

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

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

CASE NO. 39

AWARD NO. 39

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. Ernest R. Hulstrom, hereinafter the Claimant, entered the Carrier's service as a B&B Helper at Galesburg, Illinois on June 12, 1978. He was subsequently promoted to a B&B Gang Foreman's position, and he was occupying this position when he was dismissed from the Carrier's service effective February 13, 1987. The Claimant was dismissed as a result of an investigation which was held on February 3, 1987 in Fremont, Nebraska. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Carrier Safety Rules 507, 567 (A) and 584 as well as Rule 550 of the Maintenance of Way Department. Specifically, the Claimant was dismissed for his alleged responsibility and failure to follow safety precautions regarding a fire at Bridge 27.04, which fire resulted in approximately \$270,000 of damage to the Bridge and a track vehicle.

Findings and Opinion

Supervisory employees of the Carrier testified that the Claimant, who was in charge of a gang assigned to perform maintenance work on Bridge 27.04 near Fremont, Nebraska, which maintenance work involved the use of a cutting torch, failed to have his gang adequately water down the area where the cutting was being performed

and failed to have an Indian Water Pump available. The supervisors testified that such failures caused or substantially contributed to a flash fire and the rapid spread of such fire to the extent that considerable damage to the bridge and a hi-rail boom truck occurred.

The Claimant testified that, in his opinion, adequate safety precautions had been taken in terms of drenching the area with water where the cutting torch was to be used. The Claimant testified that the reason he did not have an Indian Water Pump available was due to the fact that the pump he had was inoperable and that the request he had made to have the defective equipment replaced had not been filled. The Claimant also testified that the employee using the cutting torch had been adequately screened from the high winds which were blowing on the day of the incident in order minimize the chance of a fire.

Witnesses appearing on behalf of the Claimant testified that the fire occurred without warning and that because of the high winds it spread quickly and could not be controlled.

The Claimant's testimony that he had advised B&B Supervisor L.L. Meyer that his Indian Water Pump had been "bad ordered" was contradicted by Supervisor Meyer who testified as follows:

"186 Q. No, that's fine. Do you recall at this same time at Bridge 87.42 Mr. Hulstrom asking you to get him an Indian Water Pump?

A. No sir because they said they had one in the tool car.

187 Q. Did they say that the one in the tool car was working or not?

A. No sir.

188 Q. And you do not recall them asking you to get them a pump?

A. What?

189 Q. You do not recall them asking you to acquire a pump for that gang?

A. No sir."

As stated above, the Carrier terminated the Claimant because of his alleged failure to follow (1) Maintenance of Way Rule 550, which provides in part that foremen are responsible for the tools, material

and equipment that are necessary for the performance of their work and that they must know that these tools are properly used and maintained, (2) Safety Rule 507, which provides that a water pump must be available at all times while performing cutting and burning in order to extinguish any fire that may occur, (3) Safety Rule 567, which provides that employees must work safely and exercise care to prevent injury to themselves and others and (4) Safety Rule 584 which requires employees to exercise care to avoid injury to themselves or others by observing the condition of equipment and tools, and when such tools are found to be defective, to remedy the defect, and, if the defect cannot be remedied, to report the defect to proper authority.

In the Claimant's behalf, the Organization first contends that the Carrier violated Schedule Rule 40(C) by failing to give the Claimant precise notice of the charges against him; that is, the Carrier failed to specify which Rules the Claimant allegedly violated.

The Organization further contended that on the day in question the Claimant followed the same procedures that he and other foremen had followed for many years without incident. The Organization submits that the Carrier failed to provide the Claimant with necessary training in the proper use of a cutting torch; and that the on-the-job training received by the Claimant was not sufficient to ensure that he, and other similarly situated employees, would know and understand proper safety procedures to be followed in the circumstances of the instant case.

The Organization points out that the Carrier could have avoided or reduced the possibility of the fire had it protected the creosoted timbers of the bridge by use of a fire-retardant product known as Nonflam and/or had its employees do their cutting with an hydraulic hacksaw as opposed to the cutting torch. Finally, the Organization submits that the Carrier had prejudged the Claimant's guilt. Accordingly, the Organization requests that the Claimant be reinstated to service and made whole for all losses.

This Board finds no merit in the Organization's contention that the Carrier violated Schedule Rule 40(C) by allegedly failing to give the Claimant precise notice of the charges against him. The January 26, 1987 notice of investigation stated with sufficient specificity the time, the place and the nature of the incident which gave rise to the Claimant's alleged responsibility. The failure to cite the specific rules did not cause the Claimant to suffer any prejudice, as is clear from a reading of the transcript which demonstrates that both the Claimant and his Organization Representative were fully conversant with and prepared to defend the charges arising under the Rules in question.

Turning to the merits of the claim, this Board is convinced that the Carrier presented substantial evidence that the Claimant failed to have his gang adequately drench the area where the cutting was to be performed and failed to have available a working Indian Water Pump.

Further, this Board finds the questions of whether the Carrier should have applied fire retardant materials to all of its bridges and whether the Carrier should have had its gangs use hydraulic hacksaws rather than cutting torches to be irrelevant to the issue of the Claimant's alleged failure to follow prescribed safety procedures.

This Board is persuaded that the Claimant knew of his responsibility, in supervising a gang using a cutting torch on a bridge, to ensure that the bridge area where the cutting was to be done was adequately water-drenched and that an operable Indian Water Pump was to be available. The Claimant was clearly derelict in this regard. Therefore, the Carrier had just cause to discipline the Claimant.

In addressing the question of whether the discipline assessed was appropriate, this Board has considered (1) the fact that the Claimant's actions were not deliberate, (2) the fire was, apparently, spontaneous and uncontrollable and (3) the Claimant's nine year Personal Record is unblemished except for a September 24, 1981 safety censure for a failure to comply with instructions while employed as a truck driver.

These mitigating circumstances persuade the Board that termination of employment, in this case, is an overly severe penalty. Accordingly, the discipline will be modified as reflected in the Award below.

Award The claim is denied. However, the discipline is modified to the extent that the Claimant shall be returned to service with seniority unimpaired but without back pay. Further, the Claimant shall be disqualified from his Foreman's position for one (1) year following his reinstatement. He may re-obtain Foreman qualifications after that one (1) year period in accordance with the Carrier's rules for promotion.

This Award was signed this 24th day of May 1987 in Bryn Mawr, Pennsylvania.

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