

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

*
BURLINGTON NORTHERN RAILROAD COMPANY *
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- and - *
*
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES *
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CASE NO. 100
AWARD NO. 100

On May 13, 1983 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 the Railway Labor Act. The Agreement was docketed by the National Mediation Board as Special Board of Adjustment No. 925 (hereinafter the Board).

This Agreement contains certain relatively unique provisions concerning the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction was limited to disciplinary disputes involving employees dismissed from service. On September 28, 1987 the parties expanded the jurisdiction of the Board to cover employees who claimed that they had been improperly suspended from service or censured by the Carrier.

Although the Board consists of three members, a Carrier Member, an Organization Member and a Neutral Referee, awards of the Board only contain the signature of the Referee and they are final and binding in accordance with the provisions of Section 3 of the Railway Labor Act.

Employees in the Maintenance of Way craft or class who have been dismissed or suspended from the Carrier's service or who have been censured may chose to appeal their claims to this Board. The employee has a sixty (60) day period from the effective date of the discipline to elect to handle his/her appeal through the usual channels (Schedule Rule 40) or to submit the appeal directly to this Board in anticipation of receiving an expedited decision. An employee who is dismissed, suspended or censured may elect either option. However, upon such election that employee waives any rights to the other appeal procedure.

The Agreement further establishes that within thirty (30) days after a disciplined employee notifies the Carrier Member of the Board, in writing, of his/her desire for expedited handling of his/her appeal, the Carrier Member shall arrange to transmit one copy of the notice of investigation, the transcript of investigation, the notice of discipline and the disciplined employee's service record to the Referee. These documents constitute the record of proceedings and are to be reviewed by the Referee.

In the instant case, this Board has carefully reviewed each of the above-described documents prior to reaching findings of fact and conclusions. Under the terms of the Agreement the Referee, prior to rendering a final and binding decision, has the option to request the parties to furnish additional data; including argument, evidence, and awards.

The Agreement further provides that the Referee, in deciding whether the discipline assessed should be upheld, modified or set aside, will determine whether there was compliance with the applicable provisions of Schedule Rule 40; whether substantial evidence was adduced at the investigation to prove the charges made; and, whether the discipline assessed was arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

Background Facts

Mr. Raymond L. Morton, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on November 3, 1975. The Claimant was subsequently promoted to Truck Driver and he was occupying this position when he was suspended from the Carrier's service for ten (10) days effective April 24, 1991 through and including May 3, 1991.

The Claimant was suspended as a result of an investigation which was held on March 28, 1991 in the Roadmaster's Office at Centralia, Illinois. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rule 531 of the Carrier's Maintenance of Way Rules for his alleged discourteous, disorderly conduct and use of profane language at approximately 11:30 a.m. on March 18, 1991 at the Hannibal Clinic, Hannibal, Missouri, while assigned as a Truck Driver to a Tie Gang working out of Sesser, Illinois.

Findings and Opinion

The Claimant, an operator of heavy equipment as a Truck Driver, is required by the United States Department of Transportation (hereinafter DOT) and the Carrier to submit to periodic body fluids testing for the purposes of detecting the possible use of prohibited controlled substances.

The Claimant had made an appointment for March 18, 1991 and was scheduled to undergo a physical examination, including urinalysis testing, at the Hannibal Clinic, Inc., Hannibal, Missouri with a Dr. Rapp.

The basis of the Carrier's determination that the Claimant was "discourteous" and had exhibited "disorderly conduct" and used "profane language" was based upon two (2) letters, both dated March 22, 1991, received from Registered Nurse Jean E. Chapman and Licensed Practical Nurse Pam Lankford who worked, respectively, for Dr. Rapp and a Dr. Johnson, both of whom were physicians at the Hannibal Clinic.

Division Maintenance Engineer Bratcher testified that he had received information at approximately 1:00 p.m. on March 18, 1991 from the Carrier's Chief Medical Officer, Dr. Newby, regarding what had allegedly "transpired between Mr. Morton and the personnel at the Hannibal Clinic".

