

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 4055

BURLINGTON NORTHERN RAILROAD COMPANY
 (Former Frisco)
 -and-
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

*
*
*
*
*
*

CASE NO. 10
AWARD NO. 10

On January 21, 1986, the Brotherhood of Maintenance of Way Employees (hereinafter the "Organization") 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 Section 3, Second of the Railway Labor Act, Public Law 89-456. The Agreement was docketed by the National Mediation Board as Public Law Board No. 4055 (hereinafter the "Board").

This Agreement contains certain relatively unique provisions regarding the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction is limited to disciplinary disputes involving Carrier employees represented by the Organization. Although the Board consists of three members, a Carrier Member, an Employee Member and a Neutral Member, awards of the Board only contain the signature of the Neutral Member, and the parties have agreed that such awards will be final and binding in accordance with the provisions of Section 3 of the Railway Labor Act.

In accepting the assignment, the below-signed Neutral Member agreed to render awards in disputes submitted within thirty (30) days of the date required documentation was received from the parties.

In initiating a case before the Board, the parties have agreed that they will provide the Neutral Member, by mail, with the following documentation: the notice of investigation; the transcript of investigation; the letter assessing discipline; and, the correspondence exchanged on the property. The Board has the authority to require or permit the production of such additional written evidence as the Neutral Member may decide is appropriate for review. The above documentation shall constitute the record of proceedings before the Board. The parties have agreed that it is not necessary to have oral hearings in the cases presented to this Board.

The Board's review is limited to the documentation provided and any additional argument, evidence or awards which the Board might require after review of the initial submission of the dispute. In deciding whether the discipline assessed should be upheld, modified or set aside, the Neutral Member shall determine (1) whether there was compliance with the applicable provisions of Schedule Rule 91; (2) whether substantial evidence was adduced at the investigation to prove the charges made; and (3) if discipline is found to be appropriate, whether the discipline assessed was excessive.

Background Facts

Mr. George Lee Pate and Mr. Lee Ellis Bollinger, Jr. (hereinafter the "Claimants") entered the Carrier's service as Trackmen on December 8, 1969 and March 14, 1974, respectively. At the time of the incident which gave rise to their discharge from service, Claimant Pate was working as a Foreman and Claimant Bollinger was working as a Machine Operator in the vicinity of Ludwig, Missouri.

The incident which gave rise to the Claimants' discharge occurred on December 4, 1985 when Train 95411 collided with the track machine, Brush Cutter BNX 11-0029, they were charged with operating. The Claimants were part of a track mobile gang that included Mr. C.W. Angel, who was the operator of the Brush Cutter.

Claimant Pate had been issued a Track and Time Limits authorization for the Brush Cutter to move on the main track during the time frame in question.

Claimant Bollinger, working as the Assistant Operator, and Operator Angel were cutting brush north of Ludwig and moving north when Mr. Angel turned and saw Train 95411 approaching at a speed which he concluded would result in a collision. Operator Angel grabbed Claimant Bollinger and both men "bailed off" the Brush Cutter and rolled down an embankment of approximately one hundred to one hundred and twenty five feet.

As a result of the accident, Carrier officials began an investigation that same day. The Claimants' immediate supervisor, Roadmaster Dale McCafferty, advised the Claimants that in his opinion they bore no responsibility for the accident and thus there would be no need for them to undergo urinalysis tests to determine whether they had contributed to the accident because of being under the influence of drugs or alcohol.

Shortly after receiving this advice, the Claimants were directed by Road Foreman of Equipment John K. McCreery that it would be necessary for them submit to urinalysis testing. Road Foreman McCreery also directed the members of the train crew as well as Operator Angel to take similar tests. All employees complied with Road Foreman McCreery's directive except for the Claimants. When the Claimants first refused to take the urinalysis test Road Foreman McCreery read the following notice to them:

"This is to advise that this incident may involve operating rule violations (or as appropriate, abnormal behavior). Under BN's existing policy guidelines, we are requesting that you give a urine sample to BN, or to a designated medical facility in order to exonerate yourself from an alleged Rule G violation. The urine will be used to detect the possible presence of any drugs or alcohol in your body. We should also advise you that a refusal to give a urine sample will be considered a violation of Rule G and 702(B).

Do you understand? Will you provide the sample?"

After the above notice was read to the Claimants and Operator Angel, Operator Angel provided the Carrier with a urine sample, however, the Claimants refused.

As a result of their refusal, the Claimants were dismissed from service on December 4, 1985 by Road Foreman McCreery. At the

Organization's request, an investigation was held on December 19, 1985 at Cape Girardeau, Missouri. The Claimants were represented at the investigation and given a full opportunity to present evidence regarding their alleged violation of Rule 502(b) and Rule G of the Rules of the Maintenance of Way Department. On December 26, 1985 the Carrier, after reviewing the transcript of the investigation, concluded that the Claimants had refused to submit to urinalysis tests as instructed by Road Foreman John McCreery on December 4, 1985; and that this refusal was a violation of Rule G and Rule 502(b) and therefore the Claimants' dismissals from service on December 4, 1985 were upheld.

