SBA No. 1112
BNSF/BMWE
Case No. 2
Award No. 3

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1112

BURLINGTON NORTHERN/SANTA FE

CASE NO. 2

AND **AWARD NO. 3**

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 contain only 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.

The 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 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 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, Mark McDonnell, established seniority with the Carrier on August 22, 1978 and at all material times herein was assigned as a Group 3 machine operator in the Minnesota Division, Casco Subdivision. His prior service record contains no disciplinary action.

The Claimant was the subject of an investigation on October 1, 1998 for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with his alleged failure to be alert and attentive on July 6, 1998 which resulted in the injury of another employee, K.J. Thomas. Following the investigation the Claimant was found guilty of violating Rule 1.1.2 of the Safety Rules and General responsibilities for all Employees and was suspended for twenty (20) days. Rule 1.1.2 of the Safety Rules and General Responsibilities for all Employees reads, in relevant part, as follows:

> Alert and Attentive
>
> Employees must be careful to prevent injury, to prevent injuring themself and others. They must be alert and attentive when performing their duties and plan their work to avoid injury...

FINDINGS AND OPINION

On July 6, 1998 the Claimant was operating a spike feeder and he was assisted in that work by employee Thomas. At the time they were engaged in loading spikes into kegs which required that they pull a cable from the feeder, wrap it around the keg, and place the hook at the end of the cable into a hole in the top of the lid of the keg. In so doing it is not uncommon that the cable will have some slack once hooked into the lid of the keg. Moreover, because of the hook the cable will sometimes also coil around which requires that the coil be straightened before the operation can commence. Thomas was in the process of handling the cable in order to remove the coil when the Claimant began the spike feeder. In addition, at the time he did so he was engaged in conversation with other nearby employees and did not turn his attention to Thomas until he cried out when his finger became caught in the coil as the machine operated.

Thomas was taken to a nearby hospital emergency room, but when it became apparent that he required surgery that could not be performed at that hospital, he was transported to another hospital where he underwent surgery to place pins in his finger.

Before operating the spike feeder that day the Claimant and other employees took part in a twenty or thirty minute safety briefing with regard to the work to be performed that day. Moreover, the record reflects that the Carrier has available and might have shown to those employees a video regarding the safe operation of the spike feeder. That video however demonstrates a method of handling the coil that the Claimant did not utilize that day and a method that machine operators routinely ignore, with the Carrier's knowledge.

Following the accident an inspection took place at which Carrier representatives concluded that the coil in which Thomas caught his finger was excessively coiled. They further concluded that the injury could have been prevented if the Claimant had been attentive to Thomas, a failure that Claimant admitted, and had not operated the spike feeder at the rate of speed at which it was running.

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 violation and the Organization makes no such claim. Thus, in this respect the suspension is permissible. However, the Carrier must also support its action with substantial evidence to prove that the Claimant was not, as required by rule, sufficiently alert and attentive to his work. Again, we find that the discipline meets this test. First, another employee other than Thomas and the Claimant described the incident and testified that the Claimant was conversing with other employees at the time Thomas was injured. Moreover, this employee testified that the Claimant was looking at those employees with whom he was talking and away from Thomas. In addition, this description of the incident was corroborated by Thomas. Ordinarily we might view Thomas' testimony with some suspicion because he, like the Claimant, was also charged with unspecified rule violations. However, whatever suspicion we might have was cured by the admissions of the Claimant (See Tr. at Lines 450, 454, and 455) that he was talking to other employees and that he looked away from Thomas as he did so. In light of this consistency behind the eye witnesses we conclude that the Employer has met its burden to provide substantial evidence that the Claimant was not sufficiently alert and attentive to his work on the day in question.

There remains therefore one last question for this Board to address, i.e. whether the discipline assessed was arbitrary and/or excessive. In this regard the Organization argues that the discipline in this matter was arbitrary and excessive because the Claimant was not adequately trained with respect to the risks involved in his work and that the alternative methods to perform the work were not required by the Carrier. We do not agree with this contention. The record clearly reflects that the Claimant attended a substantial safety briefing earlier that day. More importantly, the nature of the

Claimant's errors, looking over toward other employees with whom he was speaking and away from his helper who was handling the cable as the machine started, as such that any safety briefing or specific training would be in addition to the common sense that the situation demanded of the Claimant. In other words, although such caution on the part of the Carrier would have ben prudent and advisable, the failure to take such action did not excuse the Claimant. Finally, as this Board has stated before, See, **Award No. 2, Case No. 1 (February 22, 1999)**, we will not routinely set aside the good faith disciplinary decisions of the Carrier simply because we might have chosen a different course of action. Rather, we will examine the record to determine if the discipline assessed was arbitrary or excessive. Standards that could be employed would include, but are not necessarily limited to, comparisons with discipline assessed in comparable circumstances, the proportionality of the discipline to the misconduct, and the claimant's prior service record. Using those standards we must weigh the Claimant's fine service record with the fact that the precautions he failed to take were those that he should have routinely taken if he were in fact sufficiently alert and attentive. Finally, we cannot ignore that as a result of his errors a serious injury ensured that required substantial medical attention. Under these circumstances we cannot conclude that the discipline meted out, a twenty (20) day suspension, was arbitrary or excessive.

AWARD: The claim is denied.

Robert Perkovich

DATED: February 22, 1999

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