

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 174

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

Case/Award No. 174

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

Ms. Sandra J. Rupp, hereinafter the Claimant, entered the Carrier's service as a Section Laborer on August 6, 1979. The Claimant was subsequently promoted to the position of Assistant Foreman and she was occupying that position when she was suspended for thirty-five days from the Carrier's service on July 19, 1993 for her alleged violation of Rules 530 and 532B on July 19, 1993.

The Claimant was suspended as a result of an investigation which was held on July 26, 1993 in the Roadmaster's Office in Jamestown, North Dakota. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that she had conducted herself in an insubordinate manner and failed to comply with instructions from

Roadmaster Paul Campbell while she was assigned as an Assistant Foreman on Tie Gang TP07.

Findings and Opinion

Roadmaster Paul Campbell testified that on July 19, 1993 he was in charge of Tie Gang TP07; and that as the gang was short of personnel, including machine operators, he approached a Mr. Robert Rindy, ordinarily employed as a Laborer, and asked him to move a machine "out of the hole". Roadmaster Campbell testified that Mr. Rindy, at first, stated that he did not wish to take on the responsibility; and that he, Roadmaster Campbell, then obtained the presence of Foreman T.C. Avery, apparently, to act as a witness in the event Mr. Rindy refused an order to operate the machine.

Roadmaster Campbell testified that he and Foreman Avery then approached Mr. Rindy at approximately 10:30 a.m., and he offered the following explanation as to why he subsequently determined to remove the Claimant from service at that time:

A. I had taken Foreman Avery over to talk to machine op-- or Bobby Rindy, who was a laborer, to ask him to move the machine, and as I was conducting that conversation, Ms. Rupp approached the scene and started interjecting her comments in. Ms. Rupp was not involved in the situation, so I said, "Sandy, this is none of your concern. I want you to leave us." She refused. I contin-- tried to continue the conversation with Robert Rindy, and she kept interrupting, saying that I shouldn't be talking to him. I said, "Sandy, this is none of your business. I want you to go away." She said, "I'm the assistant foreman of this tie gang, and I'm in charge of safety." At that point, Robert Rindy said, "I've been taking Tylenol," and Sandy said, "See, he can't run the machine. He can only work as a laborer." And I wanted to pursue this, and she was being disruptive so I said, "Sandy, go sit on the bus." We weren't out on the track, at the time, so I told her to sit on the bus. She said, "No, I won't." And I said, "Sandy, you go sit on that bus and leave us alone." And she said, "No, I don't have to, and you can't make me." So I said, "All right, you're out of service pending investigation for insubordination and failure to comply with proper authority." . . .

Testimony was then entered in the record by several witnesses who had been in the vicinity of the interchange between the Claimant and Roadmaster Campbell. Simply stated, the collective testimony establishes that the "confrontation" was extremely brief; that the Claimant raised questions concerning the safety of an employee operating machinery after that employee had taken medication such as Tylenol; and that Roadmaster Campbell, while

not shouting/screaming, was speaking to the Claimant in a loud voice.

The Claimant explained the incident as follows:

A. Mr.--when I walked up into the conversation, the conversation was already going. My intent was to walk up to Mr. Campbell and Mr. Avery, because I was told that we would have the tract at 11-o'clock that morning. I am the lead assistant foreman. I that it is my responsibility to know what we are going to do. I sat and waited for two and a half hours, and I had absolutely no instruction, no knowledge as to what my responsibilities would be in getting our people on the track once the trains cleared at 11 o'clock. At 10:30, I had seen Mr. Avery, who I was told was to be my supervisor for that day. Upon seeing Mr. Avery and Mr. Campbell, I felt it was my duty to go and ask them what we were planning to do for that day. Being we were men short, there was a lot of questions as to who was going to be on what machine, how to switch the machines out, so on and so forth. When I walked up to this conversation, which already was in progress, I heard Mr. Campbell say, "Is that a 'yes'? Is that a 'no'?" Bob Rindy, I feel, stated to me he did want to talk responsibility of moving the machine, because he was looking at me -- we had eye contact -- because he had taken Co-Tylenol.

Q. Did you hear him state that he had taken Tylenol?

A. That is what I'd heard. I had heard the fact that he stated that he did not want to take responsibility of moving the machine because he had taken Co-Tylenol, at which point, I, in turn, brought my objection to Paul Campbell, in which he instructed me to go sit on the bus.

Q. How did he state that?

A. He said, "Go to the bus."

Q. Did you go?

A. I did not turn at that point. What I did was made my statement. As an assistant foreman, it is my responsibility to see to the safety issue that was addressed to me and to the safety of the employee.

Q. Was there subsequent conversation?

A. After that, Mr. Campbell told me, "This is none of your concern. You leave."

Q. Did you leave at that point?

A. At which point, I differed with him by stating this was my concern. After which, when I made that remark, that this was my concern, he said, "You are out of service. Get into the truck," at which point is what I complied with. I got into the truck, and that is all that happened within a matter of a very short -- very short time.

