NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award Nos. 137 and 138

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Case/Award Nos. 137 and 138

On May 13, 1983 the Brotherhood of Maintenance of Way Employes (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

Two cases, Nos. 137 and 138, have been consolidated for consideration by the Board, although they involve different Claimants and different investigations. The cases have been consolidated because the principles of discipline applicable to discipline are identical, and because both Claimants were charged and dismissed for the same act of insubordination; i.e., their refusal to shave their beards in order to be fit tested for respiratory protection.

Mr. Jerry Morris, hereinafter Claimant Morris, entered the Carrier's service as a Sectionman on May 25, 1979. He was subsequently promoted to the position of Traveling Mechanic, and he was occupying the position of Truck Driver when he was dismissed from the Carrier's service effective September 17, 1992. The Claimant was dismissed as a result of an investigation which was held on August 20, 1992 in the Roadmaster's office in Vancouver, Washington. At the investigation the Claimant was represented by the Organization. The Carrier dismissed Claimant Morris based upon its findings that he had violated Rule 564 by his alleged act of insubordination when he refused to shave his beard after being directed to do so on July 16, 1992.

Mr. David Wandler, hereinafter Claimant Wandler, entered the Carrier's service as a Sectionman on August 20, 1990. He was subsequently promoted to the position of Machine Operator and he was occupying that position when he was dismissed from the Carrier's service effective September 28, 1992. The Claimant was dismissed as a result of an investigation which was held on September 10, 1992 in the Roadmaster's office in Everett, Washington. At the investigation the Claimant was represented by the Organization. The Carrier dismissed Claimant Wandler based upon its findings that he had violated Rules 564 and 568 by his alleged act of insubordination when he refused to shave his beard after being directed to do so on July 29, 1992.

Findings and Opinion

The instant cases have their genesis in the Carrier's concern for safety associated with certain employees in the Maintenance of Way craft being exposed to a "silica dust hazard".

As a result of this concern, the Carrier, in the late spring and early summer of 1992, had its various divisions institute procedures under which specified classifications of employees in the Maintenance of Way Department would be fitted for and required to wear face mask/respirators under certain conditions.

The instant cases arose on the Pacific Division. The Pacific Division's General Manager issued Notice No. 37 on June 24, 1992. That Notice provided as follows:

> RESPIRATOR USE - MAINTENANCE OF WAY
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> Effective immediately all Maintenance of Way employees who may be exposed to silica dust and/or manganese dust and fumes will be subject to mandatory respirator use for selected operations. This is an interim control to be utilized until/unless engineering controls can be instituted to minimize exposure levels. The areas of work with the greatest potential for exposure include, but are not limited to the following:
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> > Operating or working in the immediate vicinity [visible ballast dust cloud] of ballast regulators, tampers, track brooms, tie cribbers, ballast cleaners, undercutters, ballast dumping and yard cleaning operations; as well as grinding and welding operations with manganese/metal dust and fumes.
>
> Questionnaires to determine individual ability to wear respirators have been distributed to all employees. Pacific Division Maintenance of Way

> employees (with the exception of some B&B employees not immediately subject to exposure) will be fit-tested for appropriate respiratory protection during the months of June and July. Employees must be clean-shaven at the time of fit-testing, and at any time respiratory protection is required on their position(s).
>
> Employees interested in reviewing the full Burlington Northern Respirator Manual, including the Respirator Policy should contact their immediate supervisor or the Pacific Division Safety Department.

The operative facts in both cases are not in dispute. Both Claimants Morris and Wandler have worn beards for approximately twenty years. Both Claimants Morris and Wandler have what could be characterized as neatly trimmed beards of approximately one half inch in length. Both Claimants Morris and Wandler were given adequate advance notice of the date for respirator fit-testing, and they were advised that they would have to be clean-shaven. Both Claimants appeared on the days they were scheduled to be fit-tested and they requested an opportunity to have the mask/respirator fitted over their beards in order to determine if the respirator would properly work during that part of the test when smoke was blown in the vicinity of the mask. They were not given that opportunity. They were both given direct orders to shave, and they both refused.

Both Claimants were withheld from service, the investigations described above followed and both Claimants were dismissed. Neither Claimant, Mr. Morris with thirteen years of service and Mr. Wandler with two years of service, have any discipline on their Personal Records. Both Claimants were characterized by their immediate supervisors as to good, capable and cooperative employees. The Organization Representative, who represented both Claimants, elicited testimony from the supervisors, who issued the direct orders, that neither Claimant was discourteous or abusive or profane or quarrelsome at the time that they declined to shave their beards.

The Organization Representative also produced documentation and pictures, which established that other Maintenance of Way employees, presumably most of whom worked on different Divisions of the Carrier and at least one of whom wore a beard of much greater length and of a more "unruly" style than the Claimants, had been fit-tested for respirators, had "passed" those tests, and had not been required to shave.

The Organization Representative made several attempts to elicit testimony and documentary evidence in an effort to establish that employees in other crafts, who might be subject to the same dangerous conditions regarding silica dust which motivated the

Carrier to promulgate rules for certain Maintenance of Way employees, were not subject to the same requirements as were the Claimants. The Organization Representative was rebuffed, to some extent, by both Conducting Officers, who expressed their opinion that the manner in which the Carrier treated employees in other crafts was not material or relevant to the investigations involving Claimants Morris or Wandler.

The Organization Representative, in the investigation involving Claimant Wandler, established through the testimony of Carrier witness Charles Christ, a Steel Gang Foreman, who is a clean-shaven employee, that he was fitted with two different sized respirators, and in both instances the fit-test "failed" because Mr. Christ was able to smell smoke. The Organization Representative established that Mr. Christ's "failure" of the test did not result in any adverse consequences for Mr. Christ; that is, Mr. Christ was not withheld from service and he continued working. The Organization Representative argued that withholding the Claimants from service violated Schedule Rule 40.

These two cases present some substantial difficulties for the Board.

First, it is a well-established rule in the context of the workplace that a direct order from proper authority must be obeyed, unless following such order would jeopardize an employee's health or safety. In the context of a workplace governed by a collective bargaining agreement, employees are required to follow orders and instructions from supervision, even if those directions could result in the violation of the collective bargaining agreement. Interestingly, in the Morris case, Claimant Morris testified that he was fair-skinned, and that if he was required to shave his beard and work in the high sun of July and August he would likely suffer a severe sunburn. His testimony might be construed as a defense to the charge of insubordination, as the Board might find the act of shaving, in Claimant Morris' case, as the cause of him being exposed to a health hazard. However, the same defense would not appear to be properly raised in Claimant Wandler's behalf, and the theory, absent additional evidence, is a difficult one to support.

Secondly, the Organization does not dispute the Carrier's right to promulgate a reasonable rule, which is consistently applied and which is established for the purpose of protecting employees. The Organization Representative attempted to establish a case of "disparate treatment". That is, the Organization Representative sought to demonstrate that other employees working for the Carrier, and performing the same Maintenance of Way duties, albeit those duties were performed on different Divisions of the Carrier, were not subject to the same harsh rule. While the Conducting Officers restricted, to some extent, the submission of

this evidence, there is sufficient proof in the record for this Board to conclude that all bearded employees in the Carrier's Maintenance of Way Department, who would be potentially exposed to silica dust, were not required to shave their beards before being fit-tested for respirators. In fact, it appears that a number of those bearded employees were able to be properly and safely fit-tested for respirators without the necessity of shaving.

Thirdly, the Organization Representative's attempt to establish a record, which would demonstrate that employees in other crafts, subjected to the same hazards of silica dust, were not required to (1) be fit-tested for respirators and/or (2) be clean-shaven, was a proper one. For in the context of a claim of disparate treatment, employees must be given the opportunity to challenge a rule, even if that rule is a reasonable one, by showing that the rule was not uniformly and consistently applied to similarly-situated employees. The Conducting Officers effectively cut off this line of inquiry, and they failed to insure that a full, factual record was developed so that this Board could determine whether the Claimants were treated fairly and non-discriminatorily the context of the policy's implementation.

Finally, this Board is troubled when rights of "personal preference" appear to be negated by the arbitrary implementation of a rule or policy. The rule requiring certain classifications of Maintenance of Way employees on the Pacific Division to be clean-shaven before they would be fit-tested for respirators, and if an employee failed to be clean-shaven he/she would be withheld from service and then dismissed after an investigation on the charge of insubordination, appears to be arbitrary in the face of evidence submitted by the Organization that other Division General Managers have found that safety can be assured, in certain cases, without the necessity of forcing employees to change their physical appearance and personal habits. Wearing a beard is not a "constitutional right", particularly in the face of a proper health or safety concern raised by an employer. However, wearing a beard is a "personal right", which should be safeguarded except in circumstances when it is proven that health or safety will be compromised by an employee's facial hair.

Based upon the foregoing analysis, this Board concludes that Claimants Morris and Wandler were subject to disparate treatment by the Carrier, and in spite of their refusal to obey proper authority, their exercise of a "personal right" should not have resulted in their dismissal from service.

Accordingly, the claims will be sustained and the Carrier will be directed to reinstate the Claimants with full back pay and benefits and with seniority unimpaired.

The Board would strongly suggest that representatives of the Carrier and the Organization meet and discuss, and seek to establish a uniform policy regarding fit-testing of respirators, which will not only protect the health and safety of employees exposed to silica and manganese dust, but will also protect those employees "personal rights".

Award: The claims are sustained in accordance with the above findings and opinion. The Carrier is directed to reinstate the Claimants with seniority unimpaired, and to make them whole for all lost wages and benefits. The Carrier is further directed to expunge any reference to this discipline from the Claimants' Personal Records. These Awards were signed this 24th day of December, 1992.

Richard R. Kasher

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