

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 169

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 169

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. Jerome D. Geiger, hereinafter the Claimant, entered the Carrier's service as a Sectionman on April 11, 1977. The Claimant was subsequently promoted to the position of Assistant Foreman and he was occupying that position when he was suspended for ten days from the Carrier's service on July 1, 1993 for his alleged violation of Rule 563 on June 2, 1993.

The Claimant was suspended as a result of an investigation which was held on June 14, 1993 in the Conference Room of the Carrier's Depot in Glendive, Montana. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rule 563 for his using profane language and entering into an altercation with Sectionman David Aaker.

Findings and Opinion

Roadmaster Dan Ruddy testified that on the morning of June 3, 1993 David Aaker, a probationary maintenance of way employee, and Daryl Braun, the foreman on the crew to which Mr. Aaker was

assigned on June 2, 1993, came to his office to report that on the previous day the Claimant had "hit him [Mr. Aaker] on the back of the head, or in back of the hardhat, and was very abusive with Dave [Mr. Aaker]".

Roadmaster Ruddy testified that he received a written statement from Mr. Aaker and sponsored that statement which reads as follows:

On June 2nd, 1993 while working [at] mile post 207.7 near Cury, David Aaker was assaulted by Jerry Geiger. Around 2:30 in the afternoon the crew started to work on replacing a rail with a defaulty [sic] weld found by the rail detector. Jerry Geiger was upset that the detector found a defaulty [sic] rail so late in the afternoon because he had to coach a baseball game at four o'clock. Jerry said "We better f---n get this job done quick because I have to coach a baseball game at 4:00 o'clock. At this time Jerry started to push the new hires to work fast and harassed us with vulgar [re]marks such as when I (David Aaker) was hooking up the hydraulic spiker and wrench Jerry said "Are you going to f---n make an all day job of this, come on guys f---n think". I was working as fast as I could but the hydraulic hoses had debris in the connections and [I] had to clean them out. I ignored Jerry's remarks because I was used to his constant negative attitude towards us new hires. About 3:00 that same afternoon we had put the new rail in and was putting the angle bars and bolts in. Jerry told me to put the bolts in and I [proceeded] to do what he told me. At this time I mistakenly tried to place a bolt in an angle bar hole that was not drilled out. Upon doing this action Jerry Geiger said you better start thinkin - Jesus Christ! and in the same process hit me on the side of my hardhat, hard enough so I could feel it. At this time I said "Don't ever do that again!" Geiger also said "Next time I'll hit you in the mouth!" Then Jerry said "Don't f---n threaten me - I'll kick your ass!" Not knowing what to do I continued to work by taking the hydraulic wrench and prepare[d] to tighten the nuts. At this time Jerry Geiger came over to me and said "I didn't know you were so emotional, a cry baby over a slap on the hardhat". I responded by saying "We will see what Mr. Ruddy thinks about your conduct." Jerry Geiger then said "Don't f---n threaten me with Ruddy. If you know what's good for you, you won't f---n tell Ruddy anything, people in the railroad hate cry babies, if you think I'm tough on you, just wait until you get your ass transferred somewhere else." At this time I was very upset and wanted to beat the hell out of him, but remembered from new hire training that altercations are not [sic] prohibited. I continued to do my work by tightening the bolts and stayed as far away as I could from Jerry Geiger. As soon as we got to the sectionhouse I and Daryl Braun went to see Roadmaster Dan Ruddy but he was not in. Daryl and I agreed to see him in the morning about Geiger's actions. On June 3, 1993 Roadmaster Dan Ruddy was told of the situation and asked that I write out what happened and return it to him. This was not the first time I was harassed by Jerry Geiger. Two weeks ago or so I and David Green and Pat O'Brien was called by him a "bunch of dumb f---s" after we did not get a jack up quickly as he wanted. In fact Jerry has harassed me since I started working on the Glendive section on May 6. I have several witnesses to back up

what I have said. They are Daryl Braun, Dan Roberts, Pat O'Brien, David Green and Shawn Lundvig.

I believe I'm a good worker and I try very hard to please everybody. For several weeks I have tried to please Jerry Geiger. I don't think Jerry Geiger's conduct in the past weeks and on June 2, 1993 was very becoming to the railroad. I should be allowed to work in an environment free of verbal harassment and physical assault.

Mr. Aaker testified in all material respects consistent with the written statement he authored on June 3, 1993 and reproduced directly above.

The material factual conflict in the record is found in the testimony of the Claimant who stated that he merely "tapped" the hardhat of Mr. Aaker in order to "get his attention".

While the Organization has attempted to characterize Mr. Aaker's testimony as "inconsistent" and has filled the record with the red herring allegation that there was so much noise at the work site that the Claimant had to get Mr. Aaker's attention by tapping him on his hardhat, this Board has no trouble, at all, in accepting the Carrier's conclusion that the Claimant was profane, harassing and abusive.

It is understandable why those individuals called to the investigation by Mr. Aaker, a probationary employee and a member of the craft or class who was not afforded representation at the investigation, would equivocate when asked whether they heard the Claimant use vulgar language or saw the Claimant "hit" Mr. Aaker. In spite of that equivocation, woven throughout the fabric of their testimony is the fact that Mr. Aaker's accusations against the Claimant were accurate in all material respects.

Why did Foreman Braun accompany Mr. Aaker to Roadmaster Ruddy's office on the morning following the incident when Mr. Aaker registered his complaint regarding his treatment by the Claimant? The answer is obvious. Mr. Braun was there to confirm Mr. Aaker's complaints. Mr. Aaker, Foreman Braun and others testified in a sufficiently corroborative manner so that the Carrier could properly conclude that there was merit in the claim of Mr. Aaker that he was harassed, threatened and assaulted, at least verbally, by the Claimant.

In these circumstances, this Board concludes that the Carrier relied upon substantial and convincing evidence when it determined that the Claimant had violated Rule 563. This Board further concludes that the discipline imposed by the Carrier was neither arbitrary nor overly severe in the circumstances of the Claimant's actions. Accordingly, the claim will be denied.

Award: The claim is denied. This Award was signed this 10th day of March, 1994.



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