

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 46

AWARD NO. 46

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 was limited to disciplinary disputes involving employees dismissed from service. On September 28, 1987 the parties expanded the jurisdiction of the Board to cover employees who claimed that they had been improperly suspended from service or censured by the Carrier.

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 have been dismissed or suspended from the Carrier's service or who have been censured may chose to appeal their claims to this Board. The employee has a sixty (60) day period from the effective date of the discipline to elect to handle his/her appeal through the usual channels (Schedule Rule 40) or to submit the appeal directly to this

Board in anticipation of receiving an expedited decision. An employee who is dismissed, suspended or censured 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 disciplined 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 discipline and the disciplined 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. Samuel Lee Arentz, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on July 7, 1975. He was subsequently promoted to Machine Operator and was occupying that position when he was dismissed from the Carrier's service on November 16, 1987. The Claimant was dismissed as a result of an investigation which was held on October 29, 1987 in LaCrosse, Wisconsin. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rules 531, 531(B) and portions of 530. Specifically the Claimant was dismissed for his alleged "boisterous, profane and vulgar language" directed to Roadmaster Sedlacek at

approximately 8:00 a.m. on October 22, 1987 at the Pepin Depot in Pepin, Wisconsin.

Findings and Opinion

Specifically, the Claimant was charged with being insubordinate and as being the instigator of a confrontation with Roadmaster D.L. Sedlacek approximately one hour after his shift began on October 22, 1987.

Certain facts in the record are undisputed. The Claimant was on the telephone in the Roadmaster's office speaking, apparently, with another Roadmaster, Roadmaster Sheets, who was located at Winona. The Claimant was taking notes or making entries in a small personal notebook, when Roadmaster Sedlacek approached the Claimant and asked to see what the Claimant was writing. At this point in the narrative the versions of Roadmaster Sedlacek and the Claimant diverge dramatically.

Roadmaster Sedlacek testified that it appeared that the Claimant was writing a telephone number and that when he asked the Claimant what the telephone number was the Claimant wrote "F--- Y---" on the notebook, and put it in front of Mr. Sedlacek's face. Roadmaster Sedlacek further testified that he asked the Claimant for the piece of paper upon which the profane words were written, and that the Claimant refused stating that the paper and the notebook were his personal property. Roadmaster Sedlacek testified that the Claimant laughed at him and made several gestures, which he, Sedlacek, felt were directed at him. Roadmaster Sedlacek testified that he told the Claimant that he was taking him out of service and that the Claimant then "put his face into my face and pointed his finger at me and said he worked for Roadmaster Veitz, not me, and didn't have to leave the property".

The Claimant testified that he was on the telephone with Roadmaster Sheets, who he had been directed to call by a fellow employee who had told him that Sheets wanted his "employee number so he could take care of my time". The Claimant testified that he gave Roadmaster Sheets certain time card information, in a conversation which lasted approximately two or three minutes, and that he was taking notes in a personal ledger "pertaining to the Undercutting Gang". The Claimant testified that Roadmaster Sedlacek was "nearby" while he was taking these notes, and he maintained that he did not write any vulgar words in his notebook. He also testified that he did not write anything in his notebook which could have been "mistaken for vulgar words". The Claimant attributed Roadmaster Sedlacek's testimony regarding his having allegedly seen the words "F--- Y---" written on the piece of paper to an assumption on

Roadmaster Sedlacek's part that such words appeared in his notebook. He testified that he had written down an abbreviation for the words Shoulder Ballast Undercleaner or Undercutter, and it was this abbreviation which Roadmaster Sedlacek apparently assumed represented profanity.

The Board has before it what is essentially a credibility dispute. Based upon the charges sustained in the dismissal notice the Carrier has, apparently, chosen to credit the testimony of Roadmaster Sedlacek, to the effect that the Claimant wrote profane words in a notebook and directed that profanity to the Roadmaster. It is a well-established principle that neutrals charged with resolving disputes under Section 3 of the Railway Labor Act do not substitute their judgments regarding credibility for the judgments made below. Accordingly, this Board will not substitute its judgment for the judgment made by the Carrier regarding credibility, as there is no evidence in the record which would place the veracity of Roadmaster Sedlacek in serious doubt.

The Carrier also has obviously chosen to credit the testimony of Roadmaster Sedlacek to the effect that the Claimant pointed his finger at Mr. Sedlacek telling him that he, Sedlacek, was not his supervisor.

On the basis of these findings, absent proof that the Claimant was acting in jest, this Board finds that the Carrier had proper cause to conclude that the Claimant directed profanity to a supervisor and was insubordinate. In these circumstances the Claimant was properly subject to discipline; the only question remaining for the Board is whether the discipline of discharge was appropriate in the circumstances.

The Claimant and the Organization have raised a number of questions regarding possible mitigating circumstances. First, the Organization implies that there were numerous other witnesses to the event who would have testified in a manner contradictory to the testimony of Roadmaster Sedlacek. Secondly, the Claimant has implied that Roadmaster Sedlacek, because of a pending unjust treatment claim being filed against him by the Claimant and other employees, was predisposed to persecute the Claimant and that he, Sedlacek, provoked the incident. Finally, the Organization and the Claimant imply that because the Claimant was involved in union business and because Roadmaster Sedlacek "does not appreciate union business at all being conducted around the property" that Sedlacek determined to discipline the Claimant.

If there was anything more than innuendo supporting these defenses this Board would weigh that evidence and possibly conclude

that the Claimant had been disciplined arbitrarily or in an overly severe manner. However, there is no proof contrary to Roadmaster Sedlacek's testimony that the Claimant directed profanity at him and that he was insubordinate.

In these circumstances, we have no reason to sustain the claim.

Award: The claim is denied. This Award was signed this
28th day of January 1988 in Bryn Mawr, Pennsylvania.

Richard R. Kasher

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