SBA No. 1112
BNSF/BMWE
Case No. 23
Award No. 24

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT

BURLINGTON NORTHERN/SANTA FE

AND **CASE NO. 23**
AWARD NO. 24

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 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 since 1995 first as a trackman and later as a gang trackman. He received formal reprimands in 1998 and again on March 21, 2000 for, respectively, missing work without authorization and for absenting himself without permission. Following the second reprimand, he was placed on a one year probation. On April 6, 2000 the Claimant was placed on a Level S Conditional Suspension when he tested positive on a drug and alcohol test. Because this was his first such violation of Rule 1.5 his suspension was conditioned on his enrolling and fully complying with the Carrier's Employee Assistance Program (EAP).

Following notice of July 11, 2000 to attend a formal investigation, conducted on July 19, 2000,the Carrier dismissed the Claimant on August 4, 2000 violation of Section 7.9 of the Carrier's Policy on the Use of Alcohol and Drugs when he failed to abide by the instructions of the EAP. Section 7.9 reads, in relevant part, as follows:

> 7.9 Dismissal
>
> Any one or more of the following conditions will subject employees to dismissal:
>
> A single confirmed positive test...for...alcohol obtained under any circumstances within 3 years of any serious offense...
>
> Failure to abide by the instructions of the Medical and Environmental Department and/or Employee Assistance Program regarding treatment, education, and follow-up testing.

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FINDINGS AND OPINION

Following the Claimant's suspension of April 6, 2000 the Carrier's EAP was advised of the conditions attached to the suspension. The Claimant contended that he was able to return to work, but when the EAP sought confirmation from his evaluator, the report was deemed inadequate and he was sent for additional assessment. As a result, the Claimant was referred for education at a facility close to his home as he requested. The Claimant also completed a Client Agreement with the treatment facility in which he agreed to "...satisfactorily complete this course..." The Claimant was to first appear for treatment on May 15,2000 and to continue, on a weekly basis, for six weeks. However, the Claimant attended only on May 22 and June 19, 2000 and incurred unexcused absences on June 5, 12, and 26, 2000.

The Claimant's unexcused absence on June 26, 2000 arose when he was arrested for driving while under the influence when on his personal time. Four days later the Carrier's EAP learned of the arrest and when it confronted the Claimant he denied that he was driving while under the influence and claimed that he had been wrongly incarcerated, despite a breathalyzer reading of .211. That same day the Carrier removed the Claimant from service. Subsequently, the Carrier again confronted the Claimant with the arrest and he denied that he had been arrested. When the Carrier made reference to the arrest report the Claimant then asserted that his attorney was going to have the charges dropped.

The Organization contends that the Claimant's unexcused absences were due to the fact that he was in welding school on the dates in question and that he therefore could not attend the classes. With regard to the treatment itself, the Organization asserts that the facility to which the Claimant was assigned did not meet its obligation to provide the treatment that he needed. Finally, the Organization argues that the Claimant's Client Agreement did not obligate him to refrain from using alcohol when he was not at work or using Carrier equipment.

We have carefully considered the Organization's arguments and find that they are without merit. First, assuming *arguendo* that the Claimant was indeed in welding school on the days that he was assigned for treatment there is no doubt in the record that he failed to report his absence, an obligation that he knew he was to meet. Similarly, although the Claimant is correct that nothing in the Client Agreement prevents him from using alcohol when off the clock and not using Carrier equipment, there is no doubt that the Carrier's Section 7.9 of it's Drug and Alcohol Policy subjects him to discharge once he tested positive for alcohol beyond legal limits without regard to the circumstances surrounding his alcohol usage. Finally, there is no record evidence to support his claim that he did not receive adequate treatment from the treating party before his discharge.

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The claim is denied.

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

DATED: November 30, 2006