

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

**BURLINGTON NORTHERN SANTA FE**

**AND**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**CASE NO. 107**

**AWARD NO. 108**

**CLAIMANT: ROB E. FELDICK**

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 claims 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 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 the investigation, the transcript of the 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 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.

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

The Carrier hired Claimant Rob E. Feldick on or about May 3, 2004 as a Gang Trackman in Sioux Falls, South Dakota. At the time of the incident leading to the instant Discipline, Claimant was working as an Assistant Roadmaster in Douglas, Wyoming. Prior to the incident leading to his Dismissal, Claimant had received no previous disciplines.

On March 6, 2008, Claimant allegedly instructed a BNSF Grapple Truck Driver using a boom arm to deliver railroad tie "butts" to Claimant's residence. Claimant did not have permission to take the ties for personal use at his residence and an investigation was initiated. According to Claimant, he believed that the ties were "junk" and that they had no value.

By letter dated March 14, 2008, the Carrier notified Claimant that he was to attend a formal Investigation "...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged moral misconduct, including theft and intentional misuse of company property and resources when BNSF boom truck, #21354, was used for personal use to deliver company material to your personal residence at the corner of Cedar and 4<sup>th</sup> Street at Douglas, Wyoming on March 6, 2008 at/or about 4:33 P.M. On the same day, Claimant was notified that he was being withheld from service effective March 7, 2008 pending the results of the Investigation. The Hearing took place on March 27, 2008. Pursuant to that Investigation, by letter dated April 14, 2008, Claimant was notified that he was being dismissed for violation of Maintenance of Way Operating Rule 1.6 Conduct and 1.25 Credit or Property. By notice dated May 1, 2008, Claimant exercised his right to appeal the decision to Special Board of Adjustment 1112.

According to the Organization, the Discipline imposed upon Claimant was unwarranted and excessive. The Organization contends that the burden of proof in a discipline matter such as this is on the Carrier; that burden of proof has not been met. The Organization contends that the Carrier has abused its discretion and that the Carrier's determination to discipline Claimant was based on inconclusive evidence. The Organization further claims that Claimant believed that the tie "butts" were refuse and could not be used again by the Carrier. In addition, the Organization claims that even if Claimant did engage in the alleged violations, the penalty of Dismissal was too severe. The Organization asserts that the Carrier should now be required to overturn Claimant's Discipline and make Claimant whole for all losses.

Conversely, the Carrier takes the position that it has met its burden of proof. Claimant was afforded a fair and impartial Hearing in accordance with the requirements of the Agreement. According to the Carrier, a review of the transcript makes it clear that Claimant was guilty as charged of violating Rules 1.6 and 1.25. While it may be true that Claimant believed that the tie "butts" were no longer usable, he nonetheless did not have the right to take possession of said ties. Based on Claimant's offense, Dismissal is the appropriate penalty.

In discipline cases before this Special Board of Adjustment, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is limited to the question of whether the discipline assessed should be upheld, modified, or set aside. This Board must determine whether there was compliance with Schedule Rule 40; whether substantial

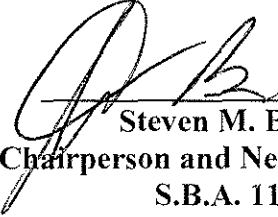
evidence was adduced at the investigation to prove the charges made; and, whether the discipline assessed was arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

This Board has found substantial evidence in the record to sustain the Carrier's position that Claimant violated Rules 1.6 and 1.25. The Carrier has proven that Claimant did violate said rules when he instructed a Grapple Truck Driver to deliver the tie "butts" to Claimant's residence on March 6, 2008 without permission from the Carrier. Based on the instant offense, we cannot find the penalty to be unreasonable and will not overturn said Discipline.

**Claim denied.**

**AWARD**

**Claim denied.**

  
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**Steven M. Bierig**  
**Chairperson and Neutral Member**  
**S.B.A. 1112**

**Dated** 8/10/08