Mr. Bratcher sponsored the two (2) above-referenced March 22, 1991 letters from the Hannibal Clinic nurses, and testified that based on those letters the Carrier understood that the Claimant had had inappropriate verbal exchanges with the Clinic's nursing staff.

The letter from Ms. Chapman, in Dr. Rapp's office, reads as follows:

Mr. Raymond Morton arrived at Dr. Rapp's office at the Hannibal Clinic, Inc on Monday, March 18, 1991, at 11:30 A.M. His driver's license was checked, he was weighed, his eyes were checked, and he was placed in an exam room. At that point, I got his vital signs and then filled out the questions at the top of the Burlington D.O.T. Physical form.

I asked him to read where it said that he certified that the above answers were true and he has read a copy of the Burlington Drug Policy. After he had signed his name, he crossed through the part dealing with the Drug Screen Policy.

I told him he could leave, because by crossing the Drug Screen Policy out, I couldn't go on with his physical. I gave him the physical form back and told him he could call another designated Burlington Doctor, but not to call my office because I wouldn't reschedule him.

Dr. Lent C. Johnson also conducts a family practice at the Hannibal Clinic, and his nurse, Ms. Lankford, wrote the following letter to Mr. Bratcher:

On March 18, 1991, I received a call from Mr. Morton stating that he had an appointment later that morning with Dr. Rapp for a Burlington Northern physical. He then asked if Dr. Johnson would give him a written order to take to the hospital for a drug screen. I told him Dr. Johnson would not be able to do that since he was not a regular patient of his and that he would not become involved.

He then repeated the question, "you mean Dr. Johnson cannot just give an order for a drug screen to be done at the hospital?" I repeated my answer, "no, he cannot because you are not a regular patient".

He then said "fuck you" and then he hung up.

Mr. Bratcher testified, upon examination by the Organization representative, that he was not privy to the conversations between the Claimant and the nursing staff at the Hannibal Clinic and that "The only thing I can verify is those are the individuals that signed them [the two March 22, 1991 letters] that I got the statement from". Mr. Bratcher also testified that he could not verify that the "conversations transpired".

Mr. Terry Hesterman, the Gang Roadmaster on the Galesburg Division and the Claimant's supervisor, testified that he had a conversation with the Claimant on March 19, 1991 regarding the Claimant's physical examination at the Hannibal Clinic; and that he initiated this conversation as the result of being advised by Mr. Bratcher that the Claimant "had had a verbal disagreement with some nurses at Hannibal Clinic, and that I was to talk to Mr. Morton when I had a chance about the incident". Mr. Hesterman testified that the Claimant said that "he had a little trouble at the Hannibal Clinic, but yes, he did get his physical taken". Mr. Hesterman testified that he asked the Claimant for "the physical papers and he did give those to me at that time".

Mr. Hesterman testified that the Claimant told him that he had made an appointment for the physical examination and that prior to going to the Hannibal Clinic he had asked the nurse if there was "a chance that he could take two urine specimens"; that the nurse had said that she would call him back after she had spoken with the doctor; that the nurse did call him back and said "no, the doctor would not do that, and hung up on him"; and that he tried to call ten to fifteen other doctors to see if it would possible for him to have two samples taken at one physical. Mr. Hesterman further testified that the Claimant told him that he then proceeded to the Hannibal Clinic for his 11:30 a.m. appointment, and that after the completion of some basic paperwork, and the checking of his heart, weight and height he was asked to sign the physical form. Mr. Hesterman testified that the Claimant told him that he told the nurse that he did not understand the Carrier's policy regarding the drug screen and sought to have it explained to him, and that the nurse said she did not have that information. Mr. Hesterman testified that the Claimant said he told the nurse that "he would like to highlight or underline and have her [the nurse] initial that he did not understand what BN's policy on drug screen [was]" and that the nurse then told him that "she didn't have to put up with his attitude and that she would like to have him leave".

