

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

BURLINGTON NORTHERN SANTA FE

AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**CASE NO. 112
AWARD NO. 113
CLAIMANT: B. MCLAUGHLIN**

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 Bryan McLaughlin on or about April 24, 2004 as a Gang Trackman in Alliance, Nebraska. At the time of the incident leading to the instant Discipline, Claimant was working as a Sectionman in Thedford, Nebraska. Prior to the incident leading to his Discipline, Claimant had received no discipline.

From August 18-22, 2008, Claimant allegedly engaged in dishonest activity when he failed to comply with BNSF Corporate Lodging Policy. According to the Carrier, Claimant did not stay in a double room as required by BNSF in Thedford, Nebraska as required by said Policy. According to Claimant, while he admitted that he stayed in a single room and knew that this was in violation of Corporate Policy, he had stayed in a single room on numerous occasions and believed that he could do so according to past practice. Claimant had no intention of deceiving the Carrier.

By letter dated August 27, 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 dishonesty when you failed to follow BNSF Corporate Policy on room occupancy at the Roadway Inn on August 18-22, 2008, while assigned as Sectionman on Gang TMGX1080, temporarily headquartered at Thedford, Nebraska." The Hearing took place on September 15, 2008. Pursuant to that Investigation, by letter dated October 1, 2008, Claimant was notified that he was receiving a Level S 30-day Suspension as result of a violation of Engineering Instructions 21.3, Staying Two to a Room, and BNSF Railway MOW Operating Rules 1.6 Conduct, Dishonesty, effective October 31, 2004. By notice dated October 15, 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 had no intent to deceive the Carrier or be dishonest. While Claimant was aware that the Corporate Policy required that two employees stay in one room, Claimant believed, based on numerous past practice experiences, that he could stay in a single room. Originally, Foreman Jay Moody had reserved a single room in the motel, and a double room was reserved for Claimant and David Moore. When Moody indicated that he was not going to stay at the motel, Claimant and Moore each stayed in a single room. 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 dishonesty. It is clear that Claimant was aware of the Corporate Policy and did not comply with said Policy when he did not stay in a double room or request

permission to stay in a single room in Thedford. Based on Claimant's offense, the Level S 30-day Suspension 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 not found substantial evidence in the record to fully sustain the Carrier's position that Claimant violated BNSF Corporate Policy. While the Carrier has been able to prove that Claimant violated Corporate Lodging Policy when he did not stay in a double room in Thedford, Nebraska, the Carrier has not proven that the penalty of a 30-day Suspension was appropriate. While Claimant was aware of the Corporate Lodging Policy, he testified credibly that he had stayed in a single room on numerous occasions without asking permission and without penalty. The discipline of a 30-day Suspension was too severe under the circumstances of this case. Claimant's 30-day Suspension shall be reduced to a 10-day Suspension and Claimant shall be made whole for the additional 20 days served.

Claim sustained in accordance with the findings.

AWARD

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

Steven
Bierig

Digitally signed by Steven
Bierig

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

Dated: April 10, 2009