

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY
- and -
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CASE NO. 29
AWARD NO. 29

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

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. Robert C. Hutchinson, hereinafter the Claimant, entered the Carrier's service as a Sectionman on August 8, 1978. He was occupying the position of Laborer when he was dismissed from the Carrier's service effective December 12, 1985. The Claimant was dismissed as the result of an investigation which was held on November 27, 1985 in Sioux City, Iowa. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had Rules 500, 501, 501B and 502 B for his alleged insubordinate, quarrelsome, vicious and disorderly conduct on November 18, 1985.

Findings and Opinion

The Claimant came to Roadmaster W.A. Morris' office in Sioux City, Iowa, on November 18, 1985 in order to discuss the problems with his Rule 9 card. Roadmaster Morris had not signed the Rule 9 card and the Claimant was concerned about his resultant loss of seniority.

It is clear from the record that the Claimant, having

received the appropriate permission, was on the telephone speaking to his Union Representative, when Mr. Morris entered the office. The Claimant and Mr. Morris then began a discussion regarding this matter and their conversation became heated. Both Mr. J.L. Randolph, Welder, and Mr. G.T. Malloy, Clerk, witnessed the "discussion".

The Claimant and Mr. Morris then went outside to the loading dock where, according to Roadmaster Morris, the Claimant first challenged him to a fight. Mr. Morris testified that the Claimant then took out a pocket knife and opened the knife in a "more or less threatening way". Mr. Morris further testified that the Claimant then stated "I know where you live, I'm going to get your a--". At the end of the altercation, according to Mr. Morris, the Claimant swore and threw a glass insulator at him.

The Claimant testified that Roadmaster Morris initiated the entire confrontation by swearing at him inside the office. He further testified that he did not have a knife and that he only kicked the glass insulator in frustration.

The Carrier had the right to credit the testimony of Roadmaster Morris, even though the Claimant disputed Morris' rendition of the facts. It is well established under procedures involving arbitration in the railroad industry that the Carrier retains the right to make credibility determinations and such determinations do not fall within the province of neutral referees. In any event, the Carrier not only had evidence of the Claimant's violent behavior as a result of the testimony of Roadmaster Morris but it also had testimony corroborating that a glass insulator had been seen "flying by the door". This observation is consistent with and supports the testimony that the Claimant threw the insulator at his Roadmaster, and generally corroborates the evidence that the Claimant was extremely angry and violent.

As a result of this finding, this Board is constrained to find that the Carrier had just cause for disciplining the Claimant. In view of the nature of the Claimant's violent and threatening behavior, the Board further finds that the penalty of dismissal was neither arbitrary or overly severe.

We would observe that Roadmaster Morris exhibited extremely poor judgment; he acted improperly by interrupting the Claimant's phone conversation with his Organization representative and his pursuing the question of the Rule 9 card was clearly the provoking cause of the incident. Had the Claimant not drawn his pocket knife, made threatening remarks and thrown the glass insulator at his supervisor, this Board would have found that the Claimant's other actions were provoked by Mr. Morris and we likely would not have sustained his dismissal from service.

As a further observation, which we trust will be brought to the attention of Conducting Officer Heyns, this Board was offended by the extraordinary leading nature of the questions the Conducting Officer addressed to witnesses Rudolph and Malloy. Conducting Officer Heyns might just as well have testified in their stead. Had these leading questions caused the Claimant severe prejudice, this Board would have overturned the discipline on procedural grounds under Schedule Rule 40. As the record evidence supported the Carrier's action and as Officer Heyns' conduct was not procedurally fatal to the Carrier's case, the claim will be denied.

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

This Award was signed this 11th day of February 1985 in Bryn Mawr, Pennsylvania.

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