

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

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

CASE NO. 73
AWARD NO. 73

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. Gilbert B. Martin, hereinafter the Claimant, entered the Carrier's service as a Sectionman on March 7, 1966. The Claimant was occupying that position when he was dismissed by the Carrier effective September 1, 1989

The Claimant was dismissed as a result of an investigation which was held on August 17, 1989 in the Roadmaster's office in Seattle, Washington. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had failed to comply with his probationary period in connection with a waiver signed on October 27, 1988 for violation of Rule G and Rule 576.

Findings and Opinion

At the investigation conducted on August 17, 1989 Ms. C.E. Franzen, the Carrier's Employee Assistance Program Coordinator, testified regarding the chronology of the Claimant's admittance to and progress in the Employee Assistance Program.

Ms. Franzen testified that on or about October 31, 1988 the Claimant had been advised to enter a treatment program for his alcohol addiction; and that she visited him at a recovery center in Bothell, Washington and "outlined the necessary probation program to him at that time". Ms. Franzen testified that the Claimant returned to service on or about December 13, 1988 and that a twelve (12) month probationary period began to run as of that day.

Ms. Franzen testified that early on during the probationary period it was clear that the Claimant was not fully complying with the program's requirements; specifically, he was not regularly attending weekly meetings of Alcoholics Anonymous (AA). Ms. Franzen testified that she counseled the Claimant regarding the necessity of his attending such meetings and that, in her opinion, he fully understood his obligations in this regard.

Ms. Franzen testified that in April 1989 she wrote to General Manager Mueller, who was in charge of the Seattle Division on which the Claimant worked, and advised him that the Claimant had failed to comply with the provisions of his first probationary period, and therefore she was recommending that he be placed in the program's second probationary period. As a result of receiving this letter, General Manager Mueller wrote to the Claimant on May 2, 1989 advising him that he was being placed in a second probationary period.

The second probation required, among other things, that the Claimant attend AA meetings twice a week. Ms. Franzen testified that "tightening up the program" was instituted because she strongly believes that "recovering people need that support". Ms. Franzen candidly testified that she "could not be sure" that she had advised the Claimant that he would be required to attend two AA meetings per week as opposed to one.

Ms. Franzen testified that at some time during the second probation she was advised that the Claimant "was not totally sober", and that she conferred with him regarding his failure to regularly attend the two required weekly AA meetings.

On July 13, 1989 Ms. Franzen wrote a letter to General Manager Mueller advising him that the Claimant was "not complying with the prescribed second-year probation plan of the Employee Assistance Program". Ms. Franzen testified that the above letter was written, in part, as the result of her having been advised by Roadmaster H.R. Armes that the Claimant had appeared on the property in June 1988

"under the influence"; and that this fact "combined with other information" was the cause of "my writing the letter on the 13th to management because I am obligated to report to management in this way".

During examination by the Organization Representative, Ms. Franzen testified regarding her general responsibilities as an Employee Assistance Coordinator and the procedures she ordinarily follows in keeping management advised of an employee's progress in the Assistance Program. The Organization Representative questioned Ms. Franzen about the delays between the issuance of her letter on July 13, 1989, its receipt in the General Manager's office on July 17 or 27, 1989 and the issuance of a notice of investigation on August 4, 1989. Ms. Franzen could not testify with authority as to what caused management to wait until August 17, 1989 to conduct the investigation. Ms. Franzen was also questioned regarding her advising Roadmaster Armes on July 12, 1989 of her decision to notify General Manager Mueller that the Claimant was not complying with the program.

Ms. Franzen as well as the Claimant testified regarding the Claimant's limited abilities in matters involving literacy, and the difficulty the Claimant had in obtaining a sponsor who would regularly support him at AA meetings.

The Claimant testified regarding his having been placed on both a first-year and then a second-year's probation. In response to a question of whether he attended AA meetings and initiated follow-up contacts with Ms. Franzen each week during his first probationary period, the Claimant testified "I attended some meetings and I did call her now and then". When asked if he attended the weekly meetings as required, the Claimant answered "No". While the Claimant testified that he was not fully aware of the requirement to attend two AA meetings weekly during his second probationary period, he did respond that during the second probationary period he attended AA meetings "once a month".

On questioning by his Organization Representatives, the Claimant testified regarding personal tragedies which he encountered beginning in 1986, his difficulties in obtaining a sponsor for AA meeting purposes and his view that he was a good worker.

