SBA NO. 1112
BNSF/BMWE
Case No. 12
Award No. 13

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT

BURLINGTON NORTHERN/SANTA FE

AND **CASE NO. 12**
AWARD NO. 13

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

On July 29, 1998 the Brotherhood of Maintenance of Way Employes ("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 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 arranged 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 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.

BACKGROUND FACTS

Claimant Jefferis was hired by the Carrier on April 15, 1992 as a section laborer and was promoted to section foreman one year later. Claimant Galutia was hired on April 2, 1992 as a section laborer and was so employed at all material times herein. Claimant Cox was hired on the same day as Claimant Jefferis and was promoted to Machine Operator in March of the following year. One year later, on March 15, 1994 he was transferred to Driver. None of the Claimants have any discipline on their service record prior to the incidents giving rise to this dispute.

Following notice and investigation, the Claimants were issued level 1 formal reprimands on March 9, 1999 for alleged violation of Rule S-12.8 which reads, in relevant part, as follows:

S-12.8 Backing

* * *

When backing vehicles other than automobiles and pickup trucks:

- Position someone near the back of the vehicle to guide movements, when available.

* * *

FINDINGS AND OPINION

On January 12, 1999 Claimants Jefferis and Cox, along with another employee, were riding in a pick-up truck driven by Claimant Cox when they stopped to put fuel into the vehicle. After they finished doing so, Claimant Cox did a walk-around inspection and moved the vehicle so that another vehicle could pull up to the gas pump. Claimant Cox then parked the truck near the filling station and all four individuals left the vehicle. Upon their return to the vehicle Claimant Cox performed another walk-around inspection and then entered the vehicle. He then looked into his rear view mirrors and begun to move the pick-up truck in reverse, only to strike a van that had parked behind him. At no

time did Claimant Cox ask Claimants Jefferis nor Galutia to exit the vehicle and guide him in his reverse maneuver. Similarly, neither Claimants Jefferis nor Galutia volunteered to do so. Claimant Cox then talked to the owner of the van, determining that there had been no prior damage to the van at the point of impact. Later that same day Claimant Jefferis, as the section foreman, reported the matter to Roadmaster Fransen. Fransen then discussed the matter with Claimant Cox who then completed an accident report.

Two days later, on January 14, 1999, Roadmaster Fransen issued to the Claimants a notice of investigation scheduled for January 27, 1999. On January 26, 1999 Organization Representative Terry Dowell wrote to Division Engineer Ed Gallagher asking that the investigation be postponed until February 3, 1999 to "...give us a chance to talk with the witness, Roadmaster Larry Fransen, who is on vacation." The next day, January 27, 1999 Roadmaster Fransen returned from vacation and spoke with Dowell, in the presence of Claimant Cox. Dowell informed Roadmaster Fransen that Division Engineer Gallagher postponed the matter to February 3, 1999 and, when Roadmaster Fransen replied that he would not be available on that date, Dowell replied either "That won't be a problem" or "You're gonna have to." Roadmaster Fransen and Dowell then discussed the possibility of an informal resolution to the matter of discipline by agreeing to a waiver of the discipline, a one year probationary period, and the deletion of any reference to the incident in the Claimants service record, with Roadmaster Fransen informing Dowell that he needed to get approval for any such action.

On February 1, 1999 Roadmaster Fransen and Dowell spoke again. Roadmaster Fransen told Dowell that because he still did not know whether the informal resolution they had discussed would be possible, he had not yet prepared nor distributed a notice postponing the February 3, 1999 investigation. Roadmaster Fransen was then away on February 2, 3, and 4, 1999 and, upon his return on February 5, 1999 he provided to the Claimants a notice, dated February 2, 1999, that the investigation had been postponed to February 10, 1999. The investigation proceeded at that time with the results of the investigation set forth *supra* at page 2.

The Organization contends that the discipline meted out to the Claimants must be overturned because the Carrier did not obtain the agreement of the Organization, as required by Schedule Rule 40, to postpone the February 3, 1999 investigation. This argument fails if either Roadmaster Fransen's description of his conversation with Organization Representative Dowell is credited ("That won't be a problem...") of if not, whether Dowell's other comment that "you're gonna have to" constitutes an agreement to postpone. In our view neither condition is established. With regard to the first point, Claimant Cox, who was also present during the exchange between Roadmaster Fransen and Dowell, did not corroborate Roadmaster Fransen's claim that Dowell expressly agreed to the postponement. Moreover, if Dowell had indeed agreed, there would have been no reason for Roadmaster Fransen to refrain from issuing a notice of postponement immediately, something he did

not do. On the second point, whether Dowell's comment that "you're gonna have to" constitutes an agreement to postpone, this Board believes that before an important right as that at stake herein is waived, there must be a clear expression to that affect. We are concerned of course that a party could play "word games" in light of this finding, but again to the extent that there might be any confusion, it could have been eliminated if Roadmaster Fransen had issued the postponement immediately. There is finally, one additional point that we believe further buttresses our conclusion that the postponement was not agreed to by the Organization. During the investigation Roadmaster Fransen described the second conversation he had with Dowell on February 1, 1999 regarding the scheduling of the investigation. In doing so he explained that he told Dowell that he had not yet prepared not distributed the notices postponing the February 3, 1999 investigation. However, he was unable to remember Dowell's reply. Thus, in the absence of clear evidence from the Carrier, who bears the ultimate burden of proof, that at this time Dowell agreed or otherwise acknowledged the alleged postponement, we can only conclude that he did not.

Schedule Rule 40(J) provides that if an investigation is hot held within the time limits extended by agreed-to postponements the charges shall be considered as having been dismissed. Since we conclude that there is insufficient evidence to establish that the Organization agreed to postpone the investigation to February 10, 1999 and because the Carrier did not conduct the investigation on the last agreed-upon date of February 3, 1999, there was a violation of Schedule Rule 40(J) and the claims must be sustained.

AWARD: The Claims are sustained. The Carrier is to revoke the level 1 formal reprimands issued to Claimants Cox, Galutia, and Jefferis and their service records are to be expunged of any reference thereto.

Robert Perkovich

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

DATED: August 3, 1999