there is no specific agreed to format as to how the discipline notice is to read, the Board does find a decision following the investigation was rendered as promptly as possible. As the Carrier stated in its letter to the General Chairman on November 5, 2001, "Even though the letter does not address the hearing directly, it was issued following the hearing and is the decision you suggest was not rendered at all...." It is evident that a disciplinary letter was written that was not in violation of the Agreement

The Organization also alleges that the only reason the Carrier set out to do a background check on Claimant was because he had filed a harassment suit.

Why the Carrier launched a compete and thorough background check of Claimant is not significant and does nothing to mitigate against the charges assessed.

Another challenge was the fact the Superintendent wrote the notice of charges and rendered the discipline which impugned the validity of the disciplinary process, is denied by the Board. The Superintendent was not at the investigation.

Thus, when he got a copy of the investigation or how he reached his decision is unknown. He did state his decision was based upon an internal investigation.

Furthermore, the Superintendent was not the sole judge of the incident. The entire matter was appealed to the Labor Relations Department who independently reviewed the transcript and supported the Superintendent's decision.

The Employees also argue that even with a record such as Claimant had, and even though he did not reveal his criminal conviction, the Carrier would have hired

Claimant, and they quote some testimony from Carrier Witness Williams allegedly supporting their argument. This Board, however, finds direct, clear testimony to the contrary. Note the following:

"Q. by Mr. Konecny, A. by Mr. Williams

27. Q. Would the information that was discovered during the verification of Mr. Schneider's employment application have changed the decision of the human resources department to offer employment to Mr. Alexander Schneider, Jr.?
A. Yes, sir. The, with this information, had we known this information it would have definitely altered the employment decision in the case of Mr. Schneider. With...

28. Q. Would...
A. Go ahead, sir.

29. Q. Would Mr. Schneider have been offered the opportunity to work in the employment of the BNSF Railroad?
A. *With this information, no, sir, he would not have been.*"

Any other challenges as to the fairness and impartiality of the investigation not directly assessed have been reviewed and found without basis or foundation.

Whether Claimant's record was vacated or not, he did answer negatively to the question, "Have you ever been convicted of a crime?", when he knew while he was completing the application that he had been convicted.

Nothing has been advanced to this Board that would mitigate against discipline assessed.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

Robert L. Hicks, Chairman & Neutral Member

Rick B. Wehrli, Labor Member

Thomas M. Rohling, Carrier Member

Dated: June 25, 2002

ORGANIZATION MEMBER'S DISSENT
TO
CASE NO. 195 OF PUBLIC LAW BOARD NO. 5850

It has been said more than once that one school of thought among railroad industry arbitration practitioners is that dissents are not worth the paper they are printed on because they rarely consist of anything but a regurgitation of the arguments which were considered by the Board and rejected. Without endorsing this school of thought in general, it is recognized that a dissent is required when the award is not based on the on-property handling. Such is the case here.

Public Law Board (PLB) 5850 was set up to resolve disputes between the ATSF and the BMWE under Section 3 of the Railway Labor Act. The Neutral of this Board, as well as the Carrier and Employe Members, are to address **and only address** disputes or controversies between the parties that are brought to them. The Neutral, in effect, breaks the deadlock for the parties on the issue in question when the Carrier and Employe Members do not agree. However, when there is no dispute or controversy concerning the facts, there is no deadlock to break and the Neutral has no alternative but to accept undisputed information as fact. This Board has stated as much in previous awards. For example, in Case No. 85 the Board stated the following:

> ***"There is no controversy in this dispute. With no controversy, the only thing left for this Board is to determine if the 30 day assessment of discipline was appropriate. It was. Claim denied."***

Another example of this Board is Case no. 164, which stated:

> ***"Whether or not the Organization could prove that the Carrier's handling in this case was not the practice routinely followed; could show that it has objected to such handling in the past; or provide a clear explanation why Rule 40 (c) was violated in this particular case, this Board does not know and will not speculate. The point to recognize in this case is, the Organization did not provide such information. As Such, there is no basis for the Board to find the Carrier in violation of Rule 40 (c) of the parties collective bargaining agreement."***

Also, please see Case No. 6 of this Board:

> ***"Claimant, therefore, had knowledge of the Investigation and did elect, at his peril, to not attend. Under these circumstances, each and every charge of the Carrier remained unchallenged. The culpability of Claimant has been established."***

