

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Form 1

Award NO. 24208
Docket No. R-43821
93-1-91-1-B-1890

The First Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers
(
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"Was the Carrier justified in its action when they first suspended the Claimant and subsequently dismissed him in regard to this incident?

If the Carrier was not justified in its actions what should the remedy be?"

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waive right of appearance at hearing thereon.

From July 1982 through September 26, 1989, Engineer W. E. Alloway (Claimant) regularly worked as a member of one of six train crews known as the "Crawford Helpers". In this operation, helper engines assist heavy tonnage trains up a 1.5 percent grade near Crawford, Nebraska. The Crawford Helpers were under the general supervision of a Terminal Superintendent headquartered at Alliance, Nebraska.

On September 25, 1989, ten of Claimant's fellow employees at Crawford presented Carrier supervision with a signed petition reading as follows:

" Dear Sirs;

We the undersigned, employees of Burlington Northern, working the Crawford Helpers are concerned about our safety while working around and with engineer W. E. Alloway. It is our opinion, although we are no professionals, that Mr. Alloway is about to have a nervous breakdown. If this were to happen there is no telling what he might do as he acts as if everyone is out to get him. We feel that he is capable of violence.

Perhaps we are over reacting but we feel that a professional evaluation would be in order. We respectfully request that what ever measures you deem appropriate be taken to protect everyone's safety until this matter is resolved."

On the basis of the petition and a personal interview with Claimant on September 26, 1989, the Terminal Superintendent took Claimant out of service and referred him to carrier physician Dr. Fairbanks, for immediate examination. After examining Claimant, Dr. Fairbanks consulted with Dr. H. Newby, Carrier's Assistant Chief Medical Officer. Neither Dr. Fairbanks nor Dr. Newby is a psychiatrist, but they mutually concluded that Claimant should undergo a comprehensive evaluation by a certified psychiatric specialist before being allowed to return to work.

By letter of September 27, 1989, the Terminal superintendent notified Claimant that the medical officer required a comprehensive psychiatric report before Claimant could be returned to service. Claimant responded by letter of October 30, 1989, asserting that his fellow employees were engaging in "defamation of character", that his personal health did not require a psychiatric examination, and concluding as follows:

"The intent for my recommendation to see a psychiatrist was for a quick personal evaluation by a competent professional to show that my current emotional state was that of a rational person. The proof itself that the allegations are

false would be by my action in the past, before and during this incident. A complete psychiatric evaluation, however, is not a reasonable request as nothing in my past behavior would warrant such extreme action.

If I go to the psychiatrist under the condition that it is for my personal health and assume the financial responsibility for the consultation, it is not only untrue but gives substance to the allegations. Accordingly, I cancelled the appointment made by Dr. Fairbanks on the grounds that the request to see the psychiatrist is a company decision and therefore Burlington Northern must assume the financial responsibility.

I will be waiting to hear from you concerning this matter."

In the meantime, by letter of October 9, 1989, the Organization's Local Chairman requested that Claimant "be given his rights as per Memorandum of Agreement dated January 23, 1941."

By certified letter of February 21, 1990, the Terminal Superintendent directed Claimant to undergo psychiatric evaluation. When Claimant failed to do so, the Terminal Superintendent notified him by certified letter on March 7, 1990, that continued failure to provide the medical documentation requested could result in disciplinary action. When claimant continued to resist compliance with the instructions of the Terminal Superintendent, Carrier cited him for insubordination. Following a proper hearing, Carrier assessed a thirty-day disciplinary action in April, 1990. Notwithstanding that discipline, Claimant still failed or refused to undergo the psychiatric evaluation. Following another proper hearing, Carrier dismissed him from service. Timely claims by the Organization protesting the thirty-day suspension and discharge were consolidated on appeal for final and binding determination by this Board.

We have reviewed carefully the transcript of proceedings in the disciplinary hearings. It should be noted that mid-way through the Investigation, Claimant informed Carrier that he was releasing the Organization representation provided him and that he would represent himself in the remainder of the proceedings. However, the Organization did make a timely appeal and presentation to the Board on Claimant's behalf following Carrier's imposition of the dismissal action.

Carrier points to substantial record evidence, including the following admissions by Claimant, to support its discharge decision:

"Q. Do you understand that Mr. Clifton is an officer of the Burlington Northern Railroad and responsible for you in your capacity as an Engineer?

A. Of course I do.

Q. You understand that Mr. Clifton is your supervisor?

A. Well, a couple removed he is.

Q. But that you are obligated to comply with his instructions?

A. That's right...if they're valid.

Q. Mr. Alloway, when you receive instructions from an officer of the Burlington Northern Railroad, if you do not agree with the instructions, is there a procedure that you go through to handle these matters?

A. Yes, there is.

Q. A grievance procedure?

A. When it comes to the rules there would be, because you go by the rule. If you have a disagreement there, well, you go to an investigation, and it is taken care of in that.

Q. So if you do not agree with instructions, then there is a grievance procedure that you can go through with your union to get the matter resolved?

A. Yes. As Dave mentioned, it is a matter of labor agreements."

"Q. Did you comply with Mr....let me rephrase that. Were you insubordinate to Mr. Clifton's instructions by not complying with

his instructions issued in his March 7, 1990 letter?

