

SBA No. 1112
BNSF/BMWE
Case No. 18
Award No. 19

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON NORTHERN/SANTA FE

AND

**CASE NO. 18
AWARD NO. 19**

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. 112 ("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 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 employed by the Carrier on April 4, 1991 as a trackman and later as a inspector and section foreman. His prior record shows that he served a fifteen day suspension in 1993 for failure to obtain and/or comply with track authority and that he received two citations for quality performance, in 1995 and 1998, for noticing a strange noise and taking action to prevent a possible derailment and for a job well done and dedication to safety.

Following notice and investigation the Claimant was issued a Level 1 Formal Reprimand and placed on three years probation for violating Rule 6.6.5 of the Carrier's *Engineering Instructions* and Rules 1.4 and 1.13 of its *Operating Rules* which provide, in relevant part, as follows:

Rule 6.6.5 Engineering Instructions

D. Replacing Rail or Thermite Welding in Cold Weather

2. ...write this information on the web of the rail. field side:

- Date
- Rail Temperature
- Amount of rail added
- Name of Foreman in charge

If rail is added, apply rail anchors to the field side of the plug rail...

Rule 1.4 Operating Rules Carrying out Rules and Reporting Violations:

Employees must cooperate and assist in carrying out rules and instructions...

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Rule 1.13 Operating Rules Reporting and Complying with Instructions

Employees will report to and comply with the instructions... Employees will comply with instructions... when (they) apply to their duties...

FINDINGS AND OPINION

On October 4, 1999 the Claimant was serving as section foreman on sections of track between Mile Post 530 and 555 on Main Track #1. In doing so he was responsible for overseeing section laborers and truck drivers to ensure that all work was performed safely and properly. At Mile Post 539.36 a defect in the rail was discovered and the section gang cut in three-quarters of an inch to the rail. When the gang completed the task the Claimant wrote on the rail the date, the temperature, the amount of rail added and the words "Upton Section." Thus, he did not write his name. The record shows that these notations are used to prevent rail buckles in hotter weather. Moreover, the Claimant failed to apply rail anchors to the field side of the rail. The record shows that rail anchors are necessary to indicate to subsequent crews that rail has been added.

Subsequently the Roadmaster discovered the notations and the absence of the rail anchors on the field side of the rail while on a routine random examination of the section of track in question.

When these shortcomings were discovered the Carrier issued a notice of investigation and, as noted above, following the investigation the Carrier issued discipline to the Claimant.

The Organization first contends that the discipline in this matter must be overturned because the notice of investigation did not comply with Schedule Rule 40 which requires that the Carrier "...specify the charges for which investigation is being held." In particular the Organization argues that the notice was vague when it charged the Claimant with "failure to properly record rail adjustment" and because there is no rule that "specifically states that...you must properly record rail adjustments." We disagree. First, the Organization has selectively quoted from the notice of investigation in support of its vagueness argument. A closer examination of the notice shows that the Claimant was charged with "...failure to record rail adjustment that was made on Monday, October 4, 1999, near MP 539.36 on MT #1 on the Black Hills Subdivision of the Powder River Division." Thus, the Claimant was notified of alleged misconduct, the date, and the precise location of the incident. In our view such notice was more than adequate to give specific notice of the charges to which the Claimant was required to respond. With regard to the argument that there is no rule which required that the Claimant record rail

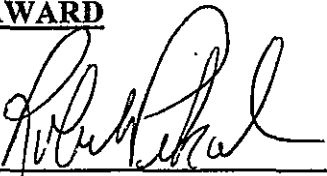
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adjustments, a cursory review of Engineering Instruction 6.6.5 clearly sets forth that information that he was required to record on the rail.

The only remaining issues therefore are whether the Carrier has met its burden to prove that the Claimant was guilty of the rule violations with which he is charged and if so, whether a reprimand and probation was an arbitrary and/or excessive penalty. On these two points the record is clear that the Claimant admitted that he failed to write his name on the rail and that he failed to apply rail anchors to the field side of the rail. His only arguments are that his failure to write his name is a minor or *de minimis* violation of the rules, that his failure to apply the rail anchors was inadvertent, and that both of these shortcomings could have easily been dealt with through a conversation between the Claimant and his supervisor.

Upon reflection, although the Organization may be correct as a matter of fact, i.e. that the Claimant's informational error was minor and that he did not act intentionally, we do not believe that absolves the Claimant of any culpability for a rule violation. Simply put, the rule has been promulgated for a reason and to say that it can be disregarded for the reasons asserted by the Organization would only serve to undermine the rules in question. Rather, we believe that the seriousness of the errors and that Claimant's absence of malice or other bad faith should be relevant to the choice of penalty that is to be assessed in light of the rule violations. Having said that however, we do not agree that the discipline in this matter must be overturned. Rather, the Carrier assessed, relatively speaking, minor discipline and in doing so it apparently accounted for the nature of the misconduct and the fact that the Claimant did not act intentionally. Under those circumstances, we decline to set aside its action.

AWARD



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

DATED: April 17, 2000