On its face the quoted testimony of Roadmaster Campbell and the Claimant should provide a simple basis for determining whether the Claimant was insubordinate. However, the Claimant and the Organization have introduced several other issues into the mix. Evidence was entered into the record regarding a prior unjust treatment hearing conducted to determine Roadmaster Campbell's responsibility for such unjust treatment, which the Organization contends is relevant because it demonstrates Roadmaster Campbell's animus towards the Claimant, who testified at that hearing. A substantial amount of evidence was introduced regarding employees' responsibilities to conduct themselves safely, and the extent to which they are "empowered" to refuse to do certain jobs if they are concerned regarding the safety of the operation. There was also a reference to an issue as to whether the Claimant was the subject of sexual harassment or discrimination by Roadmaster Campbell.

These issues of "anti-Claimant motivation" would be much more compelling if it was not so easy to "read between the lines" in this case.

This is what this Board concludes based upon its reading of the record in this case:

1) The Claimant was distressed at the beginning of the duty day because, in her mind, she had been improperly bypassed when Roadmaster Campbell designated Mr. Avery, instead of her, as foreman for the day.

2) Mr. Rindy did not advise any member of supervision prior to his beginning work at approximately 8:00 a.m. on the day in question that he had taken any medication which would impair his ability to work safely.

3) Mr. Rindy did not notify Roadmaster Campbell when he was first asked whether he would run the equipment of any impairment due to the ingestion of medication.

4) In fact, there is substantial reason to conclude that Mr. Rindy's "Tylenol excuse" was fabricated because he did not believe he would be properly compensated for the work. Mr. Rindy's

father's testimony [J.R. Rindy was a Group 3 Operator on TP07 and on-site when Roadmaster Campbell asked Robert Rindy if he would operate the machine], which follows, confirms the fact that had Roadmaster Campbell told Mr. Rindy or Mr. Rindy's father that Mr. Rindy would be paid the Group 3 Operator's rate, Mr. Rindy would have operated the machine and no question would have been raised regarding any alleged impairment:

Q. Would you at this time, for the record, tell what transpired?

A. Mr. Campbell was waiting to get the track, and we were sitting in a vehicle right next to the machines. And Mr. Campbell came up to Bob Rindy and asked him if he would be -- he said, "Do you want to run the vibrator?" Out of the hole for him. And Bob Rindy says to him, he says, "Well, do I get paid the Group 3 rate of pay?" Campbell said, "No, you get paid labor pay," and Bob said, "Well, I would rather -- rather not run it today." And then he told Bob Rindy, he says, "You'll never get another request for a machine on this gang as long as the gang runs or you are on it," and he was -- he was very, very -- what would you say -- very angry (inaudible). His face turned white, his lips were shaking. I got out of the car and tried to talk with him a little, and he just -- he refused to talk. I said, "Hey," I said, "Group 3 pay amounts to what -- \$8?" I said, "Why don't you just pay the kid Group 3 and let him run it out?" "No way in" this and that and the other -- like I say the man was just shaking. And at that time I believe Sandy was there, too. And he -- then he took off and got in his Bronco and left.

5) Roadmaster Campbell returned after conferring with other management representatives and he brought Foreman Avery to the site where he confronted Robert Rindy for the purpose of being a witness, presumably in the event Mr. Rindy refused a direct order.

The safety issue is a "very red herring" for two substantial reasons; (1) Mr. Rindy's testimony and the testimony of his father establish that Mr. Rindy was prepared to operate the machine if the pay was right, and that the Tylenol "excuse" was either purely fabricated and/or should have been raised timely before Mr. Rindy ever began his assignment and (2) Roadmaster Campbell never directed Mr. Rindy to perform an unsafe act, and therefore Mr. Rindy's safety was not in jeopardy.

Thus all the testimony and evidence regarding employee "empowerment" is irrelevant and immaterial to the question of whether the Claimant improperly challenged management's authority in the clear presence of fellow employees, and if she did whether

the Carrier was justified in imposing discipline for insubordination.

It would certainly appear that prior to the date in question a personality conflict, at least, existed between the Claimant and Roadmaster Campbell. One might even conclude, based upon the evidence in the record, that Roadmaster Campbell, on occasion, had a propensity for being volatile.

Neither of those facts justified the Claimant twice refusing to "leave" the site of a discussion between a Roadmaster and a laborer when she was told that the discussion was "none of her business". It was none of her business. It was Mr. Rindy's business. If Mr. Rindy had been directed to perform an unsafe act, which he was not, then he was responsible for determining what action should be taken; or he could have consulted with a safety representative to determine the proper course of action.

The overwhelming evidence in this record establishes that the Claimant was "spoiling" for a confrontation with Roadmaster Campbell, who, in her opinion reflected by her own testimony, improperly bypassed her and assigned Mr. Avery to act as foreman on the day in question.

The Claimant was insubordinate. Insubordination, particularly "public" insubordination, is a very serious offense in any work environment. Accordingly, this Board concludes that the Carrier had proper and just cause to discipline the Claimant, and further finds that the discipline imposed was neither harsh nor overly severe. Therefore the claim will be denied.

Award: The claim is denied. This Award was signed this 20th day of March, 1994.



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