

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. 101

AWARD NO. 101

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. Ted Bradley, hereinafter Claimant Bradley, entered the Carrier's service as a Section Laborer on May 27, 1977. Claimant Bradley was subsequently promoted to the position of Foreman and he was occupying that position when he was suspended from the Carrier's service for twenty (20) days on February 19, 1991. Mr. Michael Misner, hereinafter Claimant Misner, entered the Carrier's service as a Laborer on June 21, 1978. Claimant Misner was subsequently promoted to the position of Truck Driver and he was occupying that position when he was suspended from the Carrier's service for twenty (20) days on February 19, 1991.

Both Claimants were suspended as the result of an investigation which was held on February 4, 1991 in the Roadmaster's Office in Guernsey, Wyoming. At the investigation the Claimants were represented by the Organization. The Carrier suspended the Claimants and censured them based upon its findings that they had violated Rule 531(B) by engaging in an altercation on January 25, 1991 while assigned at Bill, Wyoming.

### Findings and Opinion

The evidence of record establishes that the Claimants were assigned to Bill, Wyoming on January 25, 1991; that they were responsible for unloading rail from a truck; that Claimant Misner "hopped upon the truck and was undoing the boomer to loosen the rail when Claimant Bradley told him to "Hurry up"; that words were exchanged between the Claimants; and, that Claimant Bradley then boarded the truck and allegedly struck Claimant Misner.

Mr. William Seeger, the Roadmaster at Guernsey, Wyoming, who was not an eyewitness to the incident, but who queried other employees regarding the incident, testified that it was his understanding that Claimant Bradley "forearmed him [Misner] and then backhanded him and hit him in the face with his fist". Roadmaster Seeger testified that his understanding of the alleged striking was based upon a report made to him by Claimant Misner.

Mr. Randy Veech, a Laborer on the gang with Claimants Bradley and Misner, testified regarding his observations on the day in question. Mr. Veech testified that "There was a slight altercation, but that was about it"; and that "there was some words exchanged and Mr. Bradley got up on the truck and, shoved with . . . I guess, shoulder, forearm, and whether he meant or not, his fist hit Mr. Misner in the face when he shoved him". Mr. Veech testified that the striking "wasn't the regular, what you would call, punch", and that he was not sure that Claimant Bradley intended to strike Claimant Misner.

Mr. Davis Walmsley, who was also a Laborer on the crew on the day in question, testified that he did not have a good view of the incident and that "It looks like he [Bradley] might have shoved him [Misner] a little bit".

Claimant Bradley testified that he did not strike Claimant Misner; that his "arm touched Mike on the way up to mark the rail"; that he had no discussion with Claimant Misner at the time; that as of January 25, 1991 he had been assigned and working for twelve (12) consecutive days, including the two (2) previous days which were his rest days; that on the Burlington Northern the Bill Section was reputed to be the "heaviest tonnage railroad in the world"; that, in his opinion, the working conditions on this line "create more stress than on other parts of the railroad"; that he has a "very bad" relationship with his ex-wife, and that on January 25, 1991 he was responsible for "pick[ing] up my kids" after work; and that when he stepped onto the truck platform he had no intention of doing any harm to Mr. Misner, did not shove him and merely moved him aside "with my shoulder; shoulder to shoulder".

Claimant Misner testified that he was on the truck and loosening the boomer on the chain that was holding the rail when Claimant Bradley said to him "Get up there and hook that rail"; that he told Claimant Bradley "If he wanted to be in such a hurry to climb onto the truck and hook the rail himself"; and Claimant Bradley then boarded the truck and moved him, Claimant Misner, out of the way to hook the rail. Claimant Misner testified "I did receive a brush from his glove on my face, but whether it was intentional, I can't really say".

In assessing the testimony in the record, it is clear that after the incident Claimant Misner was sufficiently distressed so that he contacted Roadmaster Seeger and reported what had happened. It is also clear that after the Claimants' had "cooled down" some several hours after the incident they "settled any differences they may have had". Both Claimants testified that the incident was not an "altercation", that they bore no hard feelings toward each other and they believed that they could work peacefully and safely with each other.

The Organization has suggested that the exchange of words between the Claimants, which included profanity, is common talk by railroad men including supervisors and cannot properly form the basis for the assessment of discipline. Claimant Bradley's Organization Representative has also impliedly argued that the stress of the job, twelve consecutive days of work and Mr. Bradley's domestic problems are mitigating circumstances which the Board should consider.

