

PUBLIC LAW BOARD NO. 6540

AWARD NO. 6

CASE NO. 6

Organization File: D010601.2

Carrier File: 70-01-2208

PARTIES TO
THE DISPUTE:

Brotherhood of Locomotive Engineers

vs.

The Burlington Northern Santa Fe Railway Company

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim sustained in accordance with the Findings

STATEMENT OF CLAIM:

"It is hereby requested that Engineer M. D. Roberts' discipline be reversed, that he be made whole for all lost time and benefits resultant from this incident and investigation, and that the notation on his personal record be removed."

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was dismissed for violation of Carrier rules prohibiting altercations and related misconduct. On January 25, 2001, Claimant became involved in an exchange of words and a physical scuffle with another engineer, S. J. Kloeckner; his dismissal is the subject of Award/Case No. 7 before this Board. A joint investigation was held on February 13, 2001. In addition, the Carrier filed one combined submission for both cases. Thus, our review simultaneously exposes us to the Carrier's handling of both cases.

In brief summary, Claimant sought to use the copy machine at Dilworth Yard for business reasons while Kloeckner, who was seated, was partially resting his arm on it. Claimant slowly lifted the lid of the machine to insert his original thus moving Kloeckner's arm. The accounts of Claimant and Kloeckner as well as two other witnesses describe the ensuing events. Those accounts differ significantly in some important respects, they differ slightly in other areas, and they essentially agree about still other facets.

Rather than ignore the Claimant entirely, it is undisputed that Kloeckner inquired of Claimant with words to the effect, "Do you ever say excuse me?" The accounts of Claimant's reply vary from "No" to "No, but I do say fuck you." Claimant denies the use of profanity. One of the witnesses corroborates that absence of profanity. However, Kloeckner claims to have heard it and his account is corroborated by the other witness.

It is essentially undisputed that Kloeckner rose from his chair and advanced toward Claimant. He admits that he placed his hand on the copy machine lid while rising from his chair, thus trapping

Claimant's hand under it, but he maintains he had no intention to slam it on Claimant's hand. Claimant's fingers were cut. Claimant says the lid was slammed down, and both other witnesses heard a loud noise from the lid.

At this point, it is clear that Kloeckner advanced toward Claimant. Claimant stands 5 foot 7 inches tall and weighs approximately 150 lbs. Claimant also has a crippled left hand that is essentially disabled except for the thumb and part of the index finger. Kloeckner, on the other hand, is 6 foot 2 inches tall and weighs about 350 lbs. and had no physical disabilities.

Claimant contends that he was thereafter "belly bumped" backwards into the restroom as Kloeckner advanced upon him. Inside the restroom, Claimant says Kloeckner had him in a headlock with his left arm and he was not able to break from Kloeckner's hold until they scuffled into one of the stalls where Kloeckner was too wide to enter. Claimant was able to stand up on the toilet and gain enough leverage to free his head. Kloeckner did not explicitly confirm the head lock on Claimant, but he did admit that "His head ended up on my left hand side around my hip area ..." At this point, one of the witnesses entered the restroom and persuaded the two to stop. Claimant immediately reported the incident to the trainmaster.

A significant part of the conflicting testimony surrounds the fact that Claimant grabbed Kloeckner's bib overalls with his good, but lacerated, right hand. Claimant says he did it to maintain his balance as Kloeckner bumped him backward through the restroom door. Kloeckner did not know whether he pushed Claimant into the restroom or whether Claimant pulled him inside.

Both employees were taken to a nearby clinic for medical examination and treatment. Claimant was diagnosed with a cervical strain and lacerations to his hand. Kloeckner had some scratches on his arms.

The foregoing narrative does not attempt to describe all of the details provided by the testimony. Its purpose is merely to outline the nature of the incident and some of the more noteworthy conflicts in the testimony.

Following a joint investigation, both Claimant and Kloeckner were dismissed. The decision letters of the hearing officer are identical in all significant respects except for the identity of the addressee. Both specifically note that each employee's personal record was considered in assessing the discipline.

The Organization has lodged a number of procedural complaints to challenge the discipline. Our review of the record, however, does not reveal any procedural shortcomings of significance. We do not find the actions of the hearing officer to have been improper in the manner in which he conducted the investigation. Moreover, the fact that the hearing officer played multiple roles in the process is not, *per se*, an irregularity. There must be an actual showing of specific improper conduct before multiple roles become a procedural problem.

On the merits, however, we have substantial concerns about the propriety of Claimant's discipline. The decision of the hearing officer does not provide any reasoning whatsoever to explain how he reconciled the significant conflicts in the evidence. While the evidence strongly portrays a great disparity in the degree of culpability between Claimant and Kloeckner, the hearing officer provides no proper explanation for treating the two employees identically. It is undisputed that Kloeckner initiated the verbal exchange. It is also undisputed that Kloeckner precipitated the physical

portion of the confrontation when he rose out of his chair, smashed Claimant's hand, and advanced upon him. Given the great difference in physical size and hand disability of the two employees, the record cries out for analysis and reasoning to explain how the hearing officer could have determined equal culpability; yet there was none provided by the hearing officer or by any of the Carrier officials that participated in the handling on the property.

The problem posed by identical discipline in the presence of apparent disparity in culpability is exacerbated when the personal records of the two employees are compared. Kloeckner's record reflects two prior disciplinary instances, in 1995 and 1999, for "Altercations and Assault." He also had a prior dismissal for insubordination and several violations of safety rules. On the other hand, according to the Carrier's submission, Claimant had a spotless record over 22 years of service.

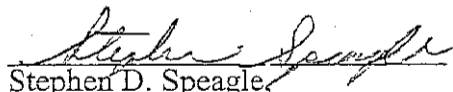
In the absence of any proper explanation whatsoever to explain the Carrier's rationale for treating the two employees identically, we are compelled to find that Claimant's discipline is excessive. We do not find Claimant to be blameless but his conduct is significantly more benign compared to that of Kloeckner. The record supports the finding that Claimant did use profanity, which tended to intensify the exchange. From that point on, however, the record strongly suggests that Claimant was essentially in self-defense and that Kloeckner was essentially in aggressor mode.

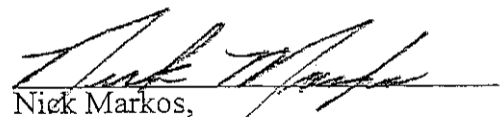
Altercations are serious misconduct and Claimant's behavior warrants serious discipline but not dismissal on this record. Accordingly, we find that Claimant's dismissal should be converted to a disciplinary suspension for cause for the time he has been out of service. The Carrier is directed to offer him reinstatement to his former employment status, if physically qualified and able to satisfy the Carrier's applicable return-to-service requirements, with seniority and the benefits of that status unimpaired but without back pay.

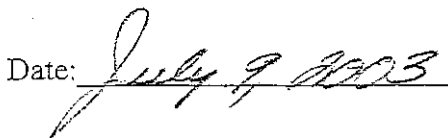
AWARD:

The Claim is sustained in accordance with the Findings.


Gerald E. Wallin, Chairman
and Neutral Member


Stephen D. Speagle,
Organization Member


Nick Markos,
Carrier Member

Date:  July 9, 2003