

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. 71
AWARD NO. 71

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. David A. Hyatt, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on August 19, 1975. The Claimant was subsequently promoted to the position of Machine Operator and he occupying that position when he was dismissed by the Carrier on September 18, 1989.

The Claimant was dismissed as a result of an investigation which was held on August 10, 1989 and reconvened on September 6, 1989 in Englewood, Colorado. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rules 530 and 535 of the Carrier's rules of the Maintenance of Way Department in connection with his alleged "use of unauthorized fuel purchases and expense accounts while working as Machine Operator at Brush, Colorado.

Findings and Opinion

A considerable amount of the testimony in the transcripts in this case was directed to the Carrier's concern regarding the alleged misappropriation of a substantial number of railroad ties over a one and a half to two year period. The evidence and testimony regarding the railroad ties primarily concerned the alleged involvement of Roadmaster J.F. Hall. The record also contained evidence regarding the Claimant's alleged involvement in purchasing ties that had belonged to the Carrier.

As reflected in the September 18, 1989 notice of dismissal, the Carrier apparently determined that there was insufficient evidence to implicate the Claimant in the misappropriation of ties, or that it was unnecessary to charge the Claimant with this offense, since, in the Carrier's opinion, sufficient evidence had been produced to conclude that the Claimant was guilty of unauthorized fuel purchases and expense account mishandling.

This Board finds that the investigatory transcripts contain substantial and convincing evidence to establish that the Claimant violated the rules with which he was charged.

The Carrier's formal investigation of missing railroad ties at Brush, Colorado began on July 26, 1989 and was conducted by Special Agents B.J. Reed and T.W. McLain. On August 2, 1989, Special Agents Reed and McLain interviewed the Claimant regarding his alleged involvement with Roadmaster Hall. The Agents testified that during that interview, the Claimant stated that he had falsified gas receipts and expense accounts. The Claimant advised the Special Agents that he "would fill out an actual expense account, Jim Hall would have an expense account he had made out for me with phony receipts and expenses, he would tell me to copy this phony expense account, then Jim Hall would sign it and send it in. . . . We would split the extra money". The Claimant further advised the Special Agents that "Jim would tell me to fill my personal car with gas and bill it to the loader's bill. I did this a couple of times."

At the August 10, 1989 investigation, the Claimant did not deny any of relevant portions of the Special Agents' testimony or report. The Claimant testified that he had fueled his personal vehicle and charged the cost to the Carrier, and that he had purchased bogus motel receipts from Jim Hall and submitted them with his expense accounts.

The Claimant further testified that he understood that he was violating the rules of the Maintenance of Way Department and that theft or pilferage is sufficient cause for dismissal. The Claimant testified that he did these things because "Roadmaster Hall had such an intimidating personality that I felt compelled beyond common sense

to go along with him". The Claimant testified that "He (Roadmaster Hall) threatened to fire me if I didn't obey his rules" and that Roadmaster Hall "was able to influence me and other people by intimidation to do these things that I knew were wrong".

A number of Carrier supervisors and employees testified on behalf of the Claimant. Their collective testimony affirmed that the Claimant has been a good and productive worker for the Carrier. Their collective testimony further affirmed that the Claimant had never directly advised any of them of Roadmaster Hall's alleged misbehavior nor of Roadmaster Hall's alleged intimidation and/or coercion of the Claimant.

This Board finds no merit in the Claimant's defense that he "felt compelled beyond common sense to go along with" Roadmaster Hall. The Claimant is an adult and has been employed for over fourteen (14) years by the Carrier. Both the Carrier and society have the right to expect that such an individual would have a firm understanding of right and wrong behavior, and the excuse that "the devil made me do it" is not worthy of consideration in this case. While the Claimant has alleged that he was coerced, there is insufficient probative evidence to support that contention. More importantly, the Claimant has not explained why he kept any of the receipts that were misappropriated from the Carrier.

The following questions of and answers by one of the Claimant's co-workers best demonstrate the reasons why this Board has concluded that the claim should be denied:

"Q. Did Dave Hyatt ever talk to you about Roadmaster Hall trying to get him to do something that Dave didn't want to do?


A. Not really, no.

* * *

Q. Did Mr. Hall ever force or coerce you to violate Company rules?

A. No."

Award: The claim is denied. This Award was signed this 12th day of November 1989 in Bryn Mawr, Pennsylvania.


Richard R. Kasher
Chairman and Neutral Member