

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

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

CASE NO. 41

AWARD NO. 41

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. Michael P. Bryant, hereinafter the "Claimant", entered the Carrier's service on July 10, 1978 as a B&B Helper at Seattle, Washington. At the time the Claimant was dismissed from the Carrier's service, by notice dated July 17, 1987, he was occupying the position of B&B Carpenter and he was working out of the Carrier's Pacific Division at the Interbay Roundhouse, Seattle, Washington.

On June 16, 1987 the Claimant was performing carpentry work, installing an awning, at the Interbay Roundhouse when he fell from a ladder and injured his leg. General Foreman of Locomotives Dennis Ruff arranged for the Claimant to be transported to a nearby hospital where the Claimant received treatment for his injury. He was given some pain medication and placed on crutches.

When the Claimant returned to the Carrier's property, B&B Supervisor R.G. Champlin conferred with General Foreman Ruff and they decided to direct the Claimant to submit to a urinalysis test because, in their collective opinion, they had probable cause to suspect he may have been under the influence of drugs and/or alcohol. Supervisor Champlin testified that several days prior to the June 16, 1987 incident that he had received "an anonymous tip" that the Claimant was suspected of using drugs.

Supervisors Ruff and Champlin met with the Claimant and advised him that he was being directed to submit to a urinalysis test. The two supervisors testified that the Claimant became extremely agitated, that he interrupted Foreman Ruff on numerous occasions while Foreman Ruff was attempting to explain the Claimant's rights to him and that the Claimant "refused" to submit to the drug/alcohol test.

The Claimant left the office where the supervisors had explained his rights to him and, apparently, upon reconsideration returned to the office presumably prepared to agree to submit to the urinalysis test. During this second meeting with Foreman Ruff, the Claimant was asked to sign and/or acknowledge receipt of an "out of service form"; that is, a form used by the Carrier when removing an employee from service pending medical investigation. Foreman Ruff testified that the Claimant, who had entered the office this second time in a calm and controlled state, became extremely boisterous and agitated when he was asked to sign or acknowledge the out of service form. Foreman Ruff further testified that the Claimant, at one point, rose from his chair and slammed his fist upon the desk in a violent manner and caused Foreman Ruff to be sufficiently concerned about the safety of the Claimant and others so that Foreman Ruff felt compelled to call upon the Carrier's special agent personnel to remove the Claimant from the property.

The Claimant and one of his witnesses testified that as the Claimant was leaving the property that he spoke with B&B Supervisor Champlin and "pled" for the opportunity to take the urinalysis test; but that his request was denied because the matter was out of Supervisor Champlin's "control". The Claimant also testified that he felt that he was being harassed and intimidated during the meetings with supervision, and that the various forms being "forced upon him for signature" caused him to be confused and misunderstand the Carrier's purpose in compelling him to take a urinalysis test. The Claimant also testified that while he was on the phone, in an effort to obtain counsel and representation from the Organization, that Foreman Ruff denied him the right to complete that phone call and to obtain adequate representation. Finally, the Claimant testified and submitted documentation to support his contention that he underwent an urinalysis test at or about midnight on June 16, 1987 and that that drug screen resulted in negative findings.

The July 17, 1987 dismissal notice states that the Claimant was found to have violated Rule "G" which prohibits employees from using alcoholic beverages or drugs while subject to duty. The Carrier concluded that the Claimant's refusal to submit to the urinalysis test provided the basis for concluding that he was in violation of Rule G.

As part of the defense in this case, the Organization contends that the investigation should have been terminated because the "incident" which gave rise to the Carrier's alleged probable cause for suspecting that the Claimant used drugs while subject to duty arose several days prior to the June 16, 1987 accident. The Organization contended that when Supervisor Champlin received the "anonymous tip" that that was when probable cause occurred, and that the Carrier's failure to act at that time is reason for this Board to conclude that (1) the Carrier was dilatory in proceeding to an investigation and (2) that there was no probable cause as the result of June 16, 1987 accident.


This Board rejects the procedural objection encompassed in the above argument raised by the Organization. The June 25, 1987 investigation was conducted timely. Supervisor Champlin explained with sufficient justification why he reasonably believed that a urinalysis test should be performed on June 16, 1987. His failure to act on the anonymous tip cannot and should not be held against the Carrier. To follow the Organization's argument to its logical conclusion, the Carrier would have to act affirmatively any time it had any suspicion that an employee was using prohibited substances or under the influence of such prohibited substances, no matter how unsubstantial that suspicion might be. While we are addressing procedural questions, we should observe here that Investigating Officer G.L. Neswick conducted an exemplary investigation on June 25, 1987. He afforded the Claimant and his Organization representative a full and fair hearing; and had it not been for the Claimant's purposeful evasiveness, the transcript would have made for very easy reading.

The Claimant comes across, in the reading of this transcript, as a reasonably intelligent and sophisticated employee. The transcript further reflects that the Claimant was previously required to submit to a urinalysis test and thus there is reason to conclude that the Claimant's alleged "confusion and misunderstanding" during the two meetings with supervision on June 16, 1987 were due, in no small part, to the Claimant's behavior; which this Board concludes was "aberrant and irrational" as testified to by Supervisors Ruff and Champlin. We are convinced that had the Claimant acted prudently at either of the meetings with supervision that no discipline would have ensued. Ordinarily, we would be prepared to deny this grievance because of the Claimant's obstructive, obstreperous and violent behavior which caused Carrier representatives to remove him from service and to instigate an investigation. However, there are a number of mitigating factors which we find should redound to the Claimant's benefit, and which justify converting the Claimant's dismissal to a disciplinary suspension.

First, it is clear that the Claimant was injured and in some pain at the time of his meetings with Carrier supervision. Secondly, although the Claimant did not make it sufficiently clear to Supervisors Ruff and Champlin that he wished to confer with a representative of the Organization, the fact remains that the Claimant did not have an adequate opportunity to so confer before he was confronted with the ultimate decision of submitting to the urinalysis test. Thirdly, it appears that there was some misunderstanding on the part of supervision regarding the Claimant's "obligation" to sign the "out of service" form; and this misunderstanding resulted in the supervisors' inappropriate insistence that the Claimant sign this form. Finally, we would note that the Claimant, with nearly nine (9) full years of service, had a clean and unblemished Personal Record. For these reasons, this Board finds it appropriate to mitigate the penalty of dismissal.

Award The claim is denied. However, the Carrier is directed to restore the Claimant to service, with seniority unimpaired but without back pay. The Carrier shall restore the Claimant to service within five (5) days of receipt of this Award dependent upon the Claimant's ability to meet the Carrier's physical standards. The Claimant's Personal Record shall note that he was suspended from July 17, 1987 to the date of his return to service because of insubordination.

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


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