Findings and Opinion

The issues in this case are considerably more complex than are the facts. The facts are simple. The Claimants were given a direct order by a Carrier officer, who had authority to issue such orders, and they refused that order. In ordinary circumstances, there would be no question that the Claimants were properly subject to discipline up to and including discharge.

However, the transcript of the investigation reflects that there are some significant issues and mitigating circumstances which require that the dismissals of the Claimants be overturned.

First, we are unimpressed with the Organization's contention that Carrier Notice No. 71 (Investigation Exhibit "T") issued by Superintendent R.J. Zimmerman restricted Road Foreman McCreery's authority to issue instructions or orders to the Claimants. This Board reads that notice, which establishes duties of Section Foremen, Maintenance Gang Foremen, Extra Gang Foremen, Assistant Section Foremen, Track Inspectors and Assistants to Roadmasters, as general guidelines for members of the Maintenance of Way hierarchy. There is nothing in that notice which limits the right of a duly designated and authorized Carrier officer from issuing a proper order to an employee of the Carrier. Accordingly, we find the Organization's contention that Notice No. 71 prohibited Road Foreman McCreery from directing the Claimants to submit to urinalysis tests to be without merit.

Secondly, while we recognize that this Board is not being asked to determine responsibility for the accident, nevertheless the record is abundantly clear that the Claimants gave the Carrier "no probable cause" to conclude that they were, in any way, responsible for the collision. Their direct supervisor, Roadmaster McCafferty, appeared at the investigation and testified to this effect. Roadmaster McCafferty is a Carrier officer; he is not a member of the craft or

class. All witnesses to the incident, and witnesses to the physical condition of the Claimants, including Road Foreman McCreery, testified that the Claimants manifested no indicia of being under the influence of alcohol or drugs. Road Foreman McCreery testified only that Claimant Pate was "extremely excited and nervous at the time". In this Board's opinion being nervous and excited in the face of (1) a potentially fatal accident and (2) the submission to a urinalysis test which might result in jeopardizing one's job does not constitute probable cause for concluding that an employee was under the influence of or had drugs or alcohol in his/her system.

Additionally, Roadmaster McCafferty testified that after he made an investigation "with McCreery, we had determined then that it was not our men (sic) fault because they had joint track and time with 95411 and they were doing as they were instructed to do". Roadmaster McCafferty further testified that he told Road Foreman McCreery, when he was asked if he, McCafferty, had any reason to want a urine sample of the Claimants that he did not. He testified that "from what I have judged and investigating all on the incident, I said my men are in good shape", and that we do not need a urine sample from them. McCafferty testified that "at that point" he instructed his men (the Claimants) that they would not have to submit to a urine test.

While the above facts do not detract from the Claimants' improper refusal to obey Road Foreman McCreery's direct order, they do constitute significant mitigating circumstances.

If the case had stopped here, this Board would have found that discipline was appropriate but would have modified that discipline because of the above-recited mitigating circumstances. However, the record reflects that the Carrier violated the Claimants' rights to representation by the Organization at a critical period in time.

In response to questions by the Organization representative, Road Foreman McCreery testified that he had sought advice from the Assistant Superintendent of Transportation regarding administering urinalysis tests to the Claimants and that he had been instructed to do so. This testimony led to the following questions by the Organization and answers by Road Foreman McCreery:

"Q. Mr. McCreery did you make a statement to anyone in regards to if they contacted with union representatives they would be fired?

A. No sir.

- Q. Was there any mention in regards to wanting a union representative around before submitting to a urine test?
- A. Yes there was.
- Q. What was your reply?
- A. I told them that they could not contact a union representative until the sample had been given.
- Q. Why was this Mr. McCreery?
- A. My instructions are, at this particular time, that this is between the Carrier and the employee and that the union can be contacted but there is no need for them (to be) present at that time."

Road Foreman McCreery's denial of the Claimants' request for Union representation, at or about the time he had read a card to the Claimants which notified them that a refusal to give a urine sample would be considered a violation of Carrier rules, significantly violated the Claimants' rights. Although a urinalysis test may not be strictly defined as "an investigatory interview", it is clear from the language on the notice, which Road Foreman McCreery read to the Claimants, that they could reasonably believe that the urinalysis test might result in disciplinary action. Therefore the Claimants were entitled, under well-recognized legal principles of grievance handling, to have their requested Union representative present. There is no showing that an Organization representative could not have been readily available and that the urinalysis tests could not have been briefly postponed awaiting the representative's arrival. Thus, Road Foreman McCreery's refusal to grant this right fatally taints the on-the-property investigation and requires this Board to sustain the claim.

Award The claims are sustained. The Carrier is directed, within fifteen (15) days of the receipt of this Award, to restore the Claimants to service, to make them whole for all lost pay, benefits and seniority, and to immediately expunge their Personal Records of any reference to the disciplines.

This Award was signed this 20th day of December 1986 in Bryn Mawr, Pennsylvania.

Richard R. Kasher