SBA No. 1112
BNSF/BMWE
Case No. 19
Award No. 20

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT

BURLINGTON NORTHERN/SANTA FE

AND **CASE NO. 19**
AWARD NO. 20

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 s 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.

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 November 11, 1978 as a trackman and later as a gang trackman. His prior record shows that he was given a formal reprimand in July of 1999 for being AWOL. Following notice of January 5, 2000 to attend a formal investigation, conducted on January 13, 2000, the Carrier dismissed the Claimant, effective January 24, 2000 for violation of Maintenance of Way Operating Rules 1.6, part 4 and 1.25 which read, in relevant part, as follows:

> **Rule 1.6 Conduct**
>
> Employees must not be:
>
> Dishonest.
>
> **Rule 1.25 Credit or Property**
>
> Unless specifically authorized, employees must not use the railroad's credit and must not receive or pay out money on the railroad account.

FINDINGS AND OPINION

Between November 19 and 29, 1999 the Claimant was assigned to Maintenance Gang 21302, an assignment for which he was authorized to receive per diem and meal expenses. From November 30 through December 6, 1999 however, the Claimant was not assigned as he was under medical treatment. Thus, he was not entitled to receive per diem and meal expenses. On December 7, 1999 the Claimant bumped into Keenesburg Section until he was bumped from that assignment on January 3, 2000. The following day was forced assigned to the RTD Maintenance Gang, which was a headquartered gang approximately 41 miles, one way, from his home.

During that same period, between November 19, 1999 and January 4, 2000, the Claimant stayed at a hotel using a credit card issued by the Carrier. The total cost of his lodging for that period was $2,773.22, of which all but for $2,124.22, was not a reimbursable expense. In addition, the Claimant accrued an unpaid telephone liability of $108.31.

On January 5, 2000 the assistant roadmaster learned of these facts and he and a special agent met with the Claimant at the hotel in question. In doing so they verified that the Claimant's wife was staying with him at that time, as well as for some of the period in question. In questioning the Claimant regarding these facts he told the assistant roadmaster and the special agent that he was staying at the hotel because electrical power at his home had been turned off and that because of unspecified personal problems he and his wife could not stay at their home. In addition he stated that he believed that he was entitled to the hotel expense because his assignment on the RTD gang was more than 75 miles, round trip, from his home.

The Organization urges that the Claimant's dismissal be set aside because the Carrier failed to prove that the Claimant intentionally stayed at the hotel at the expense of the Carrier despite knowing that he should not do so. More specifically, the Organization relies on an agreement between it and the Carrier, effective only two months prior to the events in question, that provided for expenses for employees who are required to travel more than 75 miles one way from their headquarters when forced assigned. Thus, according to the Organization, the Claimant mistakenly thought this new agreement applied when he was forced assigned to the RTD gang which required that he travel more than 75 miles round trip.

We are not persuaded by this argument. First, the Claimant admitted that sometime in December of 1999 he became aware of the fact that his understanding of the rule might be incorrect. Yet, his efforts to confirm this fact were less than vigilant. Second, both the assistant roadmaster and the special agent testified that at some point during their conversation with the Claimant he admitted that he was not entitled to the expenses and, in our estimation, his testimony at the investigation did not emphatically deny that he made this admission.

However, the most compelling reason for rejecting the Organization's plea is that even if it were correct, the Claimant's misunderstanding related only to the distance requirement for the reimbursement. In other words, he apparently understood that the expense would also be paid only for employees who were force assigned. The record clearly reflects that the Claimant was in this position on only one day of the days in question. Therefore, any such alleged misunderstanding does not explain, nor justify, the

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other days on which he stayed at the hotel at Carrier expense, including those days on which he was not assigned because he was under medical treatment.

AWARD

The claim is therefore denied.

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

DATED: May 24, 2000