A. No, I feel I was not insubordinate because the instructions were not valid.

Q. Did Mr. Clifton give you instructions to provide medical documentation?

A. Yes he did.

Q. Did you provide medical documentation?

A. No, I did not.

Q. How do you feel that you were not insubordinate to Mr. Clifton?

A. Okay, I...

Q. Mr. Alloway, let me restate the question. How were you not insubordinate to Mr. Clifton?

A. Do you want me to read my statement now?

Q. No. Just answer the question. The statement will come later.

A. No, I was not insubordinate. A statement will follow.

Q. Okay. Did you provide medical documentation as instructed by Mr. Clifton?

A. I was instructed and I did not supply the medical documentation."

"STATEMENT BY MR. ALLOWAY:

S. I feel that I am not being insubordinate as per Rule 600 and 607, sub paragraph 3 for this reason. My position concerning this matter was clearly stated in my October 31, 1989 letter to F. D. Clifton and reaffirmed by my February 21, 1990 letter, Exhibit C, and insofar as it does not affect my duties as a Locomotive Engineer, which it does not in this case, my personal health is not a

valid concern of Burlington Northern. As far as the question that was brought up before on Rules interpretation, the Superintendent in Rule 600 is Mr. Clifton, so therefore his position is the official Burlington Northern position and there is no one further to talk to or to bring this up with where I could have it resolved. As I say, this is the official Burlington position. I would also like to have a copy of this investigation. And no further statements."

- "Q. Mr. Alloway, do you understand that Mr. Weatherby is an officer of Burlington Northern Railroad?
- A. Of course, I do.
- Q. Do you understand that as Asst. Superintendent at Alliance, Mr. Weatherby is the proper Authority to give you instructions?
- A. Of course.
- Q. Mr. Alloway, do you understand that Mr. Weatherby is an officer of Burlington Northern Railroad and as such is responsible for you, in your capacity as an Engineer?
- A. When I am working as an Engineer, absolutely.
- Q. Do you understand that you are obligated to comply with his instructions?
- A. In this particular case, I do not believe so. If I was actually employed and working and receiving a paycheck from Burlington Northern, absolutely and I would comply with the instructions.
- Q. At this point have you been permanently dismissed from the employment of Burlington Northern Railroad?
- A. I feel that I have.
- Q. Mr. Alloway, did you comply with Mr. Weatherby's instructions?

A. No, I did not.

Q. Mr. Alloway, do you intend to comply with his instructions?

A. No, I do not."

Upon careful consideration of all of the facts of record, we conclude that Claimant was insubordinate as charged, but that mitigating circumstances, especially including an apparent good faith dispute about who should pay for the psychiatric evaluations, warrant adjustment of the discharge penalty imposed by Carrier. See First Division Award 23157. In our considered judgement, Claimant should now be afforded the opportunity to invoke his rights under the Memorandum of Agreement dated January 23, 1941, reading as follows:

"No employee represented by the Organizations signatory hereto, who is in the service, shall have his rights to service restricted or be removed from the service because of his physical or mental condition without the approval of the General Manager. He may, however, where a question of safety is involved, be held out of service on recommendation of regularly appointed physician pending the General Manager's decision.

In the event the employee feels that his physical condition does not justify removal from service or restriction of rights to service, he may, within 15 days following notice of disqualification, when requested in writing by himself or his representative, be examined by a panel of physicians and the following rules of procedure will govern:

(a) The employee's physician and the railroad's physician, who shall both be graduates of a class (A) medical school of regular medicine, will select a third physician who shall be a practitioner of recognized standing in the medical profession and where any special type of case is involved must be a recognized specialist in the disease or impairment which resulted in the employee being disqualified. The panel of physicians thus selected will examine the employee and render a report of their findings within a reasonable time not exceeding 15 days after selection, setting forth his physical condition

and their conclusions as to his fitness for service, which shall be accepted as final. Copy of this report will be furnished to the employee or his representative. If the conclusions reached are adverse to the employee and it later develops that his physical condition has improved, a re-examination will be arranged after a reasonable interval if requested by the employee.

(b) The railroad company and the employee involved will each defray the expense of their respective physician. the fee of the third member of the panel, not exceeding \$50.00, will be borne equally by the employee involved and the railroad company. Other examination expenses, such as X-ray, electrocardiographs, etc., not exceeding \$25.00, will be borne equally by the employee involved and the railroad company.

(c) If the decision of this panel of examining physician does not confirm the necessity for the previous disqualification or restriction, the employee will be permitted to return to the service from which removed, and compensated for loss of earnings, if any, as a result of the disqualification or restrictions.

(d) Employees who are required to submit to periodical re-examinations will be examined at the nearest point where regularly appointed physicians are available and this without the loss of time.

The agreement shall continue in effect subject to change on thirty (30) days' notice by either party to the other."

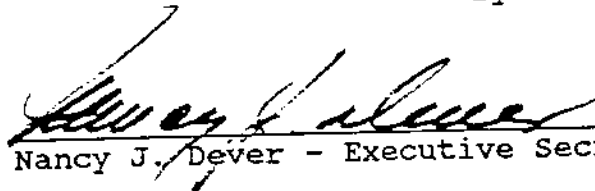
Based upon all the foregoing, we find that Carrier must reinstate Claimant to the status of suspension without pay, pending psychiatric examination in accordance with the provisions of the above Memorandum of Agreement dated January 23, 1941. Failure or refusal of Claimant to invoke his rights under the Memorandum of Agreement within 60 days of issuance of this Award shall be deemed a voluntary severance of his employment relationship with Carrier.

AWARD

Claim disposed of in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of March 1993.