These are examples of Awards of this Board that are correctly on point and are in line with awards of other Boards as well. An example of others is PLB 6302 Case No. 6, Award No. 14 which unfortunately involved yours truly as the Employe Member:

> ***"During handling on the property, Carrier maintained that the consistent practice was not to pay per diem allowances for weekends preceding vacations of less than one full week. The Organization never denied the existence of such a practice. Although the Organization has argued that Carrier failed to present evidence of the practice, Carrier was not required to do so in the absence of an Organization denial of the practice's existence. Accordingly, we find that the practice governs this case and that the claim must be denied."***

The decision in this case simply ignored this well-established principle as there were several issues before this Board where no dispute or controversy existed on the property concerning pertinent details, yet, the majority failed to accept the information as fact. The following illustrates this point.

ISSUE #1

During the on-property handling, the Employes claimed the Carrier violated Rule 13 (e) in that the hearing transcript furnished was incomplete and altered in an attempt to distort the facts which totally disregarded Claimant's rights to due process. This claim was made by General Chairman Hemphill during on-property handling. Mr. Hemphill was the representative at the investigation, therefore, he knows what took place at the investigation and recognized that the transcript did not accurately reflect what occurred, so, he made the claim accordingly. The Carrier offered nothing in response to this claim. The Neutral of this Board was the first and only one to document any argument in regard to the incomplete transcript. The Neutral recognized the Employes' claim as a serious challenge to the disciplinary process, however, he further categorizes it as an "*affirmative defense that shifts the burden of proof to the shoulders of the party making the defense.*" Such a contention is just plain wrong and illustrates the Neutral's unexplainable eagerness to defend the Carrier's handling of this matter. Simply stated, the burden of furnishing proof in support of the Employes' claim does not exist absent a denial of the allegation from the Carrier. In support of this well-established fact, one need only to refer to PLB 6302 Case No. 6 already quoted above which addresses this principle specifically by stating:

> "***Although the Organization has argued that Carrier failed to present evidence of the practice, Carrier was not required to do so in the absence of an Organization denial of the practice's existence.***"
> (Emphasis added)

In that case, which again involved yours truly, a similar "generic rejection" with identical meaning was contained in the Employes' on-property correspondence as well, which did nothing to change the opinion of the Neutral of that Board. Hence, the Neutral's position here is in serious error.

Notwithstanding, it is also recognized that neither the Carrier or the Neutral commented on the fact that the Carrier altered the hearing transcript, which still must be considered fact absent any on-property information to the contrary. To conclude on this point, it is well-established that an incomplete and especially an **ALTERED** hearing transcript should be the death of any negative decision issued by a Carrier.

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ISSUE #2

During on-property handling, the Employes also claimed the following:

> **(A)** It was Superintendent Almaguer who preferred the charges against Claimant Schneider;
>
> **(B)** The record shows Superintendent Almaguer was not in attendance at the investigation and did not review the evidence presented; and
>
> **(C)** Superintendent Almaguer did not receive a copy of the hearing transcript before he issued his letter of September 5, 2000.

Because of these undisputed facts, BMWE indicated that allowing a charging officer to pass judgement on his own charges is in direct conflict with the basic fundamentals of due process which cannot be allowed to occur. This is not a mere technicality; it constitutes a denial of the Claimant's rights.

Again, the Carrier offered no argument in response to this claim. And, **again**, the first and only one to document any argument in this regard was the Neutral of this Board. On page 6 of the award, the Neutral offers the following argument:

> "*The Superintendent was not at the investigation. Thus when he got the a copy of the investigation (sic) or how he reached his decision is unknown. He did state his decision was based on an internal investigation. Furthermore, the Superintendent was not the sole judge of the incident. The entire matter was appealed to the Labor Relations Department who independently reviewed the transcript and supported the Superintendent's decision.*"

It is quite apparent, based on this statement, that the Neutral is unconcerned how the Superintendent reached his decision because he ignores the facts identified in (A), (B) and (C) above. This is in direct conflict with countless awards that set forth the most basic of principles that such decisions **MUST** be based on the evidence of record developed at a fair and impartial investigation. There is absolutely no evidence that the superintendent developed his decision based on this principle and, in fact, it remains undisputed that he had not yet received the hearing transcript when he issued his September 5, 2000 letter. Further, one cannot substitute the subsequent "*support*" of the Carrier's Labor Relations Department for the decision that is required by the Parties' collective bargaining

agreement. Finally, as I indicated during our executive session, the Members of this Board have all been around long enough to know that it is unacceptable for the charging officer to render a decision on his own charges. This is so basic it is ridiculous for anyone to argue or ignore. Typical on this point is Award No. 13240 (Dorsey):

> "...the Hearing Officer made no finding of credibility and made no decision. It is offensive to the concepts of fairness and impartially (sic) that credibility was determined and decision made by Superintendent Brewer who had issued the charge and was not present at the investigation."

