

NATIONAL MEDIATION BOARD

SPECIAL BOARD OF ADJUSTMENT NO. 925

	*
BURLINGTON NORTHERN RAILROAD COMPANY	*
	* CASE NO. 14
-and-	*
	* AWARD NO. 14
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	*
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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 Section 3 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 is limited to disciplinary disputes involving employees dismissed from service. 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 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 are dismissed from the Carrier's service may choose to appeal their dismissals to this Board, and they have a sixty (60) day period from the date of their dismissals to elect to handle their appeals through the usual appeal channels, under Schedule Rule 40, or to submit their appeals directly to this Board in anticipation of receiving expedited decisions. The employee who is dismissed may elect either option, but upon such election that employee waives any rights to the other appeal procedure.

The agreement further establishes that within thirty (30) days after a dismissed employee's written notification of his/her desire for expedited handling of his/her appeal is received by the Carrier Member of the Board, that said Member shall arrange to transmit one copy of the notice of investigation, the transcript of investigation, the notice of dismissal, and the dismissed 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 had the option to request the parties to furnish additional data regarding the appeal, in terms of argument, evidence, and awards, prior to rendering a final binding decision in the instant case. 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 excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

Mr. Terry L. Brueckner, the Claimant, who entered the Carrier's service on November 10, 1971 was dismissed from service effective May 16, 1984 as the result of an investigation which was held on April 23, 1984. At the time of his discharge, the Claimant was assigned as Foreman RN 16 in charge of a Surface Correction Gang operating out of Hickman, Nebraska.

Findings and Opinion

The notice of investigation in this case stated that a hearing would be convened to ascertain the facts and to determine the Claimant's alleged responsibility regarding his absenting himself from duty without proper authority and his alleged failure to comply with instructions from proper authority at approximately 12:45 p.m. on April 13, 1984 at Hickman, Nebraska. The members of the Claimant's crew were also charged with the above alleged offenses.

This Board has reviewed the documents of record including a 102 page transcript taken at the April 23, 1984 investigation which involved the Claimant and Mssrs. Stickney, Werger, Frakes, Mitchell and Wissink, the other members of the Claimant's Gang.

The essential factual elements in the record establish that sometime between 12:30 p.m. and 1:00 p.m. Claimant Brueckner gave his Gang permission to quit work. The Gang has assigned hours of 6:00 a.m. to 2:30 p.m. and the time cards submitted by the Claimant for himself and his Gang showed that they worked to and through 2:30 p.m.

The essential facts in this case are not in serious dispute. There is no question that the Claimant and his Gang, who were working at his direction, tied up their machines and left the Carrier's premises at least an hour and a half prior to their established quitting time. The Claimant has not denied this fact but contends that supervision was aware that he was going to leave and to authorize his crew to leave since his crew was entitled to an hour of travel time as well as to additional time because they had worked through their lunch. The Claimant and his Organization also argue that there was a common past practice on this division or in this region whereby gangs could leave work early if they had built up a significant overtime; and rather than taking overtime pay they could shorten a particular day with the understanding of local supervision.

Division Roadmaster Bacon and Roadmaster Chatten testified at the investigation. The substance of their testimony disputed the contention by the Claimant. That is, Division Roadmaster Bacon contended that he had spoken with the Claimant regarding various questions of procedure in early April of 1984 and that he had "never said anything about taking the meal periods off, building up overtime, or anything". Bacon further testified that he had told the Claimant that he wanted the machines out there working and that at no time did he ever tell the Claimant that "we would build up overtime and take off".

Division Roadmaster Bacon, upon examination by an Organization representative, did concede that there had been a common practice on the property regarding the taking of time off. The following question and answer appears at page 26 of the transcript:

"Q. So, there were never any instructions to Mr. Brueckner that this common practice of years past and even in this year yet, also, since the maintenance season has begun was going to discontinue?

A. That's correct. There's been no bulletins put out to the effect that the foreman can or cannot take their time off, although they do know that they have to take the time off with the approval of the Roadmaster in charge."

Further testimony in the record by Roadmaster Chatten establishes, to this Board's satisfaction, that the Claimant

never received specific approval or authorization from either the Division Roadmaster (Bacon) or Roadmaster Chatten to take time off in advance of his scheduled quitting time.

On April 13, 1984 after the Claimant had taken his early quit, which he believed was justified, and had released his crew from duty early, which he also believed was justified, the Claimant and his Gang were confronted in a local tavern/restaurant by Roadmaster Chatten. Chatten testified that when he confronted the Claimant that the Claimant stated "Yeh, I screwed up and I shouldn't have. I should have stayed out there. I was instructed to stay out there until the tie gang was cleared". Chatten then testified that he asked the Claimant "What are you doing in here?" and that the Claimant shrugged his shoulders.

