

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925
Case/Award No. 181

BURLINGTON NORTHERN RAILROAD COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

Case/Award No. 181

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. Mark R. Hunter, hereinafter the Claimant, entered the Carrier's service as a Laborer on August 23, 1990 and he was occupying that position when he was dismissed from the Carrier's service on November 29, 1993 for his alleged violation of Rule 564 on October 25, 1993, in connection with his alleged discharging of a firearm at the Double H Motel, Kettle Falls, Washington, at or about 12:15 a.m., while working as a laborer on Steel Gang RP12.

The Claimant was dismissed as a result of an investigation which was held on November 3, 1993 in the Roadmaster's Office Conference Room in Spokane, 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 564 of the Burlington Northern Railroad Safety Rules and General Rules.

Findings and Opinion

The Claimant was terminated for an incident that occurred sometime in the early morning hours of October 25, 1993, while he was residing at the Double H Motel; a facility used to lodge maintenance of way crews in the vicinity of Kettle Falls, Washington.

Mr. Glen Williamson, the Manager of the Double H Motel, testified that he was on duty on the morning of October 25, 1993 when he "heard gun fire and I got up and went outside to see if I could see where it was coming from". Mr. Williamson testified that he was not able to determine from whence the shots came, nor did he see who had fired the shots. Mr. Williamson testified that local police officers appeared on the scene, and that they were "carrying some heavy artillery, M-16's, to be exact". Mr. Williamson testified that "for my own personal safety, I decided I was better off inside the motel and for the safety of my family"; and so "I went back inside and pulled my revolver out and I woke my children up and had my children go with my wife, because at that time, I didn't know where the gun fire was coming, which direction the bullets were going". Mr. Williamson testified that he did not know exactly how many shots were fired, but that he heard "quite a few more" than two.

Mr. Williamson testified that earlier in the evening he had "had some words with Mr. Hunter out back"; and that in his opinion the Claimant was "lit, you know, drunk". Mr. Williamson testified that during this exchange with the Claimant the Claimant "kicked the door quite a few times as he was trying to get out" and that he used profane language.

Mr. Williamson testified that he was advised by the police that they were going to "run a check on Mr. Hunter"; and that the Claimant was removed from the motel property by the police when they discovered "he's got some warrants out for his arrest".

Upon examination by the Organization Representative, Mr. Williamson testified that he did not have "proof" that the Claimant was intoxicated; that to his knowledge no urinalysis or breath testing was performed by the police authorities; that there was no damage to the door which was kicked by the Claimant; and that to his knowledge there was no proof as to who fired the shots. Mr. Williamson testified that he observed a "jug of alcohol" that was nearly empty; but that he could not attest as to who had been drinking from that bottle. Mr. Williamson testified that a Mr. Ellis occupied the same room at the motel as did the Claimant.

Mr. Williamson testified that he determined that the Claimant was intoxicated "by his manner" and "by the way he acted".

Mr. Don Ellis, a Welder on Steel Gang RP12 working out of Kettle Falls, testified that he had been staying at the Double H Motel for several days prior to the date of the incident.

Mr. Ellis testified, when first questioned by the Conducting Officer, that he could not remember who the other employee was with whom he shared a room on the evening in question; but that he did remember "shots being fired". When he was asked directly whether the Claimant was his roommate on October 25, 1993 at the Double H Motel, Mr. Ellis testified affirmatively; and he also testified that it the Claimant who had "fired the shots".

Upon more specific questioning by the Conducting Officer, Mr. Ellis observed that it was "a pretty confusing situation for me", and when he was asked what happened on the night in question, after the Claimant awakened him up at approximately 12:30 a.m., Mr. Ellis stated "I don't have anything to say".

After two recesses, during which Mr. Ellis apparently conferred with others, Mr. Ellis testified, after first observing that he had worked with the Claimant for the last three years "day in, day out" and that the Claimant was a "good person", as to what happened on the night in question as follows:

A. Right. Almost immediately I realized that Mark was intoxicated and thought he was just going to calm down. We -- you know -- we were just talking and carrying on and then it just got to a point, he opened up a briefcase, took out a gun. I told him to put it away, and you know, don't be screwing around. I mean, this was in a matter of minutes had passed and like I said, I thought it was just because he was wound up from the ride. He was going to shoot out the floodlight over on the motel building. And I got him to quite doing that, you know, not to do that. And he started yelling at me to shut up -- screaming at me to "Shut up, shut up". Opened up the motel door, stuck the gun out the -- down the -- straight down the side of the motel and fired a shot. It was extremely loud and I knew that -- told him, you know, "Goddamn, what are you doing, man. There's cops crawling around here. The cops are going to be here." So at that point, I knew the cops were going to be coming. The thing that really pissed me off is, I have children and the next morning I realized that you'd shot right towards that house over there and that really pissed me off. I mean, you could have killed somebody. He came back in and shut the door. I started getting nervous and I looked out the window and I seen this cop car pull up. I told him the cops are here, you know. "I told ya." And -- so I laid down on my bed and I

put my head phones on, put the pillow over my head -- I didn't want no part about what -- he wasn't comprehending at that point the seriousness of what was about to go on. I just wanted to tune out of it completely. I knew they were going to be there any second and he kicked into my bed and I pulled the pillow off and he was pointing the gun at me. And that's another I'd like to say, if you ever point a gun at me again, I'll jam that up your ass, and I'll blow you off the end of it.

