

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

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CASE NO. 96

AWARD NO. 96

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. Jose Luis Tovar, hereinafter the Claimant, entered the Carrier's service as a Sectionman on September 10, 1990. The Claimant was occupying this position when he was suspended from the Carrier's service for five (5) days effective January 16, 1991 through and including January 20, 1991.

The Claimant was suspended as a result of an investigation which was held on December 18, 1990 in the Carrier's office building at Pasco, Washington. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rules 19, 563 and 564 of the Carrier's safety rules for his alleged responsibility in an altercation which occurred at approximately 12:00 noon in the Connell Depot, Connell, Washington on December 6, 1990.

Findings and Opinion

The incident which gave rise to the investigation occurred on December 6, 1990 at approximately 12:00 noon in the Connell Depot office. Mr. Darrell Brown, who was a Head Welder working out of Connell, Washington at the time of the incident, and the Claimant, who also was working out of Connell, Washington at the time of the incident, were in the Depot on a lunch break.

The testimony of Roadmaster F.J. Breen was to the effect that he was advised on the morning of December 7, 1990 of an alleged altercation between Mr. Brown and the Claimant. Mr. Breen testified that he spoke with both Mr. Brown and the Claimant in order to obtain their versions of the incident, and that he obtained a personal injury report filed by the Claimant on December 7, 1990, which injuries were allegedly incurred by the Claimant during a physical altercation with Mr. Brown.

Both Mr. Brown and the Claimant were represented by officers of the Organization; and both Mr. Brown and the Claimant were given the opportunity to testify, to call witnesses, to question witnesses and to make statements regarding the incident.

Mr. Brown made the following statement:

Okay, I came into the Connell Depot and we were eating lunch and I was calling on the radio as the men were eating lunch to see where the trains were. Louis Tovar came in with a buddy of his, his cousin I think it is and he said, Alex Tovar he said is going to bump you out of your job. I said nothing, then he went back over to his seat and sat down and started eating his lunch and he said now Ernie Tovar he goes as soon as his machines abolished he's going to bump you out of a job. And I walked over to him and I said well I said I still won't be on the welfare cheese line and he grabbed me by the shirt and grabbed me by my hair and then I grabbed him by the jacket and I kept telling him to let go of me and he wouldn't let go. And I told him two, three, four, five times let go and I just hung onto him, he had me by my hair, in fact when I let go and when he let go of me I had a hand full of hair taken out of my head. And then after that he got really worried and came up to me and said, step outside, step outside, so I stepped outside he goes I'm really sorry, he says but it's that Don guy that big Don that gets all this started and I said well if you let everybody influence your decisions on assaulting the foreman out here, then your never going to have a job ever and that was the end of

it. And he apologized, he went back to work, worked all day long and then after work I heard something about him making a statement, about an injury affair. That was the incident.

Mr. Brown testified that he did not, at any time, strike the Claimant; that the Claimant had previously worked for him as a laborer; that he and the Claimant had previous problems; that he stood approximately six feet tall and weighed 170 pounds; that he had no idea of the Claimant's size, but that the Claimant was "small but stocky"; that he did not crush the Claimant's sandwich in the Claimant's hand; and that he did not grab the Claimant by the shirt and shoulder and slam him from wall to wall in the Connell Depot.

In response to a question from the Conducting Officer, the Claimant gave his version of the incident as follows:

Okay, me and David Aguayo were coming in. Brown, okay, me and David came in the door, Brown was already sitting there. Jim Lick was sitting there, Manney Sanchez, Doug Grimes, we walked in David sat down where the table was, I walked in and said hey Jimmy hey did you buy me a hamburger he said no Louis but I got some french fries. So I went on and he goes but if you want some go ahead and get some, so I went up, so I walked to Jim and I got some french fries and that's when Darrell Brown said, that's when Darrell Brown said hey I'll give you a hot dog Louis up your butt you know, excuse my language but anyways that's what he told me. I just turned around and I go, I bet you would like it and then I turned and walked where David Aguayo was sitting down by the bathrooms, I sat down on the desk, I was sitting down on the desk and later on we were eating a little bit and then Brown got up and said hey come on Louis let's go outside I want to kick your butt right now. For a while I thought he was joking around, I thought, you know I didn't really said anything and that's when Brown said I'll kick your butt right now Louis. Well, let's go outside and I didn't say nothing so he walked up he got up later on, later he got up and walked to where I was sitting down on the desk and he started, he came up to me and started pushing me like with his knees and upper chest, cause I was sitting down on the desk, he was pushing me saying come on hit me, you can hit me, come on, come on, you know doing that to me and I was still sitting down and then Brown was just like, you know he wanted me to hit that's what he wanted me to do and then he walked off and went back to where, kind of like where he was sat down, he didn't sit down he was standing

up. Then later on he goes, he come up to me again, he goes all you F'N Tovar are all the same, that's when he came up to me again and I was eating my lunch he grabbed it out of my hand and squeezed it, like this and goes come on aren't you going to do something about it, he squeezed it like that when I was sitting down and eating my lunch and he kind of just jumped back because he thought I was going to hit him or something. He jumped about a foot back and I was still sitting down, I was still sitting and just grabbed my sandwich like disgusted I mean, I didn't want to hit him or anything because that would be my job. I mean so I go like this, kind of flick my sandwich like this and when I flicked it like that the next thing I know, that's when he hit me in the eye. That's when he grabbed me, when he hit me like this, he hit me in the eye and grabbed me like that. Threw me, I mean he threw on the window, he threw me on the desk, he threw me all everywhere and the last, when he let me go is when he had me by the bench like this, he was on top of me and I did have him here by the shoulder, like this and one arm so that he wanted, we were all hanging on like this. He said, that's when he let me go and that's the way, when he let me go I was like this, I let go and he let me go after that I got up and I went to go sit down at the table and I want a pop and Brown was telling me I'm the boss around here and you are not going to tell no body here and I told Brown you got a piece of juice or something on your nose and he comes up to me and grabbed my sweater and wipes it off like that, and he was still, he was like kind of saying, trying to make me get mad, like hitting me after I told him you got a piece of tomato on your nose, right here a piece of juice. He grabbed my sweater and wipes it off and I still have the sweater where he wiped it off and everything and after that that's when he walked away and that's when the crew came in there later on, they were sitting down and that was it.

The Claimant testified the he resumed working on December 6th after the incident and finished his tour of duty; that he began to feel pain the following day; that he construed Mr. Brown's statement regarding the hot dog as an insult; that he stands 5 feet 3 inches tall and weighs 128 pounds; that there were photographs taken of his bodily injuries after work on December 6, 1990; that a doctor's report confirms scratches on his chest and his shoulder and damage to his cheekbone and eye; and that he did not "start" the incident. The Claimant also testified that the pictures of his injury were taken by his brother, Alex Tovar, and that other pictures of his

injuries were taken at the Connell police department. The Claimant testified that he was struck one time by Mr. Brown.

Fellow employees Aguayo (who is the Claimant's cousin), Sanchez, Grimes and Lick, all of whom were in the Depot facility, testified regarding the extent to which they observed the incident involving Mr. Brown and the Claimant. Mr. Alex Tovar, the Claimant's brother, testified regarding his efforts to seek out supervision to report the incident and his observations regarding the Claimant's injuries.

Assessing responsibility in "fighting" or "horseplay" cases is always, at best, a difficult task, even when the finder of fact is present at the hearing at which witnesses, invariably, provide different versions of the facts. The instant case is no exception to the above observation. There is no testimony in the record regarding the duration of the incident; however, based upon the collective testimony of both principals and the various employee witnesses, this Board would conclude that at most the incident began and ended within two to five minutes. It is not surprising that some twelve days after the incident there are differences in perspective. It is also not surprising that the major differences in perspective are found in the conflicting testimonies of Mr. Brown and the Claimant, both of whom apparently recognize that they would jeopardize their employment status by engaging in fighting or any physical confrontation. It is also not surprising, in view of the motivation by fellow employees not to be responsible for causing another employee to be disciplined or possibly terminated, that those employees "did not see all of the incident" or only saw and heard those parts of the incident which they desired to see and hear and therefore they could not testify, with sufficient certainty, as to several critical facts regarding the incident.

