

SBA No. 1112
BNSF/BMWE
Case No. 9
Award No. 10

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1112**

BURLINGTON NORTHERN/SANTA FE

AND

**CASE NO. 9
AWARD NO. 10**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

On July 29, 1998 the Brotherhood of Maintenance of Way Employees ("Organization") and the Burlington Northern/Santa Fe ("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. 1112 ("Board").

This Agreement contains certain relatively unique provisions concerning the processing of calms and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction was limited to disciplinary disputes involving employees dismissed, suspended, or censured by the Carrier. Moreover, 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 choose 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.

This Agreement further established 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 the proceedings and are to be reviewed by the Referee.

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

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investigation to prove the charges made; and, whether the discipline assessed was arbitrary and/or excessive, if it is determined that he Carrier has met its burden of proof in terms of guilt.

In the instant case, this Board has carefully reviewed each of the above-captioned documents prior to reaching findings of fact and conclusions.

BACKGROUND FACTS

The Claimant, Bruce Johnson, established seniority with the Carrier as a laborer on August 15, 1979. Approximately ten years later he was promoted to machine operator and he has served in that capacity since that time. On October 30, 1995 he was discharged for violating the Carrier's Rule 1.5 with respect to Drugs and Alcohol, but he was reinstated on February 12, 1996.

The Claimant was notified on February 16, 1999 that he would be the subject of an investigation, ultimately conducted on March 12, 1999, for the purpose of ascertaining the facts and his responsibility, if any, in connection with alleged dishonesty and misuse of Carrier property on January 22, 1999. Following the investigation the Claimant was suspended without pay for a period of 360 days for violations of the Carrier's Footwear Policy and Maintenance of Way Operating Rules 1.19 and 1.6 which read, in relevant part, as follows:

Rule 1.19 Care of Property

...Employees must not use railroad property for their personal use.

1999 Safety Shoe Program

Costs:

BNSF will pay 80% of the total cost of approved safety shoes for active employees...

FINDINGS AND OPINION

On December 30, 1998 the Claimant sought and obtained authorization from his Roadmaster to purchase a pair of boots. The Roadmaster approved the request without inquiring regarding the Claimants reasons for purchasing the boots, assuming that they were for use while at work. Subsequently, the Claimant requested of another Roadmaster authorization to purchase another pair of boots and again, assuming that they were for use while at work, the Claimant was not asked why the boots were to be purchased. In neither case did the Claimant inform either Roadmaster of his request of the other.

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On January 26, 1999 Rob Roy, Director of Safety, assigned Jerry Dale, Senior Special Agent, to investigate a charge that the Claimant purchased two pairs of boots from Bowman's Shoe Store for his personal use. Dale then contacted a clerk at Bowman's who informed him that on January 14, 1999 purchased a pair of size 9D boots for which the Carrier paid \$171.20. Dale was further told that eight days later a person identified as Jeff Line came into the store and tried on a pair of size 10EEE boots, but did not buy them. However, later that same day the Claimant came to the store and purchased, at Carrier expense, another pair of boots without trying them on. However, the Claimant immediately returned to the store and asked for a different style of boots, which was identical in size and style as that tried on earlier by Line. According to the clerk, the Claimant then went to his car and gave the pair of boots to Line, who was waiting for the Claimant.

On February 9, 1999 Dale interviewed the Claimant. When Dale confronted the Claimant with the clerk's description of the incident, the Claimant admitted that he purchased the second pair of boots and gave them to Line in return for electrical work he had performed for the Claimant on his personal residence. When Dale asked the Claimant if he would make a written statement to that effect, the Claimant asked for his union representative. Dale then left, but returned later that same day and again asked the Claimant for a written statement. However, the same dialogue took place and again, the Claimant did not provide a written statement.

The Organization attacks the Claimants suspension on several different grounds. First, it raises a number of alleged procedural defects committed by the Carrier. Second, it argues that the evidence fails to establish the Claimant's guilt of the charges made.