To conclude this member's opinion concerning the majority's decision regarding these flagrant procedural errors, allowing an incomplete and altered hearing transcript to be the basis for issuing discipline is completely unacceptable by any established standard. Further, it is equally unacceptable to allow a charging officer to pass judgement on his own charges. This is especially true in light of the fact he did not attend the investigation and did not have the benefit of reviewing the testimony and evidence contained in the hearing transcript. These procedural defects, separately, are more than what is necessary to overturn the Carrier's decision. Together, there should have been no hesitation by this Board to overturn the decision/discipline in this case.

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ISSUE #3

It is absolutely necessary, in cases of this nature, to determine whether inaccurate information supplied by an employee is done intentionally or not. The parties agreed on this point and that the quantum of evidence required to prove a charge of dishonesty is higher than in cases involving other types of discipline. Without losing sight of this accepted principle, BMWE contended that the only basis upon which the Carrier could not agree that Claimant filled out the application honestly was its advice that it "*seems unlikely*."

Again, the Carrier offered no argument in response to this claim. Additionally, the Neutral of this Board, like the Carrier, did not cite any evidence in support of the Carrier's contention that the Claimant was dishonest. Hence, it remains that the only basis upon which the Carrier could not agree that Claimant Schneider filled out the application honestly, is that it "*seems unlikely*."

Clearly, this does not satisfy the standards of adequacy for proving a charge of dishonesty not to mention other types of discipline charges.

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ISSUE #4

As admitted to by Human Resources Manager B. Williams, the information about the conviction is **not** information that would have dissuaded the Carrier from hiring the Claimant, therefore, the Carrier was prevented from terminating Claimant Schneider's employment relationship pursuant to Rule 20 (b).

Again, the Carrier offered no argument in response to this claim. And, **again**, the Neutral of this Board is the first and only one to document any argument in this regard. Here, the Neutral cites testimony that indicates Mr. Williams would not have hired the Claimant had he known that he had been convicted of a crime. The Neutral indicates this directly contradicts the testimony of Mr. Williams that the Employes cited. Hence, by his own admission, the Neutral indicates the Claimant would not have been hired based on the ***"contradictory"*** testimony of Mr. Williams. Obviously, such reasoning flies in the face of one of the most basic fundamentals of a fair and impartial disciplinary process that requires decisions to be based on direct and positive, i.e., not contradictory, evidence.

Notwithstanding, this Board Member does not necessarily agree that the two portions of Mr. Williams' testimony cited are contradictory. Instead the testimony cited by the Employes clarifies Mr. Williams' testimony indicating he would not have hired Claimant had he known that he had been convicted of a crime ***"unless he had something to show that that had been wiped off his record."***

Hence, in either event, it is clear the majority of this Board is in serious error by concluding that Mr. Williams would not have hired the Claimant. Further, and as a result thereof, the Carrier was prevented from terminating Claimant Schneider's employment relationship pursuant to Rule 20 (b).

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In summary, **Issues (1) and (2)** are significant procedural errors committed by the Carrier which would serve to nullify any Carrier decision. **Issue (3)** illustrates just how inadequate the evidence was in this case in connection with proving the charge of dishonesty. Finally, even if Issues (1), (2) and (3) did not exist, **Issue (4)** indicates there was no valid basis for terminating Claimant Schneider's employment relationship because of the prohibition contained in Rule 20 (b).

In conclusion, and with all due respect, the Neutral of this Board, or any Board, is not to create arguments or a basis for the Carrier's decision. This is especially true where there is no dispute between the parties on the facts of the matter. In effect, by the Neutral introducing new arguments into this case file to defend the Carrier's actions, the Neutral is no longer "neutral." Instead, the Neutral becomes an "advocate" for the Carrier which is completely at odds with the duties of the Neutral's position. Clearly, the Neutral has stepped over the line in this case. As a result thereof, this Board will have to be satisfied, on this occasion, with only two (2) Board Member signatures on the award because my signature, if affixed thereto, may be construed as an acceptance by the Employes that the decision is procedurally acceptable and appropriate, which is simply and emphatically not true.

