

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 166

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 166

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. Ralph J. Moeller, hereinafter the Claimant, entered the Carrier's service as a Sectionman on August 7, 1978 and he was occupying that position when he was suspended for five days from the Carrier's service commencing on June 14, 1993 for his alleged violation of Rule 570 on April 21, 22 and 23, 1993.

The Claimant was suspended as a result of an investigation which was held on May 12, 1993 in the Section Room of the Carrier's Depot in Sioux Center, Iowa. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had failed to protect his assignment and was absent without authority on April 21, 22 and 23, 1993 while assigned as a sectionman on Rail Relay Gang #13 at Sioux City, Iowa.

The Claimant was, apparently, afforded a second investigation on May 12, 1993 regarding his alleged failure to protect his assignment on April 27, 28 and 29, 1993; but no further discipline was assessed as the Carrier determined that that absence was "a continuation of the absence which was involved in the first investigation".

Findings and Opinion

The relevant facts are not in dispute. The Claimant was assigned on the dates in question, April 21, 22 and 23, 1993, to work as a member of Rail Gang #13. Foreman Brad Fluck testified that the Claimant's first day on that gang was April 5, 1993, and that he worked on that gang as assigned until he failed to appear for work on the three days in question. Foreman Fluck further testified that the Claimant had not obtained permission to be absent on the days in question; and the Claimant does not contest that statement.

This case, while it has been presented as a matter of discipline because the Claimant was suspended, actually involves a dispute between the Carrier and the Organization as to whether the Claimant, having filed a so-called "Rule 9" form, was entitled not to follow his gang, Rail Gang #13, when it moved beyond his "home sub-district".

This Board was not created for the purpose of rendering interpretations regarding the applicability of rules; either those that have been established under the terms of the parties' collective bargaining agreement or those that have been developed as a result of the agreement imposed by the United States Congress after the recommendations made by Presidential Emergency Board No. 219. Accordingly, not having jurisdiction or the benefit of full-blown statements of position regarding the proper application or interpretation of the cited rules and practices, this Board will not engage in a rules interpretation exercise.

Rather, we find that if the Claimant had a question, and he should have, as to whether he could choose not to follow his assignment, then he was obligated, in this Board's opinion, to notify his foreman or a member of supervision that he was leaving the gang. That would have provided management with an opportunity to advise the Claimant as to the Carrier's view of his rights. The Claimant having failed to do so, it is this Board's opinion that the Carrier had cause to impose discipline.

However, in view of what may have been a case of first impression, at least in terms of cases presented to this Board, a five day suspension where there may be a justifiable dispute regarding applicable rules is viewed by the Board as being overly severe.

This is not a typical "Rule 570" case, nor is it a case of insubordination. The Claimant failed to protect his assignment, presumably because he believed he did not have to. The Board will make no determination as to whether that belief was based upon a good faith assessment of the rules. In any event, for this time and this time only, it is the Board's opinion that the suspension should be converted to a censure and the Claimant's Personal Record should be amended to reflect the modified discipline.

Award: The claim is sustained in part and denied in part in accordance with the above findings. The Carrier is directed to reimburse the Claimant for lost pay and benefits. This Award was signed this 10th day of March, 1994.

Richard R. Kasher

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