This Board is in a somewhat precarious position, since if Mr. Brown was also disciplined for the December 6, 1990 incident and if that discipline was appealed and is presently pending before an arbitration tribunal we must ensure that this decision is not construed as an assessment of blame or an exculpation of guilt if and when Mr. Brown's discipline is reviewed. Accordingly, this Board here disclaims any intention to make a binding assessment regarding the nature of Mr. Brown's activities on December 6, 1990 insofar as those activities may or may not be found to have violated any of the Carrier's Safety and General Rules.

Having made the above observations, this Board now turns to the question of whether the Carrier has presented substantial and convincing evidence that the Claimant engaged in prohibited activities on December 6, 1990, and, if so, whether the discipline assessed was appropriate.

While most of the facts in the record are disputed, and while the Carrier has the final authority in resolving issues of credibility, certain facts, insofar as the Claimant's activities are concerned, are undisputed. By the testimony of both Mr. Brown and the Claimant, Mr. Brown approached the Claimant where the Claimant was sitting. By the Claimant's testimony, prior to Mr. Brown's approach, the Claimant responded to what he interpreted as an insult when Mr. Brown said "I'll give you a hot dog Louis up your butt" by stating "I bet you would like it". If the Claimant considered Mr. Brown's "hot dog" statement as an insult, it is reasonable to conclude that his response would be equally insulting and likely "provoking".

Additionally, by the Claimant's testimony he "flicked" his crushed sandwich in a manner that a part of the sandwich hit Mr. Brown in the face. By the Claimant's testimony, when Mr. Brown approached him and began to push up against him with his knees and his chest, the Claimant remained seated on the desk and did not retreat.

Finally, the Claimant disputes Mr. Brown's testimony that the Claimant taunted him by telling Mr. Brown that different members of the Claimant's family would likely exercise their seniority to displace Mr. Brown from his current assignment. The Carrier had the right to credit Mr. Brown's testimony, regarding this matter, and to conclude that the Claimant had some responsibility for instigating, prolonging and/or participating in the verbal byplay which precipitated the physical altercation.

When all of the Claimant's actions are considered in the full context of the incident, while one might argue that Mr. Brown provoked the incident, exacerbated the verbal exchange into a physical confrontation and threw "the first [and only] punch", the fact remains that the Claimant, in this Board's opinion, took no action to avoid the confrontation. While the Claimant may consider that he acted in a purely self-defensive manner, the record does not support that conclusion.

Rule 563 provides, inter alia, that "Employees must not enter into altercation with any person, regardless of provocation, but will make note of the facts and report such incident in writing to their immediate supervisor".

The Chairman of this Board is not unmindful of the fact that many maintenance of way employees regularly, naturally and commonly use language that is acceptable in that environment but may not be in others. Unfortunately, in today's society, in and out of the

workplace, the Board has observed an ever increasing trend of disputes being settled through verbal and physical violence.

In spite of these observations, the fact remains that Rule 563 requires all employees to avoid verbal and physical altercations, regardless of how they may view their "macho" image being compromised. This Board is not, as stated above, exculpating Mr. Brown from blame. And while the Claimant may believe that he was the subject of an unprovoked attack, he did return Mr. Brown's perceived insult with an insult and he failed to take any action to evade what he considered to be an unprovoked attack.

In these circumstances, the Board finds that the Carrier had just cause to conclude that the Claimant was a participant in an altercation and to conclude that the appropriate discipline for such participation was a five (5) day suspension.

Award: The claim is denied. This Award was signed this 18th day of May 1990.

Richard R. Kasher

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