SBA No. 1112
BNSF/BMWE
Case No. 16
Award No. 17

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT

BURLINGTON NORTHER/SANTA FE

AND **CASE NO. 16**
AWARD NO. 17

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 member, 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 was hired by the Carrier on June 21, 1976 as a trackman and was later transferred to a welder position in 1988. He has since then, and at all material times herein, worked in that capacity. The record shows that he received two commendations in the early 1990's for quality performance and he was censured in 1996 for failing to comply with the instructions of an equipment manufacturer thereby causing damage to property.

Following notice and investigation the Claimant was issued a Level S suspension of thirty (30) days for violation of Engineering Instructions Rule 11.15.18, Safety Rule S-1.2.5, and Operating Rule 1.13 which provide, in relevant part, as follows:

> Engineering Instruction 11.15.18 Reporting Log Books or Sheets
>
> The thermite welder is responsible for reporting required information in the thermite log book...
>
> Safety Rule S-1.2.5 Safety Rules, Training Practices, and Policies
>
> Comply with all company safety rules, training practices, and policies, and engineering instructions
>
> Operating Rule 1.13
>
> Employees will...comply with instructions...

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FINDINGS AND OPINION

On January 3, 1999 Track Inspector G.R. McCoy discovered a broken insulated joint plug on one of the rails at Mile Post 504.7 on Main Track #1 of the Black Hills Subdivision and duly reported the discovery in his track inspection book. The following day the Claimant was serving as a welder in the gang dispatched to make the repair. In doing so the Claimant made two ¾ inch cuts to the rail and completed two welds on the rail. However, when he marked the rail, as per standard procedure, with the date and his name, he also incorrectly marked the rail "+1-1/2." Moreover, he failed to make any notation of his alterations to the rail adjustment log or the welding book[1].

On July 13, 1999 a derailment occurred at the site of the work done by the Claimant. Carrier officials inspected the site and determined that a track buckle derailment had taken place because of excess track. In doing so they took note of the various rail markings, including those of the Claimant described above.

The Organization first attacks the Claimant's suspension on the basis that the Carrier did not comply with Schedule Rule 40 because the notice of investigation was not sufficiently clear and specific enough to ensure the investigation was fair and impartial as required by Schedule Rule 40. More particularly, the Organization cites the fact that the notice failed to make reference to any specific rules that the Claimant allegedly violated and did not make reference to any specific conduct of the Claimant that breached the relevant rules.

The record shows that the notice of the investigation stated that the Claimant was to be investigated "...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged involvement in derailment which resulted in subsequent damage to track structure, train consist, and lading, at approximately 1730 hours on Tuesday, July 13, 1999 at or about MP 504.7, Main Track #1 on the Black Hills Subdivision,.." In addition, the record shows that the Organization attempted on at least two occasions made its objection to the clarity and specificity of the notice known to the Carrier and attempted to elicit more precise information from the Carrier. However, its efforts did not succeed.

The underlying purpose behind the requirement that a claimant be given clear and specific notice of the charge is to enable him or her to prepare a defense and to answer the charges alleged. Thus, it is something more than a mere technicality, and is a basic and fundamental premise upon which industrial justice is grounded. However, that does

[1] The record shows that rail markings and entries to the rail adjustment log and the welding books are necessary so that rail can be subsequently readjusted to the proper rail temperature.

not mean that each time a claim is made that a notice of investigation is insufficient it must be accepted. Rather, the claim must be carefully scrutinized to ensure whether the notice of investigation is broad enough to include the cause for which the employee was dismissed and sufficiently specific to acquaint the employee of the matters to be investigated. For example, a notice that provides the acts and conduct complained of and the time and place of their occurrence would meet this test. (See e.g., SBA No. 1112, Case No. 15, Award No. 16, at page 3, holding a notice sufficient where it referred "*...not only the Rules in question, but also the date, time and location of the incident* (such that) Claimants were required only to reflect back to that point in time and, in conjunction with the Rules cited, (to) determine the nature of their defense.")

When the notice of investigation in this matter is viewed in this context we conclude that it does not meet the test of adequacy sufficient to ensure a fair and impartial hearing as required by Schedule Rule 40. First, the notice cites to no Rules which the Claimant allegedly violated. Second, it names a date, time and location of an incident, the derailment of July 13, 1999, but the record of the investigation clearly demonstrates that the misconduct for which the Claimant was suspended took place on January 4, 1999. Thus, and very much unlike the award of this Board in Case No. 15, Award No. 16 cited above, the Claimant could not easily reflect back on the events of July 13, 1999 in order to determine what his defense might have be. This infirmity in the investigation notice is further exacerbated by the passage of more than six months between the date of the Claimant's misconduct and the date cited in the notice.