Yours truly,

R. B. Wehrli
Organization Member

Exec.ses.195 6-20-02

CARRIER MEMBER'S RESPONSE TO THE ORGANIZATION'S DISSENT TO CASE NO. 195 OF PUBLIC LAW BOARD NO. 5850

The Organization has made allegations in their dissent that must be addressed if for no other reason than to let the Board and the Arbitral community know that this Carrier does not condone disclosing discussions between the parties and the Arbitrator in executive session under any circumstances.

Even though the Organization's dissent does not contain anything really meaningful, it is vital that the Carrier address the Organization Member's remarks on the fourth page of the dissent where the Organization Member states, "Finally, as I indicated during our executive session, the Members of this Board have all been around long enough to know that is is unacceptable for the charging officer to render a decision on his own charges. This is so basic it is ridiculous for anyone to argue or ignore." The dissent goes on to quote a Dorsey Award (3-13240) as if all the Awards on the subject reflect Mr. Dorsey's opinion. The way the quote is written, the Organization member makes it appear as though the Carrier Member and the Arbitrator agreed with his position. However, Third Division Award 13383, (Hall), reviews a similar argument. Mr. Hall held:

> **As applied to the record and facts in this case we cannot concur in the decision arrived at in Award 13180. We must, necessarily, start out with the premise, that in the absence of an Agreement restricting the powers of the management, the Carrier would have an inherent right to dismiss or discharge an employe without a hearing. On this property, however, Carrier has restricted itself by Agreement in the matter of discipline of its employees as contained in Rule 26 to Rule 31, inclusive, of the Agreement. Having examined these Rules we can find nothing that prescribes who shall prefer the charges, conduct the hearings nor that the officer conducting the hearings must render the decision or assess the discipline.**
>
> **We have held in many awards that the Carrier could not be held to the same degree of perfection in the conduct of discipline cases as would be expected at a trial in a court of law. It is a matter of common knowledge that in court of law, trial and appellate judges frequently delegate to referees the sole and primary duty of taking testimony, this procedure including matters concerning discipline – such as, in contempt proceedings wherein domestic relations are involved, juvenile court hearings, disbarment proceedings involving the discipline of lawyers, and in many other proceedings. In all of these instances just referred to the trial or assigning judge renders the ultimate decision.**
>
> **In the instant case we cannot assume that there has been a complete lack of co-operation between the Terminal Trainmaster and the Superintendent in arriving at a determination of the disposition of it. . . .**

This is but one of a multitude of Awards that indicate that the Charging Officer's assessing of discipline does not violate the Agreement. Even though the Organization Member of the Board may be convinced "that it is unacceptable for the charging officer to render a decision on his own charges," the Carrier Member does not share his convictions.

Further, the Organization continues to argue that the Claimant was not guilty of falsely completing his employment application, even with the incorrectly completed application and the court records indicating the Claimant had a criminal record when he completed the application attached to the hearing as exhibits. This is evidence enough.

In support of the Carrier's position, Rule 20(b) of the Agreement provides:

> ***20(b) – Omission or Falsification of Information.*** An employe who has been accepted for employment in accordance with Section (a) will not be terminated or disciplined by the carrier for furnishing incorrect information in connection with an application for employment or for withholding information therefrom, unless the information involved was of such a nature that the employee would not have been hired if the carrier had had timely knowledge of it.

This Rule clearly gives the Carrier the right to re-think the hiring decision made, once it is determined that an employee's application was not completed correctly. It is not a matter of whether the person felt they were answering the questions on the application honestly, it is a matter of the Carrier's right to determine whether they would have hired the employee had they had the information not included on the application. In this case the Carrier would not have hired the Claimant had they known of his criminal record. Although the Organization continues to argue that the Carrier witness stated he would have hired the Claimant, the Award itself quotes clear testimony proving otherwise.

The Carrier is not going to address each of the other complaints raised in the Organization's dissent. Suffice it to say that the Carrier does not agree with the Organization's assessment of the Award.

Unlike the Organization member of this Board, the Carrier member will sign the Awards. He has signed many Awards of this Board that he did not agree with and he certainly will be called on to sign others. One thing for sure, the Carrier member of the Board cannot accept the Organization's flagrant and self-serving violation of the confidentiality of the executive session discussions.

Thomas M. Rohling
Carrier Member PLB 5850