

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

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*****
BURLINGTON NORTHERN RAILROAD COMPANY          *
- and -                                         *
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES    *
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                                           CASE NO. 37
                                           AWARD NO. 37
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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 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 T. Ruiz, hereinafter the Claimant, entered the Carrier's service as a Laborer at Bellingham, Washington, on September 12, 1978. He was subsequently promoted to the position of Machine Operator and he was occupying this position when he was dismissed from the Carrier's service effective August 26, 1986. The Claimant was dismissed as a result of an investigation which was held on August 5, 1986 at the Roadmaster's office in Bonners Ferry, Idaho. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he was in violation of Rule G on July 30, 1986 while on Carrier property and while subject to duty.

Findings and Opinion

Mr. Trent Hudak, a management trainee on the Billings Region, was in charge of Tie Gang No. 8 working out of Bonners Ferry, Idaho on July 30, 1986. He testified that he observed the Claimant in the vicinity of the dining car prior to the start of work that morning; and that his observations led him to believe that the Claimant was in violation of Rule G, specifically, being under the influence of alcohol. He testified that the Claimant's gait was slow and that he observed him stumble; that the Claimant's eyes were bloodshot; that the Claimant had his head "hung low"; and that he smelled alcohol on the Claimant's breath.

Mr. D.L. Bowman, Supervisor of Work Equipment on the Spokane Division, testified that he was present on the morning of July 30, 1986 and that he smelled alcohol on the Claimant's breath and observed that the Claimant's eyes were bloodshot.

Mr. Gary Brecht, who was working as a foreman on Tie Gang No. 8 at Bonners Ferry, Idaho on the morning of July 30, 1986, testified that he observed the Claimant who appeared to him to be either "hung over" or "intoxicated". He further testified that he smelled alcohol on the Claimant's breath.

In contradiction to this testimony, the Organization produced approximately twelve of the Claimant's co-workers as witnesses; their testimony was to the effect that the Claimant had returned to the bunk car on the evening of July 29, 1986 in a sober condition, that they did not observe him drinking, that he went to bed at approximately 9:30 p.m., and that they discerned none of the typical indicia of intoxication when they saw or interacted with the Claimant on the morning of July 30, 1986.

Some of Claimant's co-workers, who testified, stated that they had heard Mr. Brecht threaten on several occasions to "get" the Claimant; that is, Mr. Brecht was alleged to have threatened to find reason to have the Claimant terminated from employment.

First, this is a classic Railway Labor Act discipline case wherein the transcript of proceedings contains direct contradictory testimony. The Board has no ability to make credibility determinations. Therefore, the fact that the Organization produced more witnesses than the Carrier is not a persuasive factor in resolving the dispute. It is clearly established that the Carrier retains the right to make credibility determinations; and, as it did in this case, if the Carrier wishes to credit the testimony of those witnesses who stated that they observed the Claimant in violation of Rule G, it has the right to do so. If this Board found that the evidence the Carrier relied upon was not substantial or clear and convincing, or if we found that the evidence was in some manner flawed, then we would be in a position to reverse the imposition of discipline.

However, in the instant case, in spite of valiant efforts by the Organization, there is no showing that the evidence is less than substantial or is flawed. First, the Organization has argued, directly and by innuendo, that because of Mr. Brecht's alleged predisposition to find a reason to discipline the Claimant, Mr. Hudak conspired with Mr. Brecht to have the Claimant terminated. There is no evidence in the record to support this argument. There is no

showing that Mr. Hudak was motivated by any animus toward the Claimant, nor is there any showing that Mr. Brecht suggested to Mr. Hudak that the Claimant be disciplined. Secondly, the Organization makes much out of, what this Board considers to be, minor inconsistencies among the testimonies of Messrs Hudak, Bowman and Brecht. How long Mr. Hudak was on the bus, the time when the Notice of Investigation was drawn, and matters of similarly insignificant import, do not detract from the fact that three (3) individuals testified that they observed signs of alcohol use by the Claimant and smelled alcohol on his breath while he was subject to duty.

Further, there is no showing that the Claimant was harassed because his father was a Union Representative nor did the Organization Representative present any evidence to support the allegation in his closing statement that the Claimant was harassed because he is a member of a minority group.

Although we find that certain Carrier representatives acted without due regard for the Claimant's physical and emotional well-being after he was removed from service, when they left him at a bus depot without sufficient funds and in a circumstance where the next bus would not arrive for approximately twenty-four (24) hours, those facts do not detract from the seriousness of the Claimant's offense.

Accordingly, we find that the Carrier has relied upon substantial evidence which establishes that the Claimant was in violation of Rule G on the morning of July 30, 1986. In the circumstances of this case, and in view of the Claimant's prior disciplinary record, we do not find that the discipline of dismissal was arbitrary or overly severe. Therefore, the claim will be denied.

Award The claim is denied. This Award was signed this 17th day of October 1986 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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