

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

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BURLINGTON NORTHERN RAILROAD COMPANY                          *
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    - and -                                                    *
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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES                    *
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CASE NO. 106
AWARD NO. 106

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. Kenneth D. Holmes, hereinafter the Claimant, entered the Carrier's service on July 16, 1979 as a Sectionman. The Claimant was subsequently promoted to the position of Machine Operator and he was occupying that position when he was dismissed from the Carrier's service effective on or about July 18, 1991.

The Claimant was dismissed as a result of an investigation which was held on June 21, 1991 in the Roadmaster's Office in Brush, Colorado. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that the Claimant had violated Rules 580, 575, 564 and 343 for his alleged unauthorized use of diesel fuel in his personal vehicle while he was working as a Machine Operator on BN 975314 near the Fort Morgan Depot on March 15, 1991 at Fort Morgan, Colorado.



Findings and Opinion

Mr. S.J. Mannes, the Roadmaster at Brush, Colorado, testified that on June 13, 1991 he stopped at an Amoco gas station and was advised by the manager of the station, an individual named "Dan", that one of the station's drivers had allegedly placed diesel fuel in the personal vehicle of the Claimant on or about March 15, 1991.

Roadmaster Mannes testified that as a result of this information he contacted Carrier Special Agent B.B. Thompson, and that he and Mr. Thompson subsequently obtained a statement from the driver, Margarito Leon.

That statement, drafted and signed on June 14, 1991, was sponsored by Roadmaster Mannes, and it reads as follows:

On March 15th, 1991, I went to FM Depot to BN crane. When finished filling the crane, the operator of the crane told me to fill the pick-up. I filled the pick-up and reeled my hose back in. When I went to have the crane operator sign the ticket he told me not to ever get caught filling diesel fuel in the pick-up, or we would both be in trouble or fired.

Pick-up was a king cab with "Marlyn" name on the passenger door also name "Holmes Ansley" Nebraska.

I immediately went back & told the manager of our bulk plant Dan Neb about had happened. I told him that if the crane operator called for more fuel, not to put any in Holmes pick-up.

The statement was signed by Mr. Leon and witnessed by Roadmaster Mannes and Special Agent Thompson.

Roadmaster Mannes testified that the Claimant was working as a Machine Operator at Fort Morgan, Colorado on March 15, 1991 and that he was operating a derrick locomotive crane, an on-rail piece of equipment which uses diesel fuel. Mr. Mannes testified that machine operators, such as the Claimant, have the authority to call outside vendors to obtain fuel for their machines.

Roadmaster Mannes sponsored a gasoline receipt which indicated that 54 gallons of diesel fuel were delivered for use by BN Vehicle 975314, presumably the derrick crane being operated by the Claimant. Mr. Mannes testified that machine operators are reimbursed for the use of their private vehicles, but they are not authorized to charge the Carrier for fuel placed in their personal vehicles by fuel vendors who service the Carrier's vehicles.

Mr. Billy Bates Thompson, a Special Agent for the Carrier headquartered in Denver, Colorado, testified that he was contacted by Mr. Mannes and that he was advised that there was a "possible theft of diesel fuel that had taken place on March 15th". Mr. Thompson testified that he was present when the statement by "Mac" [Mr. Leon], the driver, was taken.

The Claimant testified that he was working as a Machine Operator on March 15, 1991 running a diesel electric crane identified as BN 975314, and that the signature on the fuel invoice for that date was his. The Claimant testified that he could not remember whether it was a Mr. Leon who delivered the fuel on that date and that he could not recall having a conversation with a Mr. Leon.

The Claimant testified that he owns several vehicles, one of which is a pick-up truck with an extended cab and printing on the side of the passenger door that says something to the effect "Marlyn" and "Holmes, Ansley, Nebraska".

The Claimant testified that he did not tell Mr. Leon to fill up a pick-up on March 15, 1991; that he had no idea why Mr. Leon would make such a statement; that, as far as he knows, "I've never met him [Leon]"; and that he did not use the Carrier's credit or the Carrier's account to have diesel fuel placed in his pick-up truck.

The Claimant's wife, Ms. Marlyn A. Holmes, testified that on March 15, 1991 she had possession of the family's pick-up truck, the one with the extended cab, and that she had driven the truck on Tuesday, March 12, 1991 from Colorado to Ansley, Nebraska. Ms. Holmes testified that she had stopped in North Platte, Nebraska on March 13, 1991 at an establishment known as Tomahawk Truck Stop and obtained 36 gallons of diesel fuel for the pick-up. She sponsored an exhibit, a fuel receipt in support of this testimony. Ms. Holmes testified that she had possession of the pick-up truck in Nebraska until the Claimant returned home on Saturday, March 16, 1991 and then he took the truck on either Sunday night or Monday morning (March 17, or 18, 1991), and returned to work in Colorado.

