

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 178

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 178

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. Donald C. Whitford, hereinafter the Claimant, entered the Carrier's service as a Sectionman on June 1, 1992 and he was occupying that position when he was dismissed from the Carrier's service on October 21, 1993 for his alleged violation of Rules 530 and 530(A).

The Claimant was dismissed as a result of an investigation which was held on October 5, 1993 in the Trainmaster's Office in Great Falls, Montana. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rules 530 and 530(A) associated with his alleged dishonesty in reporting a personal injury on September 3, 1993 and for his alleged failure to give a factual report regarding that injury.

Findings and Opinion

On September 3, 1993 the Claimant was working as a Laborer on the Conrad Section at Power, Montana.

The evidence of record establishes that his regularly assigned Foreman, a Mr. Novakovitch, was called to another location during the course of the Claimant's work day.

The evidence of record further indicates that Acting Foreman Adolph Bertoli, shortly before 11:00 a.m., requested that the Claimant assist fellow employee Juan Rodriguez in moving some ties. The Claimant and Mr. Rodriguez moved two ties, by hand, and did not use "tie tongs" to move those ties.

At some point in time subsequent to completing his work for that day, the Claimant filled out and filed a Personal Injury Report. In that Report he wrote, in the section of the form captioned "Describe Fully How Incident Occurred", that while "Lifting ties by hand from little hill up on track with Juan Rodriguez told by Adolph Bertoli I was going to drag with tie tongs and Adolph told me just to carry them".

Roadmaster E.K. Sherman testified that he was notified at approximately 2:30 p.m. by Foreman Novakovitch that the Claimant had "sustained an injury to his back", and that Foreman Novakovitch had "mentioned to me that there was some questionable stuff related to this injury as far as Foreman Bertoli telling Mr. Whitford not to use some tie tongs, or something to that nature".

Roadmaster Sherman testified that he then attempted to investigate the nature of the injury and the apparently conflicting versions of the incident, and that when he was unable to find the Claimant to obtain information from him, a notice of investigation was issued in order to obtain facts and determine responsibility, if any, regarding the Claimant's injury that allegedly occurred on September 3, 1993. An investigation was held on September 23, 1993 regarding the question of the circumstances of the alleged injury; and the Claimant, Roadmaster Sherman, Foreman Bertoli and Sectionman Rodriguez testified in that investigation, the transcript of which was designated as Exhibit No. 1 in the instant case.

As a result of that first investigation, the Carrier issued the notice of investigation which was conducted on October 5, 1993.

In spite of numerous pages of transcript in both investigations there are several simple facts which form the basis for this Board's decision.

Foreman Bertoli testified at both investigations that he did not tell the Claimant not to use tie tongs in moving the ties.

Sectionman Rodriguez testified that Foreman Bertoli did not tell him and he did not hear Foreman Bertoli tell the Claimant not to use tie tongs.

The Claimant, consistent with the writing on his Personal Injury Report, testified that Foreman Bertoli told him not to use tie tongs, and that in the process of lifting and moving the second tie he injured his back.

Those simple contradictory statements form the basis for the Carrier's determination that the Claimant was dishonest and failed to provide factual information when he completed and submitted the report regarding his alleged personal injury.

There is also evidence in this record regarding when and under what circumstances the Claimant reported the personal injury; and while that evidence is not directly relevant to the instant case, as the Organization correctly points out, the witnesses' testimony regarding the reporting of the personal injury could be properly considered by the Carrier in determining the critical question of credibility.

Insofar as that testimony is concerned, the Claimant testified that when he allegedly injured his back in moving the second tie at approximately 11:00 a.m. he immediately advised Foreman Bertoli of the incident. Foreman Bertoli denied that the Claimant told him of the injury. Foreman Bertoli testified as follows regarding what he would have done if an injury was reported to him:

Q. If somebody made a report of an injury to you, Mr. Bertoli, what would you have them do?

A. I would've asked him how great his injury would have been and also told him to go sit down, rest for awhile, and see if his injury would have been worse enough, bad enough, or how bad the injury he would have sustained, I would've probably told him to go see a doctor or -- and fill out the paper of proper procedure.

Q. Would that include -- as a supervisor, are you not obligated to have them fill out certain reports, including the Personal Injury Report that Mr. Whitford completed?

A. That's correct.

Q. But you did not ask him to complete this Personal Injury Report, did you?

A. I didn't know he was hurt.

Simply stated, this is a case upon which the Carrier has apparently determined, after assessing the credibility of the Claimant vis a vis Foreman Bertoli, that Foreman Bertoli should be believed when he testified that he did not instruct the Claimant, as the Claimant asserts, not to use tie tongs.

It is well-established that referees under Section 3 of the Railway Labor Act do not, in reviewing disciplinary matters, substitute their judgment for that of the carriers regarding credibility determinations. This Board can and has, on the other hand, reviewed testimony in order to determine whether there is any reason or logic to support certain evidentiary conclusions made by the Carrier.

In this case, an overwhelming amount of logic and reason supports the Carrier's conclusion that the Claimant was not telling the truth when he wrote on his Personal Injury Report and testified that Foreman Bertoli specifically told him not to use tie tongs.

Aside from the fact that fellow employee Rodriguez did not hear Foreman Bertoli issue such an order and Foreman Bertoli denied that he issued such an order, the question is why would he issue such an order if all witnesses agree that using tie tongs is a "safer and easier" method for moving ties? Neither the Claimant nor the Organization has offered any rational explanation for why Foreman Bertoli, an experienced maintenance of way employee and one who is represented by the Organization, would issue such an order that is contradictory to safe practices.

Having reviewed numerous personal injury reports during the course of chairing this Board, this Arbitrator must ask the question why the Claimant felt it was necessary, in describing how the incident occurred, to state that he was instructed not to use tie tongs. Why did not the Claimant merely say "I injured my back while lifting ties"? Why did he find it necessary to

attempt to direct blame for his alleged injury to Foreman Bertoli, by implying that Foreman Bertoli directed him to engage in an unsafe practice? And if the practice was unsafe, why did the Claimant follow Foreman Bertoli's instruction?

There are no reasonable or rational explanations for the Claimant's behavior, except to conclude that the Claimant sought to shift blame for his alleged injury to a fellow employee.

Based upon the evidence in the record, it is clear that the Carrier credited the testimony of Messrs. Bertoli and Rodriguez and discredited the version of the incident offered by the Claimant. The ancillary facts and circumstances, related above, support the Carrier's credibility determination. Therefore, this Board concludes that there is clear and convincing evidence that the Claimant violated Rules 530 and 530(A) by failing to give an honest and factual rendition of the manner in which he allegedly sustained a personal injury on September 3, 1993.

The Carrier is justified in considering the failure to be honest and factual in the context of filing a Personal Injury Report as a serious breach of rules. In light of what the Carrier determined to be fabrications by the Claimant and in view of the Claimant's short term of employment, this Board concludes that the discipline imposed was not arbitrary or overly severe. Accordingly, the claim will be denied.

Award: The claim is denied. This Award was signed this 24th day of December, 1993.

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