This Board is mindful that if the Carrier had cited the events of January 4, 1999 and the Rules applicable to those events in the notice of investigation that issued after the July 13, 1999 derailment, it would have been open to attack that the investigation notice was untimely and therefore deprived the Claimant of a fair and impartial hearing. However, as attractive as that argument might appear at first blush, it does not put the Carrier on the horns of a dilemma when it is viewed more closely. It is axiomatic that one cannot make a charge until he or she knows or should have known that a charge was warranted. In the instant case the Carrier did not know, nor was there any evidence that it should have known, of the Claimant's misconduct until the triggering event, the derailment of July 13, 1999. Thus, had it issued a sufficient notice of investigation, as described above, following the derailment it would have in all probability been timely and clearly would have ensured that the Claimant's dues process rights were preserved. Only then could this Board then look to the merits of the charges alleged.

We therefore conclude that the Carrier violated Schedule Rule 40 with its notice of investigation in this matter and the claim is sustained, without regard to the merits of the charges alleged.

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AWARD

The claim is sustained. The Carrier is hereby ordered to rescind the Level S suspension of thirty (30) days assessed against the Claimant, to expunge from his file any record of the suspension, and to make the Claimant whole for any loss of wages and/or benefits as a result of the suspension.

January 5, 2008

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

DATED:

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INTERPRETATION TO AWARD NO. 17

On January 5, 2000 this Board issued its Award in this matter finding that the Claim should be sustained because the Carrier failed to comply with Schedule Rule 40 in its Notice of Investigation. More specifically, this Board found that the Carrier violated Schedule Rule 40 when it failed to cite rules in its Notice and when it failed to cite the events that formed the basis for the discipline assessed against the Claimant.

On February 3, 2000 the Carrier filed a request for an interpretive award to Award No. 17. In its request the Carrier asks only that this Board interpret Award No. 17 with regard to the first of its two holdings, i.e. that the Carrier's failure to cite specific Rules in the Notice of Investigation violated Schedule Rule 40. As such, it does not ask this Board to disturb its other holding or its Award that the claim be sustained and the remedy it ordered be implemented. On February 11, 2000 the Organization filed a letter opposing the request.

The Organization first contends that the Carrier's request for the interpretive award is improper under the SBA No. 1112 Agreement because it is "...really nothing more than an effort to reargue the case." In support of its argument, the Organization cites the fact that the Carrier provided in support of its request submissions and awards not provided in the original record nor requested by the Neutral Chairman. We find however that the Organization's arguments on this are without merit. First, as noted above, the Carrier does not seek that the result of the Award No. 17 be revised as to result, but only that one basis for the holding be interpreted. Thus, we do not view the request as an attempt to reargue the case, because the claim will be sustained nonetheless.

We therefore turn to the merits of the Carrier's request. In support of its request for the interpretive award, it argues that neither party sought a ruling whether the failure to cite a rule or rules in the Notice of Investigation violated Schedule Rule 40 and that our finding that the Carrier's failure to do so did indeed violated the Rule was not in

accordance with "established precedent on this property." The Organization disagrees on both points. We find the Carrier's first argument unpersuasive. The record in this matter clearly indicates that the Organization attacked the clarity and specificity of the Notice of Investigation and as such, we believe, put the content of the Notice in issue. To hold as the Carrier urges on this point would be elevate form over substance, a result we do not countenance. On the second point however, we find that the Carrier makes a strong argument. It notes in its letter, and without contradiction from the Organization, than numerous Awards of this very Board have held that failure to cite specific rules in the Notice of Investigation does not rise to the level of a Schedule Rule 40 violation. Thus, if for no other reason than the wisdom of remaining consistent, Award No. 17 should be so interpreted and clarified and we do so[1].

The Organization's final argument in this matter is the assertion that the failure to cite a specific rule in the Notice of Investigation was "particularly egregious...because...(there was) no way the claimant could have prepared a proper defense..." against Engineering Instruction 11.15.18, which it characterizes as a "very specific technical rule." Again, we disagree. The rule in question provides that the "...welder is responsible for reporting required information in the thermite log book..." Thus, if the Carrier had not committed its other rule violation, i.e. the failure to cite the events of January 3, 1999 in conjunction with the derailment of July 13, 1999, we believe that the Claimant could well have reflected back on his conduct of the earlier date with regard to log book entries and prepared a defense to the alleged rule violation. Of course, as noted above, since the Carrier failed to make that reference to the critical facts of the earlier date, the Claimant was deprived of his right to a proper defense and, as the Carrier concedes by limiting its claim for an interpretation to only one holding of the original Award, the claim must remain sustained.

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

DATED: February 28, 2000

[1] Because we reach this finding in reliance on our own prior awards. We have found it unnecessary to look to the other authority cited by the parties in support of their positions.