

SBA No. 1112
BNSF/BMWE
Case No. 15
Award No. 16

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON NORTHERN/SANTA FE

AND

**CASE NO. 15
AWARD NO. 16**

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 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 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.

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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.

BACKGROUND FACTS

Claimant Thompson was hired by the Carrier on April 4, 1994 as a track laborer and has at material times herein served in that capacity. Claimant Williams was hired on April 4, 1974 as a section laborer and was promoted, first to section foreman and then subsequently to foreman. He has worked in that latter capacity at all material times here. Claimant Sanchez hired on as a gang trackman on March 3, 1972 and was promoted to machine operator some time thereafter. He has worked as a machine operator at all material times herein. The record reflects that prior to the incidents giving rise to this dispute none of the three claimants had ever been disciplined.

Following notice and investigation the Claimants were issued a Level 1 Formal Reprimand for violating Rules S-17.2.2, S-17.2.6, S-1.1, S-1.2.3, and S-1.2.4 which read, in relevant part, as follows:

Rule S-1.1 Job Briefing

...a job safety briefing...includes a discussion of the general work plan, existing or potential hazards, and a ways to eliminate or protect against hazards.

Rule S-1.2.4 Co-workers Warned

Warn co-workers of all unsafe practices and/or conditions.

Rule S-17.2.6 Load Clear of Persons

Do not move a load until all persons are clear...

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Rule S-1.2.3 Alert and Attentive

Assure that you are alert and attentive

FINDINGS AND OPINION

On April 23, 1999 the Claimants were working together and were attempting to remove a rail from a pile of rails so that the rail could be cut for another purpose. They conducted a safety briefing in which they determined that Claimant Thompson would be responsible for making the saw necessary for the cut available, that Claimant Sanchez would be responsible for seeing that the rail was secured for lifting and removal from the pile and that Claimant Williams would operate the crane to lift the rail. After identifying the rail that was to be removed, they conducted another safety briefing, reiterating the subjects discussed before. There is no evidence that at any time during the safety briefing did the Claimants discuss center marking the rail and no such mark was made at any time during the task.

After Claimant Thompson obtained the saw he stood near the rail pile and observed Claimant Sanchez hook the rail to the boom. After Claimant Sanchez signaled that all were clear, Claimant Williams lifted the rail. As it was lifted one end of the rail came loose from the hook and began to twist around and Claimant Thompson reached for the rail to steady it. As the rail was lowered it continued to roll around and Claimant Thompson's finger was pinched. Claimant Williams was taken to the hospital where he was treated for a broken and lacerated ring finger. His treatment included stitches and pain medication. While at the hospital the Claimants were interviewed by the Roadmaster and described the incident as set forth above.

The Organization first contends that the discipline must be overturned because the notice of the investigation did not comply with Schedule Rule 40 which requires, *inter alia*, that the notice "...must specify the charges for which the investigation is being held." More particularly, the Organization argues that because the notice referred only to the Rules that were allegedly violated the notice was vague and insufficient. We disagree. Rather, when the notice is read in its entirety we believe that it was sufficient to put the Claimants on notice of the facts and charges that required a defense. Specifically, the notice refers not only to the Rules in question, but also to the date, time and location of the incident. Thus, Claimants were required only to reflect back to that point in time and, in conjunction with the Rules cited, could easily determine the nature of their defense.

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On the merits the Organization contends that none of the Claimants violated any of the Rules cited by the Carrier. Rather, it argues that the evidence of record shows that the Claimants conducted a safety briefing, that they did not lift the rail until all were clear and acknowledge as such, that each of them were in fact alert and attentive, and that no warning could have been given to one another because there was no reason to know that an accident or incident was imminent. Finally, with regard to Claimant Thompson, the Organization complains that he was interviewed about the incident while under the influence of pain medication.

We are not persuaded by any of the Organization's arguments because, although the record evidence does indeed support its arguments, the Organization ignores one important, and undisputed, fact. The record shows without dispute that none of the Claimants center marked the rail in question or discussed the wisdom of doing so. Moreover, the record shows that a rail is to be center marked precisely to avoid an accident such as that which occurred on the day in question. Thus, although the Claimants conducted a safety briefing and lifted the rail only when all were in the clear, their failure to center mark the rail and to discuss doing so means that they were negligent in their briefing and work. Similarly, we cannot therefore conclude, as the Organization urges, that they were alert and attentive and were absolved from giving any warning to one another.


There remains then the final argument, that Claimant Thompson was under the influence of pain medication when interviewed by the Roadmaster. Again, although the record does indeed support this conclusion, it does not compel the result the Organization wishes. Again, there is no dispute in this record that the Claimants failed to center mark the rail or to discuss doing so. Thus, the operative facts which support the discipline are not in question and the interview of Claimant Thompson has no bearing on our conclusion.

AWARD:

The claims are denied.



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



DATED: