

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 152

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 152

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. Michael H. Doyle, hereinafter the Claimant, entered the Carrier's service as a B&B Helper on March 14, 1973. The Claimant was subsequently promoted to the position of Foreman and he was occupying that position when he was suspended by the Carrier for a period of twelve months commencing on January 11, 1993. The Claimant was also directed to meet with the Carrier's Manager of Employee Assistance for possible testing and treatment.

The Claimant was suspended as a result of an investigation which was held on December 9, 1992 at the Carrier's conference room in Fargo, North Dakota. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rules 19 and 563 as a result of allegations that he had sexually harassed B&B Carpenter Cheryl E. Anderson.

Findings and Opinion

On November 30, 1992 Ms. Cheryl Anderson, a B&B Carpenter who had worked as a member of the Claimant's crew for several years, submitted a "Complaint Form" to the Carrier's Labor Relations Representative in which she alleged that she had been harassed because of her sex. On the complaint form Ms. Anderson noted that she had received "on the job offers", that "Mike Doyle (foreman) has offered to go to motel and spend night with me" and that the Claimant made "Verbal advances directed to me in regards to 'ass' & 'what's between the legs'". Ms. Anderson noted that these events occurred "around the end of Sept. 1992".

The Carrier immediately instituted an investigation by interviewing members of the Claimant's gang on November 30, 1992. When the Claimant discovered that the Carrier was meeting with members of his gang, he requested the opportunity to meet and discuss the situation with responsible Carrier officials.

The Organization has contended that the Carrier violated elements of due process and the "fair and impartial" investigation aspects of Schedule Rule 40. Among the elements raised, the Organization contends that the Claimant was not advised that he could or should have an Organization Representative available when he met with Carrier officials on or about December 1, 1992. The Organization also maintains that the members of the Claimant's gang had dates when incidents were alleged to have occurred suggested to them and they were asked to corroborate those dates and incidents. The Organization argues that Schedule Rule 40 was violated because certain of the incidents, listed in the notice of investigation, occurred more than fifteen days prior to the investigation being conducted.

There is insufficient merit in any of those objections for this Board to conclude that the claim should be sustained. The Claimant was not denied representation at his meeting with the Carrier. He requested the meeting, and he could have requested the presence of an Organization Representative. Testimony and recollections were not placed in the mouths or minds of the Claimant's gang members. The employees who were interviewed were merely asked to recall, as best they could, whether they heard the Claimant make certain statements or suggestions, and whether, in their opinion, those statements and/or suggestions were directed at Ms. Anderson. Finally, the Carrier acted promptly and within the time limits of Schedule Rule 40 and noticed an

investigation within fifteen days of the allegation of "sexual harassment" being brought to its attention.

Much of the evidence in this case required the Carrier to make credibility judgments. The Carrier weighed the testimony of Ms. Anderson and several of the Claimant's fellow employees, to the effect that the Claimant used sexually-charged and vulgar language which distressed and/or intimidated Ms. Anderson, against the Claimant's testimony that he could not remember such statements/incidents or that, on some of the alleged incident dates, he did not make such statements.

The Carrier determined to credit Ms. Anderson's testimony and that of several gang members regarding statements made by the Claimant, directed at Ms. Anderson. Some of those statements, made as Ms. Anderson was on a ladder were to the effect that "if she were wearing a dress he could obtain a better view of what she had". The Carrier had the right to credit Ms. Anderson's testimony that the Claimant, while he and Ms. Anderson were alone in a Carrier truck, suggested to her that they spend an evening in a motel and advise the other members of the gang/crew that the truck had broken down. Contrary to the Organization's suggestions and contentions, statements of this type exceed the bounds of normal "shop talk" or the day-to-day "profanity" which one might expect to hear exchanged between Maintenance of Way employees.

The Claimant as a foreman was in a position to make work assignments to members of his crew. The Claimant received training, although it appears to be minimal, regarding what constitutes "sexual harassment". As the Organization Representative correctly points out, the "law" of sexual harassment and what constitutes sexual harassment is undergoing considerable change. However, without writing a treatise regarding the subject, it is clear in this case that the Claimant should have known that his untoward comments and suggestions and his use of certain vulgar language would likely offend and create an intimidating work environment for any female employee; even if that female employee had, what the Organization suggests, was a friendly "social relationship" with the Claimant. Accordingly, the Board finds that the Carrier had cause to discipline the Claimant, and the Board will not modify the period of suspension.

However, as part of the discipline is to require the Claimant to cooperate with the Manager of Employee Assistance and to submit to any testing and/or treatment which the Manager of Employee Assistance deems necessary, it is this Board's conclusion that it is inappropriate to restrict the Claimant "for

the duration of his employment from ever holding a foreman's or any other 'supervisory position". If, in fact, the Manager of Employee Assistance determines that the Claimant sufficiently understands his responsibility to refrain from similar prohibited activities, the Claimant's restriction should be lifted if he successfully completes employee assistance treatment or if the Manager of Employee Assistance determines no treatment is necessary.

Award: The claim is denied in accordance with the above-findings.

This Award was signed this 24th day of April,
1993.

Richard R. Kasher

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