

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 129

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Case/Award No. 129

On May 13, 1983 the Brotherhood of Maintenance of Way Employes (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. Tom P. Long, hereinafter the Claimant, entered the Carrier's service as a Laborer on October 6, 1980. 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.

The Claimant was dismissed as a result of an investigation which was held on August 14, 1992 in Marysville, Washington. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated Rule 575 for his alleged theft of property belonging to the Imperial Motel in Grand Forks, British Columbia on or about July 31, 1992, while assigned as a Machine Operator on Steel Gang RC03.

Findings and Opinion

The Claimant was a Machine Operator on Steel Gang RC03 which was assigned to perform work in the vicinity of Grand Forks, British Columbia on July 29, 30 and 31, 1992. Members of the Gang were provided lodging at the Imperial Motel in British Columbia, Canada on the evenings of July 29 and 30, 1992.

On the morning of July 31, 1992, a report was made to Roadmaster Jeffrey D. Owen that a teapot was missing from a room at the Imperial Motel, which room had been occupied by the Claimant and Mr. Gary Adams, a fellow gang member. Roadmaster Owen and Gang Foreman Charles Christ testified regarding the efforts undertaken to discover the whereabouts of the missing teapot and to recover it. Mr. Christ testified that he and the members of the gang were informed that if the teapot was not found the crew bus and the members of the gang would be stopped at the US-Canadian border and that a strip search would be conducted. Mr. Christ testified that he spoke with Gang Member Adams regarding the tea kettle and that Mr. Adams recalled "seeing it in the room"; but that he did not know where it was and he stated that he had not taken it. Mr. Christ testified that he then spoke with the Claimant and that the Claimant told him "he would have no problem returning it"; and that the Claimant did, in fact, return the tea kettle to the motel. Mr. Christ testified that the Claimant advised him that he "borrowed it [the tea kettle] to make hot chocolate."

Machine Operator Michael Lewis, called as a witness by the Claimant, testified that he saw the Claimant with the tea kettle, that the Claimant did not hide or conceal the tea kettle when he entered the bus, and that he understood that the Claimant did not intend to keep the tea kettle but took it for the purpose of making hot chocolate.

Mr. Michael Derogatis, another Machine Operator on Steel Gang RC03 who was called by the Claimant to testify, stated that he observed the Claimant board the crew bus on the morning of Friday, July 31, 1991 with the tea kettle and that he understood that the Claimant was using the tea kettle to make and drink his coffee or tea.

Machine Operator Martin Quinlan, who was also a member of Steel Gang RC03, testified in similar fashion as did Messrs. Lewis and Derogatis.

Messrs. Lewis, Derogatis and Quinlan all testified that the Claimant did not conceal the tea kettle and that he did not, in their opinion, intend to steal the tea kettle.

The Claimant testified that he "borrowed the tea kettle that was in my motel room", and that he "borrowed it both Thursday and Friday morning". The Claimant testified that it was his intention to return the tea kettle "when the day was done"; and he believed that because "we were rentin' the rooms and anything within the room is actually ours to use while we are there" that he did not believe he needed authority to borrow the tea kettle and that he did not ask for such authority. The Claimant testified that it would have been "kind of stupid" not to return the tea kettle, since his name was on the hotel register; and that he borrowed the tea kettle because "they have me off in another country workin', [and] I didn't have my thermos with me". The Claimant testified that no one had complained when he borrowed the tea kettle on Thursday, July 30, 1992 and that "If there was a problem I figured they would have said something on Thursday about the tea kettle not being there"; and that as "Nothing was said, I borrowed it again Friday morning and I had returned [it] to the Motel before the work day was up, which was my every intention anyways".

There is no question that the Claimant took property from the Imperial Motel, which was valued between \$10.00 and \$25.00, for his personal use, and that he did not have permission to take the tea kettle off motel premises for any purposes. It would have been extremely easy, particularly for one like the Claimant who, apparently, has no problem in expressing himself, to approach the motel manager and request the privilege of borrowing the tea kettle so that he could make and drink hot chocolate, coffee or tea at the work site.

The Claimant, at the least, was derelict and his extraordinary bad judgment resulted in an incident which was damaging to the reputation of his Gang and the Carrier.

On the other hand, the probative evidence in the record appears to establish that the Claimant did not have the requisite intent required for this Board to conclude that he was going to steal the tea kettle. The question of intent is a close one; for it is not clear how the Claimant would have returned the tea kettle if, after the Gang completed its work, the crew bus was going to return to the Gang's headquarters point in the United States. It is not clear, how the Claimant would have arranged to return the tea kettle to the Imperial Motel; since the record before the Board does not establish whether the motel was on

route between the work site and the border crossing. Because of the factual deficiency in the record regarding the location of the motel in relation to the work site and the return route to the border, and in light of the fact that the Claimant made no effort to conceal the tea kettle and readily admitted that it was in his possession, this Board is constrained to conclude that the Carrier has failed to establish by substantial and convincing evidence that the Claimant intended to keep the tea kettle indefinitely.

However, this Board is persuaded that the Carrier had just cause to discipline the Claimant because of his egregious poor judgment which jeopardized the entire crew and the Carrier on foreign soil. Accordingly, it is this Board's opinion that the Carrier had the right to discipline the Claimant and that a disciplinary suspension, terminating ten (10) days from the date of this Award represents an appropriate penalty for the Claimant's monumental lack of judgment.

The claim will be sustained, in part, and denied, in part.

Award: The Carrier is directed to reinstate the Claimant to service with seniority unimpaired within ten (10) days of the date of this Award, this Award being dated December 15, 1992. The time off between the Claimant's removal from service and his reinstatement, on or about December 25, 1992, shall be considered a disciplinary suspension, and the Claimant shall not be entitled to any back pay or lost benefits.

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

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