

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY *
- and - *
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES *

CASE NO. 33
AWARD NO. 33

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 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 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 are dismissed from the Carrier's service may chose to appeal their dismissals to this Board. They have a sixty (60) day period from the date of their dismissals to elect to handle their appeals through the usual channels (Schedule Rule 40) or to submit their appeals directly to this Board in anticipation of receiving expedited decisions. An employee who is dismissed 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 dismissed 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 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, 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. Rex C. Prescott, hereinafter the Claimant, entered the Carrier's service as a B & B Helper on August 9, 1978. He subsequently was promoted to First Class Carpenter and was occupying this position when he was dismissed from the Carrier's service effective March 7, 1986. The Claimant was dismissed as a result of an investigation which was held on December 30, 1985 in Seattle, Washington. At the investigation the Claimant was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had violated General Rule G and Rule 702(B) of the Consolidated Code of Operating Rules for his alleged failure to comply with instructions and insubordinate conduct on December 20, 1985.

Findings and Opinion

On December 20, 1985 the Claimant was a member of B&B Crew #5, which was working on the Pacific Division and stationed at Edmonds, Washington. While the Crew was engaged in pile driving rail for the construction of a bulkhead and in its efforts to cross over pipes owned by Standard Oil a rail was driven so that it penetrated a jet

fuel line. This accident resulted in the shut down of the area to rail traffic and significant spillage of fuel.

An F-27 accident report filed on the date in question by Foreman N.J. Polston stated that "I miscalculated pipe location and when I drove the rail it penetrated the jet fuel line".

When Supervision arrived at the accident scene, at approximately 12:30 to 12:45 p.m. (the accident had occurred at approximately 12:15 p.m.), it was determined that the accident was due to "human failure" and it was further decided that the six (6) members of the crew should be taken to a local hospital facility in order to undergo urinalysis testing. The Crew was broken into two groups of three employees each and the first group including the Claimant was transported to the hospital facility. The Claimant's fellow workers submitted to the urinalysis after signing a consent form. When the consent form was read to the Claimant he had certain objections to it. The form read as follows:

"2900 Bond Street
Everett, WA 98201

URINALYSIS TEST REQUEST - Burlington Northern RR

Name: -----
Date: -----
Time: -----

I hereby request the Co-operative Medical Laboratory at Providence Hospital to withdraw a sample of my urine for the purpose of testing it chemically to determine its alcoholic content and/or toxins.

The procedures necessary to take a sample of my urine and test it chemically have been explained to me and I understand the nature of those procedures.

I further authorize the hospital to deliver the result of this urine test to:

D.G. Boespflug
Asst Trainmaster
Burlington Northern RR
2900 Bond Street
Everett, WA 98201
Telephone: 259-9646

The cost of this test will be billed to the Burlington Northern Railroad.

I hereby release the hospital, its medical staff and any employees from any and all liability in connection with the results of this test.

Sign: -----"

A card containing the following language was also read to the Claimant by Trainmaster Boespflug:

"This is to advise that this incident may involve operating rule violations. Under BN's existing policy guidelines we are requesting that you give a urine sample to the BN, or to a designated medical facility in order to exonerate yourself from alleged Rule G violation. The urine will be used to detect the possible presence of any drugs or alcohol in your body. We should also advise you that a refusal to give a urine sample will be considered a violation of Rule G and 702(B). Do you understand? Will you provide the sample?"

The evidence of record establishes that the Claimant and Trainmaster Boespflug had some discussion regarding the nature of the release form and the Claimant's willingness to take the urinalysis test. The Organization Representative developed on examination of Trainmaster Boespflug that none of the Claimant's actions indicated, in any way, that he was under the influence of any drug or alcohol; that the Claimant was not asked to perform any dexterity tests; that Trainmaster Boespflug was close enough to the Claimant to smell any alcohol or drugs and that he smelled none; that the Claimant was not observed using any controlled substances or alcohol or drugs; that there was no finding of any drugs in the Claimant's possession and that no individual had advised the Carrier that the Claimant possessed any illegal substances; that Trainmaster Boespflug was familiar with Carrier policy which requires that there be probable cause before an individual is asked or required to take a drug test; the Trainmaster Boespflug was familiar enough with the Crew so that he knew that B&B Foreman Polston was in charge; and, that he, Trainmaster Boespflug did not instruct, but did request, the Claimant to sign the release.

The record in this case indicates that the Claimant was willing to undergo a urinalysis test and was willing to have the results of that test made available to the Carrier. The Claimant was unwilling to sign a consent form which included language that would release the hospital and its employees from all liability associated with the taking and reporting involved in the urinalysis test. The Claimant made his objection clear to Carrier supervision and told Carrier

supervision that if the word "mandatory" was written on the consent form, he would take the test. The Claimant also offered to have his urine tested through a different facility.

The Carrier refused to place the word "mandatory" on the consent form and also refused to delete the release of liability language for the hospital.

In the context of the facts of this case, this Board makes several findings. First, in light of the admission by Foreman Polston that he was responsible for the puncturing of the fuel line and in view of the failure of Carrier supervision to adequately investigate the accident there is reason to find that the Carrier lacked "probable cause" to have the Claimant undergo a urinalysis test. This finding is buttressed by the fact that the Carrier had Second Class Carpenter, Vic J. Pollow, who was also a member of the Crew but who was approximately 200 to 300 yards away from the location where the pipe was struck, undergo a urinalysis test. Secondly, it is clear from the colloquy between the Claimant and Trainmaster Boespflug that the Claimant was never specifically advised that he "would" be disciplined but that he was advised that he "could" be disciplined if he did not sign the release form. It is even more clear that the Claimant was never directed or instructed to take the urinalysis test, and that the Claimant was not insubordinate when he requested that the word "mandatory" be written on the consent form. It is apparent to this Board that the Claimant wanted the record to be clear that he was not voluntarily relinquishing any claims he might have against the hospital if the urinalysis testing was done in a negligent manner. The Claimant did not defy his supervisor, and there is no basis for finding a violation of Rule 702(B).

In view of these findings, this Board will sustain the claim and hereby directs the Carrier to reinstate the Claimant with full back pay (less outside earnings) and with seniority unimpaired. The Carrier is further directed to clear the Claimant's record of any reference to this incident.

Award The claim is sustained in accordance with the above findings.

This Award was signed this 10th day of April 1986 in Bryn Mawr, Pennsylvania.


Richard R. Kasher
Chairman and Neutral Member