SBA No. 1112
Case No. 1
Award No. 2

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1112

BURLINGTON NORTHERN/SANTA FE

and **CASE NO. 1**
AWARD NO. 2

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 establishes 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 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

The Claimant, Sue Haney, established seniority with the Carrier since June 6, 1994. At all times material herein she was employed by the Carrier as a group 5 machine operator.

The Claimant was the subject of an investigation on October 15, 1998 for the purpose os ascertaining her responsibility, if any, in connection with her alleged failure to report an injury in a timely manner. Following the investigation the Claimant was found guilty of violating Rules S-28.2.5 and S-1.2.8 of the Carrier's Safety Rules and General Responsibilities. She was then suspended for a period of thirty (30) days and placed on a probation period of three years with the stipulation that if she commits a serious rule violation during that period she will be subject to dismissal. Those rules read, in relevant part, as follows:

> Rule S-28.2.5
>
> A. Injuries to Employees
>
> All cases of personal injury, while on duty or on company property, must be immediately reported...
>
> C. Employees with Information Concerning Injuries
>
> Employees with information concerning an accident or injury to themselves;..must immediately report the information...
>
> Rule S-1.2.8
>
> Make reports of incidents immediately to the proper manager.

FINDINGS AND OPINION

On May 19, 1998 the Claimant was working as a group 5 machine operator on the RP05 steel gang. While doing so she was a passenger in a van driven by another gang member who drove the van at a high enough rate of speed that as the van rode over large holes in the road the passengers, including the Claimant, were substantially jostled about the van. In fact, the Claimant was jostled around such that she hit the right side of her head on the roof of the van. As a result of the impact, she felt pain in her neck and her neck was stiff the next day, but she believed that the pain would subside. As a result she did not file an accident or injury report nor did she mention the incident to any member of Carrier's management. By July of that same year the pain did not subside and she mentioned her neck pain to a doctor, without describing the incident, when she was treated for the flu. The doctor however said that neck pain was often associated with the flu and advised that the pain would probably cease when the flu passed. However, approximately one month later after the flu had passed the neck pain persisted. She then sought medical attention and an x-ray was taken after she advised her physician of the incident in the van. A few weeks later, in early September of that same year, she consulted a doctor about her dentures, thinking that perhaps they could be the source of the neck pain. In addition, she visited a chiropractor about the neck pain and, on or about September 17, 1998, she first informed a member of management about her neck pain and the incident in the van in May. As a result an injury report was taken by that supervisor and the Carrier first learned of the matter.

Four days later, on or about September 21, 1998, the Claimant also corresponded with the Federal Railroad Administration. In her letter she described the nature of her injury and asserted that the Carrier had a practice of intimidating employees so that they would not report accidents and injuries.

The Claimant's service record includes, *inter alia*, another injury that was sustained and reported in a timely fashion when, in November of 1994, the Claimant lacerated a finger while removing a jammed spike from a spiker. The Claimant was also issued on April 18, 1997 a Level 1 Formal Reprimand for using threats, insults and engaging in quarrelsome conduct toward a foreman. At that time she as also assigned a probation period of one year.

As noted above, this Board's charge is to determine first whether the Carrier violated Schedule Rule 40 in assessing the discipline meted out in this matter. We are unable to identify any such violated and the Organization makes no such claim. Thus, in this respect the suspension and assignment of probation is permissible. However, the Carrier must also support its action with substantial evidence to prove that the Claimant did not, as required by legitimate rule, report her injury in a timely fashion. Again, we find that the discipline meets this test. In making this conclusion we do not pass on the Claimant's contention that although she was injured on May 19, 1998 she did not report the injury because she thought her neck pain would subside. Rather, it was clear as early

as August 25, 1998 when the Claimant sought medical attention and received x-rays of her neck that her pain had continued for approximately three months. Moreover, approximately three more weeks and three additional medical treatments took place before the Claimant came forward and filed her injury report. Thus, assuming *arguendo*, that her initial failure to report the injury might have been justified, a conclusion we do not necessarily reach, there can be no doubt that for a period of three subsequent weeks there was no such justification.

Therefore, the only remaining issue with regard to whether the Carrier has met its burden to substantially prove the Claimant's rule violations is the Organization's claim that her failure to report the injury as required by rule was somehow justified or excused by the alleged policy and practice of the Carrier to intimidate employees so that they will not report accidents and injuries. We believe initially that any such policy or practice would be a serious issue and not one to be countenanced lightly. However, just as the Carrier must meet its burden or proof that there have been rule violations, the Organization bears a burden of proof to support this affirmative defense. Here, the Organization has failed to meet that burden. There is no evidence to support the claim that the Carrier has such a policy generally and to the extent that the Claimant's particular circumstances were addressed in the record, the testimony and evidence clearly show that she was not the subject of any intimidation or coercion that might excuse her rule violations. Accordingly, we find that there is substantial evidence of the Claimant's violation of rules requiring that she promptly report any accident or injury.

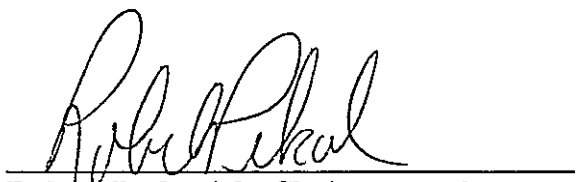
This Board however has one more responsibility, i.e. to determine whether the discipline assessed was arbitrary and/or excessive. As noted above, the Claimant was suspended for thirty days and placed on probation by which subsequent rule violations could place her job in jeopardy for a period of three years. This Board does not believe that the good faith decisions of the Carrier in assessing discipline should be routinely disregarded simply because we might, if we were in that position initially, impose some other penalty. Simply put, we recognize that the minds of equally reasonable people might differ. Moreover, if we were to act in this fashion the legitimate functions of management will have been abdicated and every disciplinary decision challenged such that chaos might result.

On the other hand the Carrier and the Organization have authorized this Board to consider whether the disciplinary decision was arbitrary or excessive. In this regard we do not view as problematic the assessment of the thirty day suspension. Although this is not a short period of time and involves a substantial financial penalty, there can be no question that the rule in question is an important one and that the Claimant consciously disregarded her obligation under that rule for at least three weeks. However, we do believe that placing the Claimant on probation for three years, a period in which she is subject to dismissal for another serious rule violation, is excessive. Indeed, this penalty is three times greater than the probation imposed for her earlier rule violation and is not supported by some other course or pattern of misconduct that might justify this escalation of penalty.

Thus, we believe that a probationary period consistent with that imposed in the earlier instance is more appropriate and would not be arbitrary or excessive.

In light of the foregoing, we find that the thirty day suspension was supported by substantial evidence and should not be disturbed, but that the three year probationary period should be reduced to a period of one year.

AWARD: The claim is sustained in accordance with these findings.



DATED: February 22, 1999

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