The Organization contends that the suspension is flawed because the Carrier did not conduct a fair and impartial hearing, because the investigatory hearing was not promptly held, because the Carrier did not provide the Claimant with union representation, and because the interrogation by Dale was coercive. After careful consideration we reject each of these procedural attacks.

With regard to the conduct and timing of the hearing, the record clearly discloses that the Carrier's investigation was not complete until Dale interviewed the Claimant on February 9, 1999. Prior to that time there was only the unsubstantiated statement of the clerk from the shoe store which alone might have been an inadequate basis on which to place charges against the Claimant. Thus, once the Carrier had the Claimant's statement it placed the charges against him only seven days later and well within the time period required by Schedule Rule 40. At the hearing itself the Carrier objected to leading questions asked by the Presiding Officer, his failure to permit the Claimant to ask questions of the witnesses and the failure to permit his representative from making a closing statement. We find that these shortcomings do not taint the proceedings. It is clear that the leading questions were asked only after the Organization conducted cross-examination and were in the nature of a repetition of questions, that were not leading, asked on direct examination. As far as the Presiding Officer's failure

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to permit the Claimant from asking questions, the record is clear, see e.g. line 259, that he did ask the Claimant if he had "...any further questions to ask..." On the issue of the absence of a closing statement, there is no question that the opportunity was not afforded to the Organization representative. However, the Organization representative was not impeded from making a complete evidentiary record nor have we had any difficulty identifying the arguments that he would have most likely made in a closing statement.

The remaining procedural arguments raised by the Organization involve the interview of the Claimant conducted by Dale on February 9, 1999. More particularly, the Organization contends that Dale did not provide the Claimant union representation, that he did not provide the Claimant his *Miranda* rights, and that he threatened the Claimant with prosecution. Again, we do not find these arguments persuasive. First, the record is clear that the Claimant did not ask for union representation until Dale asked him to make a written statement and that, even though Dale attempted a second time, the Claimant provided no written statement. Thus, no incriminating statements or questions were made after the Claimant made his request and he was not prejudiced. Similarly, the record is equally clear that the investigation was not criminal in nature therefore the Claimant was not entitled to his *Miranda* rights. On the final point, the alleged coercion during the interview, we would be required to credit the Claimant and discredit Dale. For the reasons discussed below, we decline to do so.

The critical issue in this case is whether the evidence supports the charge that the Claimant purchased the boots in question in order for personal purposes. On this point we are faced with a dilemma for the Carrier's evidence is hearsay and the Claimant's denial is not directly rebutted by any record evidence. However, hearsay evidence is not always unreliable, especially if the evidence to the contrary, in this case the Claimant's denial, is not credible.

After careful consideration of this record, we believe that to be the case in this instance. Simply put, to credit the Claimant requires that we conclude that a clerk from the shoe store, with no apparent animus toward the Claimant or other malevolent motive, reported the incident to the Carrier and made a spurious, yet specific, claim to it during the investigation. Although such a scenario is not impossible, we find it highly unlikely. In addition, the Claimant did not directly rebut Dale's testimony that at the interview he admitted purchasing the boots to pay Line and neither Line nor Campbell, an employee that the Claimant alleged was present at the time in question, testified nor gave a statement corroborating the Claimant's version of the incident. Finally, the two statements from the individuals who stated that they saw certain boots in the Claimant's possession are not helpful because they do not establish that the boots that were observed were the boots in question. Accordingly, we find that there is substantial evidence to support the charges made against the Claimant.

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The only remaining question then is whether an unpaid suspension of 360 days is arbitrary or excessive under the circumstances. The Claimant has approximately twenty years of service. However, the charge is a serious one going to his fundamental trustworthiness and involves a sustained charge of moral turpitude. Further, there is absolutely no mitigating evidence other than the Claimant's denial of the charge, a denial that we find without support. We conclude therefore that the penalty assessed is neither arbitrary nor excessive.

AWARD: The claim is denied.



Robert Perkovich, Chairman and Neutral
Member, SBA No. 1112

DATED: 