

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY *
- and - * CASE NO. 75
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES * AWARD NO. 75

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. Charles C. Norman, hereinafter the Claimant, entered the Carrier's service as a Track Laborer on June 25, 1979. The Claimant was occupying the position Sectionman when he was suspended by the Carrier for thirty (30) days, effective August 9, 1989.

The Claimant was suspended as a result of an investigation which was held on August 17, 1989 in the Roadmaster's office in Fort Collins, Colorado. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had failed to comply with instructions from his Tie Gang Foreman on August 9, 1989, and therefore had violated General Rule "B" and Rule 576.

Findings and Opinion

On August 9, 1989 the Claimant was part of a nine (9) member tie gang assigned to work in the vicinity of milepost 69 at Fort Collins, Colorado. The Claimant and Track Laborer M.R. Longsine were working under the direction and supervision of Tie Gang Foreman Elias Castillon, Jr. The Claimant and Mr. Longsine were specifically assigned, by Foreman Castillon, to "knock off and pick up anchors".

Foreman Castillon testified that he directed Mr. Longsine to accompany him "to Loveland to pick up a fuel truck" and that he told the Claimant "to go out there and knock off anchors and pick them up" and that the Claimant "refused to work out there without any foreman". Foreman Castillon testified as follows:

- "Q. What did you do then, Mr. Castillon?
A. I told him, well, you know, you have to do it, you have to go out there and knock those anchors off. We have this job to do and it has to be done. He said, 'I won't work out there without any foreman'.
- Q. And what did you instruct him to do?
A. Again?
- Q. Again.
A. I instructed him ... you see, we were parked by the machines that were tied up there at Wood's Lumber. I was driving towards the crossing where I was going to drop him off and I was going to go to Loveland, and he said he wasn't to go out there and work, you know, without me being there.
- Q. Mr. Norman, was in the truck when you instructed him again. What was he going to do?
A. He was going to knock off anchors.
- Q. Knock off anchors. After Mr. Norman refused to work without a foreman, what did you do then?
A. At that time I told him, if you don't want to go out there and work, get off the truck and stand here at this crossing until I go to Loveland and come back. He got off the truck, I started, I started driving away and I seen him walking away from the crossing back to the machines. There was some mechanics out there. I turned around and I came back and I told him, 'Where are you going?' He said, 'I'm gonna go out there and sit down and talk to the machine...to

the mechanics.' I told him, 'I instructed you to stay at the crossing until I got back,' because I didn't want to have to drive all the way back in there to go pick him up and go back to work. He just walked away and said, 'ah bull', and just kept walking away."

Foreman Castillon testified that he and Track Laborer Longsine left the area for approximately 30 to 45 minutes while they picked up the fuel truck; that the Claimant was aware of the fact that he, Castillon, had a track warrant for the area being worked; that he offered the Claimant a copy of the track warrant; and that he, the Claimant, "still refused to work without the foreman being there".

On examination by the Organization Representative, Foreman Castillon testified that he had been supervising the Claimant for less than a week at the time the incident occurred and that he had been a Section Foreman at the location for approximately a week prior to the incident. Foreman Castillon testified that it was not unusual for sectionmen to work without the presence of a foreman and that in his opinion the reason the Claimant refused to follow his instructions was because he "figured he didn't want to work by himself, it was hot". Foreman Castillon also testified regarding the Claimant's responsibilities to place the anchors that had been removed in barrels that were located on a "folding type portable push cart", and about his estimation of the grade of the track area in which the Claimant was working.

Track Laborer Longsine testified that when Foreman Castillon instructed the Claimant to knock off anchors that the Claimant said "he wasn't going to do it because what if he got hurt down there, there wouldn't be anybody there to help him". Track Laborer Longsine acknowledged that a foreman is not present at all times when he works on the track. Mr. Longsine testified that if the barrel on the pushcart had been filled with anchors there was a possibility it could have "gotten away" because of the grade in the area.

