

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6535

In the Matter of Arbitration:

BURLINGTON NORTHERN SANTA FE RAILWAY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case No. 1

Public Law Board No. 6535:

R. C. Robinson, Member designated by BMWE

W. A. Osborn, Member designated by BNSF

B. C. Deinhardt, Esq., Neutral Member and Chair appointed by National
Mediation Board

STATEMENT OF CLAIM

As set forth by the Organization,

“(1) The dismissal of Mr. R. E. Ellis for alleged violation of the Maintenance of Way Operating Rules as follows: Reporting; Statements; Furnishing Information; Carrying out Rules and Reporting Violations; Conduct; Reporting and Complying with Instructions and Respect of the Railway Company on March 3, 2000 was arbitrary, capricious, on the basis of unproven charges and in violation of the agreement [cite omitted].

(2) The claim as presented by former General Chairman E. R. Spears on May 30, 2000 to Division Superintendent T. D. Sarrett shall be allowed as presented because said claim was not disallowed by Superintendent Sarrett in accordance with Rules 90 and 91.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Mr. R. E. Ellis shall be returned back to service at once,¹ paid for all time lost and the charges be removed from his service record.”

BACKGROUND

The Claimant, Ralph Ellis, had twenty-six years of service as a trackman, machine operator and foreman with BNSF and its predecessor the St. Louis-San Francisco Railway Company. He had no prior discipline until he was dismissed in April 1999 for allegedly failing to properly notify his supervisor of an on-duty injury and failing to properly notify his supervisor of prescription medication received to treat the injury. He was reinstated in June 1999 and the dismissal was reduced to a suspension. (On November 14, 2000, in a decision by PLB 6103, Claimant was fully exonerated and the claim related to that dismissal/suspension was sustained.) On February 22, 2000, he filed a lawsuit against the Carrier for age discrimination. (The lawsuit was later dismissed by the court.)

On March 3, 2000, Division Engineer Burnie Vaughn, Roadmaster Alfred Franklin and Special Agent Tommy Sneed went to Claimant's home, told him he was removed from service and served him with a letter dated March 3, 2000, which advised him that he was

dismissed from service ... for making false statements, resulting in a lawsuit being filed against the BNSF Railway.

Your action violated the Maintenance of Way Operating Rules as follows: Reporting; Statements; Furnishing Information; Carrying out Rules and Reporting Violations; Conduct; Reporting and Complying with Instructions and Respect of the Railway Company. Also, for violations in Maintenance of Way Safety Rules as follows: Reporting.

On March 8, the Organization requested that it be advised in writing of the precise charge, that Claimant be reinstated with pay for all time lost, that his record be cleared and that an investigation be held. On April 5, the Organization again requested that the

¹ The Board notes that Mr. Ellis is now deceased.

Carrier provide the precise charges against the Claimant, prior to the investigation. The Carrier responded that the charges were "precise enough for Mr. Ellis to prepare for statements. Per Rule 91(a). Should there be further clarification needed at the investigation, the conducting officer will be courteous enough to recess and help answer any questions at that time." The letter was copied to Roy Emborg, Roadmaster, the Conducting Officer.

The investigation was held on April 14, 2000. From the beginning of the hearing, the Organization representative General Chairman E. R. Spears repeatedly objected to the investigation. On page 14 of the transcript he stated, "Mr. Emborg, before we get started, I'd like to object to his investigation totally. I've requested twice the precise charge Mr. Ellis has been charged with, and have not been furnished a copy of the precise charges. Once we got that investigation open here, he's been charged with several rules violations. We don't know how he's been charged for these violations. We haven't been informed of anything he's done out here that would warrant the carrier from charging him these violations." Page 15 by Mr. Spears, "Like I say, we don't know anything about a false statemtn or any of these other rules, either." Page 16, Mr. Spears in response to a question from Mr. Emborg as to whether he was prepared to proceed, "I don't feel like I'm prepared. We haven't been furnished with precise charges and the carrier is not going to grant my desire to, so, therefore, we'll have to proceed on." On page 42, Mr. Ellis made clear that he did not really "understand the charge of the incident that's being investigated." On page 54 and again on page 57, Mr. Ellis reiterated that he didn't know what the hearing was going to be about and Mr. Spears added, "We'd known the precise charges of the investigation, we would've had, we would've had more additional witnesses here to...on, on behalf of Mr. Ellis. That's one reason we want to request for a recess until we could be more prepared to, to handle this case, as we found out what the carrier was charging him with." On page 58 Mr. Spears claimed that the investigation had not been conducted in a fair and impartial manner because, "We wasn't able to recess for we can produce more, additional witnesses, once we found out what the carrier has charged Mr. Ellis with."

At the hearing, it became apparent that the main charge against Mr. Ellis was a statement that was included in his February 22, 2000 complaint for Damages against the Carrier. Paragraph 17 of the Complaint read, "Since his injury, Plaintiff has been mugged while at work. Although Plaintiff suffered injuries to his head that necessitated immediate stitching to close, Plaintiff dared not allow the emergency room physicians to anesthetize him and stitch his head until authorized to do so by the roadmaster for fear of again being terminated." When Carrier received the Complaint in February, it investigated and discovered that Claimant had not been mugged on duty on the property but at a convenience store. Mr. Spears asked Carrier Division Engineer Vaughn, "Could you tell us what part of that document that feels like, you feel like that you had reasons to dismiss Mr. Ellis?" Mr. Vaughn replied, "Yes. The...A good part of the document, but the main, I question most of the document, in its integrity, but the biggest part that we found false is that 'the plaintiff has been mugged while at work,' that's item number 17." At the hearing, there were also a number of questions about what reports to supervision Mr. Ellis had made of his mugging and the injuries he suffered therefrom.