The Carrier dismissed the Claimant because of his failure to comply with the second probationary period established by the Employee Assistance Coordinator.

The Organization challenges the dismissal and contends that the time limit established in Schedule Rule 40A, which requires that an investigation be held within fifteen (15) days from the date of an occurrence, was not met in the instant case. The Organization points

out that the communication initiated by Employee Assistance Coordinator Franzen on July 13, 1989 represents knowledge by a Carrier officer of an alleged occurrence, and therefore the Carrier was required to conduct the investigation in the instant case no later than fifteen (15) days from the date of Ms. Franzen's letter. In fact, the Organization contends that the Carrier had notice of the Claimant's alleged improprieties as early as mid-June of 1989. Finally, the Organization submits that the Claimant did not receive proper notice of the investigation.

The Board finds some difficulty in assessing the record in this case; because it is not abundantly clear as to what is the appropriate interface between Carrier officers authorized to issue and administer discipline and Carrier personnel in its Employee Assistance Program, such as Ms. Franzen.

There is substantial merit in the Organization's procedural objection. When an incident occurs or when management becomes aware of the existence of a personal conduct incident which might call for the imposition of discipline, then the time limit of Schedule Rule 40A is activated. The Rule reflects the parties' intention to have investigations held within a reasonably short period of time after the subject event(s) occurred, so that memories may be as clear and as fresh as possible when the investigation is convened.

The question in the instant case is whether, in administering the Employee Assistance Program, Carrier personnel involved in the ultimate disciplining of an employee in that program are required to coordinate with Employee Assistance personnel and to comply with the time limits of the collective bargaining agreement. The Board recognizes the sensitive and confidential nature of the environment in which Employee Assistance Coordinators operate. The Board further recognizes that Employee Assistance Coordinators do not, as part of their duties and responsibilities, recommend the imposition of discipline. Nevertheless, the Board is of the opinion that the Employee Assistance Program must be coordinated with operating supervision and labor relations supervision so that the underlying principles of the collective bargaining agreement may be preserved.

If this Board were to conclude that because an employee was participating in the Assistance Program he/she was not entitled to the substantive and/or the procedural protections of the collective bargaining agreement, then the Board would improperly expand its jurisdiction by modifying what is clear and unambiguous in that agreement. Rule 40A reads "Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employees of the Security Department) and except as provided in Section B of this rule." The

only exception made is for employees of the Security Department; apparently so that they may complete a thorough on-the-property investigation before charges are brought. In the instant case responsible Carrier personnel had information more than fifteen (15) days prior to August 17, 1989, the date the investigatory hearing was held regarding the Claimant's alleged non-sober state and his alleged non-compliance with the conditions of his probation. Accordingly, the Board must conclude that the Carrier failed to comply with the above-cited provision in Schedule Rule 40.

In these circumstances, the claim will be sustained. The Board has the authority to fashion an appropriate remedy. That authority is inherent in any arbitrator's mandate, unless the terms of the collective bargaining agreement specifically establish limitations as to what remedies may be granted. In the instant case, we find it is appropriate to return the Claimant to his second probationary period and to employment with the Carrier. However, in light of the Claimant's admissions that he had not complied with the terms of his previous probations, we will direct that the Claimant be returned to the supervision of the Employee Assistance Program; that he not receive back pay for the time held out of service; and that he be further withheld from service for two (2) weeks after the receipt of this Award so that he, an Organization Representative and an Employee Assistance officer may properly coordinate the Claimant's rehabilitation program which should include efforts to obtain a reliable sponsor for the Claimant's attendance at future AA meetings.

Award: The claim is sustained. The Carrier is directed to reinstate the Claimant to service and to re-enroll him in a second probationary period in accordance with the provisions of the Employee Assistance Program. The Claimant's seniority shall be unimpaired, however he will not be entitled to any back pay. The Claimant shall be physically returned to service two (2) weeks after the receipt of this Award; and the Claimant, his Organization Representative and a representative of the Employee Assistance Program shall coordinate efforts to rehabilitate the Claimant from his alcohol addiction. These rehabilitation efforts shall include a search for, and hopefully the obtaining of, a responsible sponsor for the Claimant's participation in the AA program.

This Award was signed this 12th day of November 1989 in Bryn Mawr, Pennsylvania.



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