Mr. Bradley's Organization Representative has also cited for the Board's consideration the dictionary definition of "altercation"; and he has pointed out that such word is defined as consisting of "vigorous contention in words", or a "heated argument or dispute, or wrangle". The Organization suggests that no altercation occurred. The Organization also argues that Roadmaster Seeger did not interview Claimant Bradley and therefore the investigation was not conducted fairly.

The Organization also introduced a warning letter in evidence in which a section foreman was notified to cease and desist from engaging in "boisterous language and quarrelsome conduct" and that this warning was the extent of the discipline and no notice was placed in that employee's personal record.

The record before the Board does not contain any evidence to support the Organization's contentions that the investigation was conducted unfairly, or that the Claimants were not provided proper notice of the investigation, or that the Claimants were not prepared to fully and intelligently respond to the charges contained in the

notice of investigation. Accordingly, the Board finds no reason to sustain the claims based upon any alleged or perceived unfairness exercised by Carrier representatives.

The citation of a single incident of discipline involving "boisterous language and quarrelsome conduct", which only resulted in the issuance of a warning notice, does not constitute disparate treatment without further evidence of the facts in that case. More importantly, it is this Board's opinion that disparate treatment is not established by the citation of a single incident on a property as far-reaching as the Burlington Northern in which lesser discipline was imposed for an allegedly similar offense. The Organization is obligated to show more than that; it is necessary to show that there has been some consistent imposition of lesser discipline than the discipline grieved and that the members of the craft or class were led to believe that they would receive no discipline or less discipline than they did for their actions. There is no showing in the instant case that the Claimants or others should have expected less severe disciplinary treatment if, in fact, they were involved in an altercation while on duty and on Carrier property.

The facts of the case establish, in spite of both Claimants' denials, that there was an exchange of harsh words, and that profanity was directed at Claimant Misner in anger. The exchange was clearly not mere "shop talk". The Board is not offended by the use of non-threatening profanity used by Maintenance of Way employees in the course of their everyday activities. However, that was not the nature of the verbal exchange in the instant case. The verbal exchange escalated into physical contact; and while Claimant Bradley may not have "intended to strike" Claimant Misner, he certainly intended to push or shove him out of the way so that he, Bradley, who was under "job stress" and "personal domestic stress" could get the work done more quickly.

The Claimants were involved in moving heavy supplies, they were on the bed of a truck and they were clearly engaged in activity which required them to abide by the Carrier's safety rules.

While Claimant Misner stated at the conclusion of the investigation that the only reason he reported the incident was because "I guess my ego got knocked down a little bit", it is clear that he reported the incident because he was struck. This Board has no difficulty in concluding that the substantial and convincing evidence of record establishes that Claimant Bradley pushed or shoved or struck Claimant Misner in anger. That is an altercation. Was Claimant Bradley justified because he was tired, or because he was stressed, or because he had worked twelve consecutive days, or because his domestic life was in a shambles? Obviously, he was not.

There is insubstantial evidence in this record to conclude Claimant Misner's verbal response to Claimant Bradley's angry words provoked Claimant Bradley to board the truck and to make physical contact with Claimant Misner. The reliable evidence of record establishes that Claimant Misner said to Claimant Bradley "Jesus, you don't have to be in such a hurry"; that Claimant Bradley replied "Shut the fuck up, hook the rail"; and that Claimant Misner then said "Well, if you're in such a hurry, maybe you should get up here and do it". It is this Board's finding that Claimant Misner's responses did not justify the physical assault.

This Board finds that the Carrier properly concluded that Claimant Bradley engaged in an altercation with Claimant Misner, and this Board finds no reason to mitigate the discipline imposed. On the other hand, this Board finds no evidence in the record to support the Carrier's conclusion that Claimant Misner was guilty of any rules' violations. He did not provoke the incident, he did not engage in any quarrelsome, abusive or profane language and he did not strike Claimant Bradley. Accordingly, the Board finds that Claimant Bradley was properly disciplined and that Claimant Misner was not.

The Board further finds that the discipline imposed upon Claimant Bradley was neither arbitrary nor overly severe in view of the dangerous conditions and his initiating a physical assault.

Award: The claim of Foreman Bradley is denied. The claim of Truck Driver Misner is sustained, and the Carrier is directed to reimburse Claimant Misner for all lost wages and benefits and to physically expunge any reference to this discipline from Claimant Misner's record.

This Award was signed this 16th day of June 1991.

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