The Carrier had the right to credit the testimony of Roadmaster Chatten, even though the Claimant disputed Chatten's rendition of the facts. It is well established under procedures involving arbitration in the railroad industry that the Carrier retains the right to make credibility determinations and such determinations do not fall within the province of neutral referees. In any event, the Carrier not only had the evidence through the testimony of Roadmaster Chatten, but there was other substantial evidence in the record which led the Carrier to reasonably conclude that the Claimant did not have any specific authorization to leave the property early or to release his Gang early. Additionally, the Carrier was not arbitrary when it failed to find that an unspecified and undefined alleged past practice allowed Maintenance of Way Foremen to decide when significant overtime had built up and thereby take early quits and authorize their gangs to take such early quits. The evidence of record supports the Carrier's general contention that authorization to quit short of established quitting time is required. The Claimant failed to obtain such authorization and this Board must find that the Claimant thereby violated Carrier rules.

It is also significant to note that at least one member of the Claimant's Gang (Mr. D. G. Wissink, a Machine Operator) admittedly did not have any travel time or overtime entitlements. Yet, the Claimant included Wissink as a member of his Gang and gave him an hour and a half to two hours off short of quitting time. This fact supports the Carrier's contention that the Claimant violated applicable rules and was subject to discipline.

This Board discounts any arguments by the Carrier concerning the implication that the Claimant and/or the members

of his Gang were "guilty of consuming alcoholic beverages while on duty". Clearly the members of the Gang justifiably believed that they had been properly relieved from service and the Claimant, although mistakenly, might have justifiably believed that he had the right once off duty to determine what to eat and drink. In any event, this Board has not weighed in the evidence any implications that the Claimant was engaging in improper activity at the tavern/restaurant where he was found by Roadmaster Chatten at approximately 12:50 p.m. on April 13, 1984.

The Organization has argued that the investigation was not a fair and impartial one because the Claimant as well as other members of the Gang were required to put their own names on the notices of investigation. This Board is unimpressed with that argument as it is clear that the Carrier did not deprive the Claimant of any rights to notice or due process by requesting him to put his own name on the notice of investigation/charge. There is no showing that the Claimant was not fully conversant with the facts and allegations concerning the incident on the specific day in question and the notice of investigation itself meets the standard industry requirements.

Additionally, although there may have been some confusion in terms of giving the proper employees notice, that confusion was rectified sufficiently in advance of the investigation so that there is no showing that the Claimant was deprived of any of his essential rights under Rule 40 of the subject collective bargaining agreement.

The Organization has presented strong argument regarding the alleged common past practice regarding foremen's rights to release themselves and their gangs early when there has been a substantial build up of overtime. That argument, compelling as it is, does not overcome contradictory testimony and evidence in the record, which the Carrier chose to credit, which establishes that foremen must have some authorization to implement the practice of releasing employees early when there has been a build up of overtime or travel time.

Accordingly, this Board finds that the Carrier had substantial probative evidence to conclude that the Claimant had violated Carrier rules, and therefore to impose a disciplinary penalty. The Claimant was employed by the Carrier for approximately 13 years at the time of this discipline. He had been previously disciplined in 1973 for violation of Rule G and was subsequently returned to service

in May of 1974 on a leniency basis. In March of 1977 the Claimant was censured for violation of Carrier rules including failure to protect an assignment and for failure to comply with instructions from proper authority. In November of 1983 the Claimant acknowledged that he was guilty of violating Carrier Safety Rule 570. Although the Claimant's record is not unblemished, this Board finds that there is some merit to the Organization's contention regarding possible conflict between established practice and Carrier Safety Rules. Giving the Claimant the slightest benefit of the doubt, this Board will uphold the imposition of discipline but will convert the dismissal to a disciplinary suspension. Accordingly, the Carrier is directed to offer the Claimant reinstatement without back pay and with seniority unimpaired within 15 days of the receipt of this Award.

Award: The claim is denied. However, the Carrier will offer the Claimant restoration to service, without back pay but with seniority unimpaired within 15 days of receipt of this Award. If the Claimant chooses to return to service, the Carrier may require him to meet the established physical qualifications standard applied to all employees.

This Award was signed this 23rd day of January 1985 in Bryn Mawr, Pennsylvania.


Richard R. Kasher
Chairman and Neutral Member
SBA No. 925