The Claimant testified that he told Foreman Castillon that he did not think it would be safe for him to be knocking off anchors "using that cart", as he would have to be loading two (2) 55 gallon drums "by myself", and "I reminded him that last year we had a fatality with a man working improperly alone". The Claimant testified that he did not violate any of the Carrier's rules and that he did not fail to comply with the instructions from Foreman Castillon. The Claimant testified that he was not insubordinate.

The Carrier determined that the Claimant violated General Rule B and Rule 576 when he failed to comply with instructions from Foreman Castillon.

The Organization has challenged the Carrier's finding that the Claimant was insubordinate and contends that the evidence of record establishes that the Claimant was not guilty of this serious charge. The Organization submits that the transcript of investigation establishes that there was confusion and miscommunication regarding Foreman Castillon's instructions, and that the Claimant acted properly under General Safety Rule A which provides that "Safety is of the first importance". The Organization contends that the Claimant should not have been withheld from service pending investigation, and that the Carrier's so doing was arbitrary. In conclusion, the Organization submits that the incident "was a relatively minor one that should have been handled at the time". Therefore, the Organization requests that the Claimant be reinstated and made whole.

While there is some conflict in the testimony between Foreman Castillon's version of the facts and the Claimant's, this Board is of the opinion that the Carrier was justified in crediting the testimony of Foreman Castillon which establishes that the Claimant defied a direct order.

This Board is persuaded that the Claimant, for reasons that are not readily apparent, decided that he did not wish to be left at the work site, during a hot summer's day, doing hard manual labor, while a fellow laborer, Mr. Longsine, and his Foreman were off on a less onerous assignment of picking up a fuel truck.

This Board is also persuaded that the Claimant's safety concerns were exaggerated in order to justify his refusal to obey a direct and proper order. The Claimant has attempted to establish that loading a substantial number of anchors into the barrels on the push cart would have created a hazard because of the incline/grade of the area where the work was being performed. This Board was of the opinion that the Claimant could have performed substantial, productive work in his Foreman's absence and not have jeopardized his safety. Specifically, the Claimant could have knocked off anchors and not loaded them in the barrels during the 30 to 45 minute period that his Foreman and co-worker were absent from the work site. In fact, at the conclusion of the hearing, the Conducting Officer asked the Claimant the following question:

"Q. Mr. Norman, you previously stated that safety was a factor and not loading the anchors on the push cart, could you have waited for Mr. Castillon and Mr.

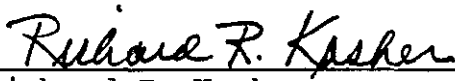
Longsine to return and then load the anchors in the barrel on the push cart?"

Before the Claimant could answer that question, the Organization representative, wisely, objected, stating that he believed that the question had been covered "many times, and its obvious that we have a situation with a miscommunication".

The Organization Representative made a valiant attempt to protect the Claimant from responding to a question, which, if answered honestly, would have clearly established that the Claimant knowingly and insubordinately refused to comply with a reasonable and proper instruction from his Foreman. The Claimant's refusal to work was not conditioned upon any safety concerns regarding the alleged dangerous condition which might exist if the barrel on the push cart was overfilled with anchors. The Claimant is a ten (10) year employee, and his demeanor at the investigation indicates that he is articulate and intelligent. If there was a miscommunication it was the Claimant's fault. He easily could have said "I'll knock off the anchors while you're picking up the fuel truck, but I'll wait until help returns before loading the anchors into the barrels because I am concerned that the weight of the anchors in the barrels and the incline of the track area may cause the push cart to roll and get away from me". He said no such thing; he just refused to do any further work.

In the circumstances, this Board finds that the Carrier had just and sufficient cause, based upon the substantial and convincing evidence in the record, to discipline the Claimant for his refusal to comply with proper instructions from his Foreman. The Board further finds that the discipline in this case was not arbitrary, and that sufficient evidence of insubordination existed so that the Carrier was justified in removing the Claimant from service pending investigation. Accordingly, the claim will be denied.

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
Special Board of Adjustment No. 925