Mr. Ellis continued to explain the incident in greater detail, and made reference to the fact that he was aware that the Claimant had a problem with alcohol abuse. In response to a question by the Organization Representative, Mr. Ellis testified that he "actually" saw the firing of the gun.

Ms. Linda McKee, the Claimant's fiancee, testified that on the afternoon of October 25, 1993 [presumably, October 24, 1993] she and the Claimant had been "target shooting"; and affirmed the Organization Representative's speculation that the "empty rounds in the pistol" that was in the Claimant's suitcase could have been the result of the target shooting.

The Claimant testified regarding the incident on the evening in question as follows:

A. Okay. I had gone into the motel room and Don was listening to some music. And so -- and it was really loud. And so, I kicked the bed and you know, tried waking him up to say, you know, "Turn it down", you know, we gotta get some sleep. He just -- he started yelling and screaming and then I got on the -- fact to bring Linda back here on this one. I got on the phone with her and I heard a backfire outside. I went outside and looked. And that's when I took -- I did take a gun out there with me, 'cause it sounded like gun shots. So I took the gun out there with me saying "There's somebody shooting at the motel or what was going on." I didn't know. Then I back into the motel, finished talking to Linda, and then I saw lights from police cars. Went back outside, but I have to restate that there's a fence there -- we're in an end apartment, and there's a house way over to the right and then there's a big field to the left side, and that's where I saw a red Scout, out in the field. The accusations that Don said, pointing a gun or anything like that, I had it in my hand. I'd never point at him, though. I mean, I went through the Vietnam War, I know what it's like to kill somebody, and I'd never do it again. I don't know why, I think he's -- think he's a little bit paranoid, because he heard gun shots after I went outside. Let's see -- and he stated that he saw me shooting the gun. But that can't be because I was outside.

The Claimant testified that his arrest by police authorities on the evening in question was due to a traffic violation, and it "had nothing to do with the incident at the motel". The Claimant testified that while he was in the hotel room on the telephone with Ms. McKee that shots were fired which Ms. McKee heard.

Ms. McKee was recalled and testified that while she was on the telephone with the Claimant "I heard a noise", and that she did not know "what it was"; but that it could have been a shot, a backfire or somebody slamming a door.

The Claimant was dismissed from service because the Carrier concluded that he had violated BN Safety Rules. In his closing statement, the Organization Representative argued that the circumstances of the incident "are very vague", and that there was "a lot of high pressure on people and witnesses to what they say and how they say it". The Organization also objected to the "coercing of a witness with the threat of an investigation", and alleged that that threat (presumably made to Welder Ellis) was made by a Carrier Roadmaster.

This is a case which, essentially, involves a straight forward issue of credibility. The Carrier, apparently, chose to believe Motel Manager Williamson and Welder Ellis when they observed that the Claimant was intoxicated. Whether the Claimant was the person who drank from the nearly empty "jug" observed by Mr. Williamson is immaterial. Lay persons are qualified to render opinions regarding indicia of intoxication, and confirmation by a breath or blood test is not necessary to establish evidence of alcohol use.

The Carrier also, apparently, chose to credit the testimony of Mr. Ellis, to the effect that he observed the Claimant handling a weapon and discharging that weapon sometime between the hours of 12 midnight and 12:30 a.m. on October 25, 1993.

The Board is not in a position to second guess the Carrier's credibility determination, as there is no evidence, of any significant weight, that would place that determination in question.

It should be noted that the Board gave no weight to the issue of the Claimant's alleged arrest, since there is no documentation and minimal testimony in the record regarding the actions taken by the Kettle Falls police or whether the arrest was related to the discharging of the weapon.

Finally, the Organization has argued that a witness was coerced. All the record reveals is that Mr. Ellis, for some reason, did not wish to testify about the incident. As he took the witness stand he appeared to have a bout of temporary amnesia. There is no showing that his recollection was not properly refreshed or that he was compelled to make false witness. Shots were fired. The Claimant had, at least, two pistols in his possession. Empty cartridges were found in the Claimant's room. The Claimant was intoxicated. All of these facts, in addition to Mr. Ellis' testimony, contributed to the Carrier's conclusion that the Claimant had committed a serious breach of the BN's safety rules and of the societal rules which protect the general public at large.

Based upon the foregoing findings, this Board finds no reason to challenge the Carrier's credibility determination and to thus overturn or modify the discipline. Accordingly, the claim will be denied.

Award: The claim is denied. This Award was signed this 7th day of February, 1994.

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