

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

BURLINGTON NORTHERN SANTA FE

AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**CASE NO. 109
AWARD NO. 110
CLAIMANT: C. R. RAMIREZ**

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 Carlo R. Ramirez on or about October 9, 2006 as a Gang Trackman. At the time of the incidents leading to the instant Discipline, Grievant was working as a Machine Operator on a Mobile Gang in Glendo, Wyoming. Claimant had no prior disciplines.

On July 9, 2008, Claimant was working as a Grinder Operator on Gang TRWX0005 near Glendo, Wyoming, while temporarily headquartered at Guernsey, Wyoming. Claimant indicated that while disembarking from a welding truck, he stepped on a rock with his right foot, causing him to roll and sprain his right ankle. This accident led to the instant Investigation.

By letter dated July 16, 2006, the Carrier notified Claimant that he was to attend a formal Investigation at the Roadmaster's Office in Guernsey, Wyoming "... for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to be alert and attentive when you failed to survey the work area for potential hazards before getting off standing equipment and your alleged failure to provide complete information to BNSF officials regarding your injury, while assigned as Grinder Operator on gang TRWX0005 at/or near Glendo, Wyoming on July 9, 2008, temporarily headquartered at Guernsey, Wyoming." The Hearing took place on August 12, 2008. Pursuant to that Investigation, on September 10, 2008, Claimant was notified that he was being disciplined and was issued a Level S Record Suspension of ten days on the BNSF Railway for violating Maintenance of Way Operating Rule 1.1.2, "Alert and Attentive" and 1.2.7 "Furnishing Information". By notice dated September 22, 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 harsh 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 argues that the Carrier has abused its discretion and that the Carrier's determination to discipline Claimant was based on inconclusive evidence. The Organization claims that Claimant has not received a fair and impartial Investigation. The Organization claims that the Discipline imposed upon Claimant was improper. Claimant has performed similar work numerous times without incident. In this case, when Claimant was disembarking from his truck, he took the usual precautions and simply came down on a rock that he did not see, twisting his ankle; there was no negligence on the part of Claimant. 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, Claimant was guilty as charged of violating the Carrier's Rules. Based on the evidence presented at the Investigation, Claimant did not disembark properly from his truck, which caused his accident. Based on Claimant's offense, the Discipline imposed was appropriate.

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 not found substantial evidence in the record to sustain the Carrier's position. A review of the incident yields the conclusion that Claimant acted appropriately on the day in question. A review of the matter yields that Claimant did properly disembark from the truck and that, as Claimant asserted, there was nothing further that he could have done to prevent his injury. This Board cannot find that the accident was the fault of Claimant. Based on this conclusion, this Board has determined that Claimant did not violate Maintenance of Way Operating Rule 1.1.2, "Alert and Attentive" or 1.2.7 "Furnishing Information".

Claim sustained.

AWARD

Claim sustained. The Carrier is ordered to make the Award effective on or before 30 days following the date of the Award.

Digitally signed by
Steven Bierig
**Steven
Bierig**

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

Dated: March 10, 2009