

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY *
- and - *
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES *

CASE NO. 21
AWARD NO. 21

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 is limited to disciplinary disputes involving employees dismissed from service. 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 are dismissed from the Carrier's service may chose to appeal their dismissals to this Board. They have a sixty (60) day period from the date of their dismissals to elect to handle their appeals through the usual channels (Schedule Rule 40) or to submit their appeals directly to this Board in anticipation of receiving expedited decisions. An employee who is dismissed 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 dismissed 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 dismissal and the dismissed 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 excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

Background Facts

Mr. John T. Strong entered the Carrier's service as a Section Laborer on August 10, 1978. Mr Strong was subsequently promoted to the position of Welding Foreman, and he was occupying this position when he was dismissed from the Carrier's service effective July 31, 1985. Mr Gordon E. Johnson entered the Carrier's service as a B&B Laborer on August 7, 1947. Mr Johnson was subsequently assigned as Grinder on Welding Gang #1, and he was occupying this position when he was dismissed from the Carrier's service effective August 3, 1985. Mr. Strong and Mr. Johnson (hereinafter the Claimants) were dismissed as the result of an investigation which was held on August 8, 1985 in Galesburg, Illinois. At the investigation both Claimants were represented by the Organization. The Carrier dismissed the Claimants based upon its findings that they had violated Rule 575 of the Carrier's Safety and General Rules, by having allegedly misused company funds on their expense statements for June 3, 4, and 5, 1985.

Findings and Opinion

On June 3, 4, and 5, 1985 the Claimants were assigned to duties in Dubuque, Iowa. As Carrier housing was not available to them, they registered and stayed three nights at The Dodge House in Dubuque and subsequently submitted "Employee Expense/Labor Agreement Claims" for reimbursement of their expenses to Mr. G.A. Goy, Assistant Roadmaster. Mr Goy received these expense statements on July 20th, 1985. Mr Goy, upon checking The Dodge House receipts, noted that the number nine on one of the receipts appeared to have been altered. It was his impression that the receipt originally read room 80 but had been changed to read room 89. Mr. Goy then contacted a Mr Weaver who turned the matter over to the special agents' office.

Mr. R.A. Kline, Special Agent, received this information on July 29, 1985 and investigated the receipts by going to The Dodge House. He spoke to a Ms Sharon Ferguson, an employee of the motel. Ms Ferguson advised that she had written the receipts. She also provided Mr Kline with two cash register receipts from the motel for the Claimants for the dates involved. The amounts on the two sets of receipts did not match.

The Carrier presumably believed that Claimants Strong and Johnson only paid \$65.14 and \$56.45, respectively, for the three nights they spent at The Dodge House as opposed to the \$71.55 that each of them claimed. The Carrier's case is built upon circumstantial evidence which indicates that the Claimants paid the lesser amounts with credit cards and subsequently received false handwritten receipts from desk clerk Ferguson. The Carrier further appears to contend that the Claimants shared a single room for certain of the nights in question, and thus were billed a lesser rate than they claimed on the handwritten receipts.

The Carrier's case is defective in certain very material respects. First, from a procedural prospective, the Carrier, in its notice of investigation, advised the Claimants that the purpose of the investigation was to "determine your responsibility in connection with your alleged misuse of Company funds on or about June 3, 4, 5, 1985 in Dubuque, Iowa". The fact is that the Carrier drew a broad, general and misstated charge when it constructed this notice. It would have required no more than twenty seconds for the Carrier's officials to state in the notice of charge that the question to be determined was whether "you claimed false expenses during your stay at The Dodge House on June 3, 4, and 5, 1985". The purpose of requiring a specific notice of charge is so well-known that it does not require further explanation here. The Claimants were deprived, to some extent, of procedural due process by the Carrier's imprecise notice. This Board is aware of the fact that the Claimants and their Representatives probably assumed that the charge could have involved expenses incurred at The Dodge House, otherwise they would not have been prepared with a copy of the cash register receipts incurred for the dates in question. However, the Claimants' omniscience does not cure the Carrier's failure to specifically charge them. The Board cannot assume that the Claimants would not have produced witnesses and other evidence regarding their stay at The Dodge House had they been given proper notice. On this basis alone, the claims could be sustained.


Secondly, the Carrier's case is built upon a most confusing record. The Carrier has relied upon the credibility of desk clerk Ferguson who stated, by hearsay through Special Agent Kline, that "she would not normally make out written receipts unless there was some particular reason that the person needed it and then it would only . . . it would correspond to the register receipt and not be increased more than the amount of the register receipt or the amount paid". However, Ms Ferguson attested to the fact that she was the person who prepared the written receipts which in fact "increased" the amounts of the Claimants' register receipts. The Carrier seems to contend that the Claimants somehow convinced Ms Ferguson to issue false receipts. Therefore, the Carrier is asking this Board to credit Ms. Ferguson's testimony regarding general procedures but to discredit her action in allegedly improperly increasing the handwritten receipts. Ms Ferguson did not appear at the investigation. The Carrier,

therefore, through its conducting officer and other readers of the transcript, had no opportunity to judge her credibility. The hearsay testimony regarding Ms Ferguson's statements would lead us to believe that she was hurried on the morning of June 6, 1985 when the Claimants checked out and this led to her confusion regarding the proper rates and amounts to be charged. Yet, when one reads the handwritten receipts authored by Ms Ferguson they are extremely legible and appear to be written in a slow and careful manner. They show that both Claimants were billed \$71.55 and that they occupied different rooms; Claimant Strong was shown in room 80 and Claimant Johnson was shown to have occupied room 89. The Board should also note that the "overwrite" of the number 89 at the top of Claimant Johnson's receipt is not the only error on that bill. Ms Ferguson apparently incorrectly showed both Claimants as registering into the motel on "6/5". Nobody questions the fact that both Claimants registered into the motel on 6/3/85. Obviously, Ms Ferguson made at least one error. The Carrier has not presented sufficient evidence to disprove the Claimants' contentions that they occupied separate rooms; that they were incorrectly billed a lesser rate; and, when they checked out they were billed and paid \$71.55 which they subsequently claimed. Having failed to present convincing and substantial evidence, the Carrier's discipline cannot be upheld.

Finally, although there may be some strong grounds for suspecting that the Claimants engaged in questionable activity regarding their payments to The Dodge House and their subsequent claims for reimbursement, discipline is not properly imposed based upon speculation and supposition alone. Accordingly, the claims will be sustained. The Carrier is directed to restore the Claimants to service with backpay for all time lost, less outside earnings. The Claimants service records are to be cleansed of the charges and their seniority shall be unimpaired.

Award: Claim sustained in accordance with the above findings.

This Award was signed this 4th day of October 1985 in Bryn Mawr, Pennsylvania.



Richard R. Kasher
Chairman and Neutral Member
Special Board of Adjustment 925