The facts recited above are found in the "direct" examination of the witnesses.

That evidence, standing alone, comes very close to meeting the "substantial and convincing" standard which is required to sustain the Carrier's burden of proof in disciplinary matters presented to this Board.

However, a number of significant questions were raised by the Organization Representative, during his incisive cross-examination, which, among other considerations, requires this Board to conclude that the Carrier has failed to sustain its burden of proof.

It should first be observed that Mr. Leon signed his statement in Brush, Colorado on June 14, 1991 and that the investigation was held in Brush, Colorado on June 21, 1991. The Organization Representative asked Roadmaster Mannes whether he had asked either the manager of the fuel station, Mr. Dan Neb, or Mr. Leon to attend the investigation. Roadmaster Mannes responded "I did not".

The Organization Representative asked Roadmaster Mannes whether, subsequent to his interview with Mr. Leon, he had asked Manager Neb why the fuel station had waited so long to report the incident. Roadmaster Mannes testified that the incident "came up just in casual conversation".

It is clear from the questions asked of both Roadmaster Mannes and Special Agent Thompson on cross-examination that their "investigation" was limited, exclusively, to obtaining a statement from Mr. Leon. They did not attempt to discover why there had been a three (3) month delay in reporting the incident, and they, obviously, made no effort to effect the appearance of either Mr. Neb or Mr. Leon at the investigation.

This Board recognizes, as did the Organization Representative, that the Carrier cannot compel non-employees to attend disciplinary investigations. On the other hand, it is this Board's firm conviction that when an employee's job/career is at stake the Carrier is obligated, at least, to make a good faith effort to insure that the investigation is as "full" and fair as possible.

After hearing the testimony of Mrs. Holmes regarding the pick-up truck with the name "Marlyn" on the passenger door being in Nebraska at the time it was allegedly filled with diesel fuel in Colorado, the Conducting Officer recalled Roadmaster Mannes. After telling Roadmaster Mannes the specifics of the testimony given by Mrs. Holmes while Mr. Mannes was sequestered, the Conducting Officer then elicited that in Mr. Mannes' opinion Mr. Leon could have been mistaken about the date the fuel was allegedly placed in the Holmes' pick-up truck.

That colloquy and the questions the Organization Representative asked Mr. Mannes regarding the demeanor of Mr. Leon establishes why it was critically important for the Carrier to, at the least, make the effort to effect the appearance of the Claimant's accusers.

It is conceivable that Mr. Leon would have agreed to attend the investigation and that questions from the Organization Representative could have raised substantial doubt in the mind of those Carrier officials who reviewed the transcript as to the accuracy of Mr. Leon's recollections, which would then have been ninety (90) days old.

It is also significant to note that nowhere in Mr. Leon's report does he physically identify the individual "crane operator" who allegedly asked him to place diesel fuel in a pick-up truck. The Claimant has denied he knows or spoke to Mr. Leon. This Board cannot, based upon a three paragraph written statement which is devoid of many necessary identifying facts, leapfrog to the conclusion that it was the Claimant who improperly solicited gas for a personal vehicle on March 15, 1991.

The record in this case raises numerous other questions of concern to the Board. Why did the fuel station manager, allegedly having been advised in March 1991 that diesel fuel had been pumped into an employee's private vehicle, not bring that fact to the attention of the Carrier but instead, presume the Carrier for all of the fuel delivered on March 15, 1991, even though it was known that all the fuel was not delivered for Carrier use?

The Chairman of this Board has, on this property and others, sustained the discharge of employees who have been proven to have charged a carrier's account for fuel that was used in those employees' personal vehicles. In those cases the carriers have presented corroborating evidence, either through signed receipts or eyewitness identification or some other form of verification which supports a conclusion that the charged employees were guilty of the serious infraction of theft.

In the instant case, while there is some reasonable basis to suspicion that the Claimant had Mr. Leon fill the personal vehicle identified by Mr. Leon with diesel fuel and have the Carrier pay for that fuel, the evidence does not meet the required "substantial and convincing" standard. Accordingly, the claim will be sustained.

Award: The claim is sustained. The Carrier is directed to reinstate the Claimant with seniority unimpaired and to make him whole for all lost wages and benefits. The Carrier is further directed to physically expunge all reference to the instant discipline from the Claimant's Personal Record.

This Award was signed this 5th day of October, 1991.

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