By letter dated April 24, 2000, Claimant was found guilty and was dismissed from service. On May 30, the Organization filed a claim that claimant had been unjustly dismissed. By letter dated July 28, the Carrier denied the appeal. The Organization claims that it did not receive the letter until August 15, in an envelope postmarked August 11. On August 4, the Organization appealed the case to the Director of Labor Relations and asked that the claim be honored as submitted, as the Division Superintendent did not disallow the claim within 60 days as required by Rule 90.

The parties not being able to resolve the dispute, the case came before this Board. The parties agreed to submit the case on the record instead of hearing oral argument.

The Organization asserts that the charges were not clear, the Claimant was not able to prepare a defense, and he was wrongfully denied an adjournment to present witnesses once he discovered what the charges were. On the merits, he claims that the wording of the complaint was misleading. He never intended to say he was mugged while on duty and on the property. He was instead alleging that the mugging happened during a

period when he was back at work. This was relevant because he was afraid to seek full medical attention because he had been fired before for getting pain medication without notifying the roadmaster. When he realized from the investigation that the working could easily be misconstrued, he amended his Complaint. Finally, the claim should be allowed as presented because the Carrier violated Rule 90. The disallowance was not postmarked until August 11, more than 60 days after the claim was presented.

The Carrier takes the position that the finding of guilt and the dismissal were just and warranted. According to the Carrier, Claimant was clearly guilty of dishonesty. He filed a Complaint in court stating that he was mugged while at work, when in fact it was not while he was at work. He signed the Verification at the end of the Complaint stating that he had read it and that the facts were true to the best of his knowledge. He also testified during the investigation that he had read the lawsuit in its entirety before he signed it. The charge was adequately specific for the Claimant and the Organization to prepare for the hearing. As set forth by the Carrier in its submission,

one has to but review the court filing to see exactly what this dismissal notice says. The court filing contained 17 "Facts" with the 17th "Fact" listed being the claimant's allegation that he was mugged at work. It was his allegation that he was mugged while at work that was a part of resulted in the filing of the lawsuit. The Claimant knew he had filed a lawsuit against the Carrier and he knew what statements of "Fact" were contained in the complaint he had filed. He acknowledged during the hearing that he had read the Complaint before it was signed and field. The Claimant certainly knew he was dismissed for some statement he had made when filing the lawsuit. For the Organization and the claimant to come into the hearing acting as if they had no idea what the hearing was about is preposterous.

As to the allegation by the Organization that Carrier's declination to the initial claim was untimely, the Carrier responds that the letter was in fact filed timely. Further, even if it was late, the Carrier's liability would cease as of the date the late declination was received, here, August 15.

FINDINGS

Upon the entire record, the Board finds that the parties are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

We find that the Organization has met its burden of proving its defenses by a preponderance of the evidence. We agree that the charges were so vague as to prevent the Claimant from preparing his defense. First, the letter states that he was dismissed "for making false statements, resulting in a lawsuit being filed against BNSF." It does not state that he was also fired for failing to report his injury from the mugging to his supervisor. Therefore, the references in the charge letter and the decision letter to all of the rules about reporting are unrelated to the charge "you are dismissed from service...for making false statements." To the extent that the dismissal resulted from those rules other than dishonesty, it is defective.

Second, the letter states that Claimant was dismissed for making false statements [plural], resulting in a lawsuit being filed. It does not specify that the lawsuit being referred to is the one Claimant filed. Second, even if it assumed that it was, it says the false statements resulted in the lawsuit. Therefore, one could assume that the false statements preceded the lawsuit, not that they were contained in the lawsuit. Even knowing now what the Carrier theory was, it is unclear what the charges mean. How did the statement about being mugged at work, contained in the lawsuit, cause the lawsuit? This confusion prevented Claimant from being able properly to defend himself.

Because of the failure of the Carrier to tell the Claimant exactly what the false statements were that he was alleged to have made that resulted in the lawsuit, we find that the dismissal should be rescinded. Therefore we do not need to reach the issue of the allegedly late disallowance.

Unfortunately, Claimant can no longer be reinstated. However, his estate is entitled to backpay for the period between his dismissal and his death or any period of disability that preceded his death, reduced by any wages he made during that period, and

to any other benefits to which he would have been entitled. This Board will retain jurisdiction to ensure compliance with the Award.

AWARD

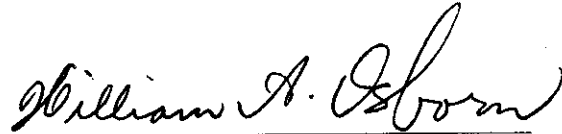
The claim is sustained.

Barbara C. Deinhardt 11/30/06

B. C. Deinhardt
Neutral Member and Chair



R. C. Robinson
Labor Member



W. A. Osborn
Carrier Member

12/07/06