The Claimant's testimony was consistent, in all relevant respects, with his rendition of the "incident" which he had conveyed to Mr. Hesterman on the day following his scheduled physical examination. The Claimant testified that when he appeared for his physical examination he asked the nurse if the doctor "would take another urine sample for me, and she said, no, he would not". The Claimant testified that he then told the nurse that "I would pay for it myself" and that the nurse told him that the doctor would not give him a "written prescription to go to the hospital to get one taken there". The Claimant testified that "I went on with my physical then". The Claimant testified that at the conclusion of a certain stage of the physical examination the following occurred:

She asked me to sign ... she asked me if I had any of the above diseases or drug ... or disease history and would I sign it. I answered those questions I never had heart diseases or cancer. And then she asked me when I went to sign that, I was reading as I signed it, and it says, "I have read the Burlington Northern Policy on drugs". And I asked her if she had a copy of the Burlington Northern Policy on drugs. And she said no. And I said would you mind if I underlined that and initial that then that I don't understand that part of it. And I made ... started to make a little mark on the name and she said you'd have to leave, I can't complete the test now.

The Claimant denied the representation in Nurse Lankford's letter that he said to her "fuck you" and hung up the phone.

The essence of this case is the Carrier's acceptance of the "facts" as they appear in the letters of the two nurses. The nurses did not appear at the investigation, and thus neither the Claimant nor the Organization representative was given an opportunity to question those "witnesses".

The agreement establishing this Board requires the Carrier to demonstrate that "substantial evidence was adduced at the investigation to prove the charges made". Neither Mr. Bratcher nor Mr. Hesterman were at the clinic. The nurses were, as was the Claimant. The Claimant's testimony is the only evidence in the record which was subject to scrutiny and evaluation, and his testimony is not self-incriminating.

The Organization representative has correctly pointed out that the Claimant was not afforded the opportunity to "confront his accusers". This Board agrees that the Claimant was entitled, at the least, to have one of the nurses appear so that he and the Organization could ask questions to clarify or explain what was written in the letters. If either or both of the nurses were available for questioning by the Claimant the Board could have determined, even if the Claimant said or did what he was alleged to have said or done, whether there were any mitigating circumstances involved.

The State Police Barracks at Hannibal, Missouri advises that it is approximately 170 road miles between Hannibal and Centralia, Illinois. If the Carrier was sufficiently concerned about the Claimant's alleged misconduct, it is this Board's opinion that one or both of the nurses could have been transported to the hearing, or the investigation could have been held at a location closer to the Clinic.

The Claimant was entitled to a more full and fair investigation than he received. In any event, as noted above, the evidence in the record does not meet the standard of "substantial" as required by the agreement, and, therefore, the claim will be sustained.

By way of dicta, this Board would observe, even though the record is scanty, that the Claimant appeared to have made a reasonable request; that is, to ensure that he could obtain, and pay for, a second urinalysis to confirm or rebut the results of the urinalysis being conducted by the Hannibal Clinic. The Board would assume that the Hannibal Clinic is NIDA certified, and thus following standard procedures would have "split the specimen" for control purposes.

The Board further assumes that the Claimant, as a layman, is not knowledgeable about such procedures. Therefore the Claimant understandably and reasonably sought to protect the job he has held, with a virtually unblemished record, for the past sixteen (16) years. His request to have a second specimen taken, and to pay for that specimen, is not, on its face, unreasonable. That is not to say that the Clinic had to comply with his request, but if his reasonable request was met with a "snippy" or discourteous response then the Claimant's alleged "attitude" would be understandable.

However, the Carrier by failing to present any reliable evidence gave the Board no opportunity to make such judgments. Thus the claim will be sustained in accordance with the above findings.

Award: The claim is sustained. The Carrier is directed to make the Claimant whole for all lost wages and benefits as the result of the ten (10) day suspension. The Carrier is further directed to physically expunge the suspension and any reference thereto from the Claimant's Personal Record.

This Award was signed this 18th day of May, 1991.



Richard R. Kasher
Chairman and Neutral Member
Special Board of Adjustment No. 925