

SBA No. I 112
BNSF/BMWE
Case No. 32
Award No. 33

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON/NORTHERN/SANTA FE

AND

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

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**Claimant:
Scully, Thomas M.**

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On February 2, 2001 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. 1112 ("Board").

This Agreement contains certain relatively unique provisions concerning the processing of claims and grievances under Section 3 of the Railroad 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 Railroad 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 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

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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, Thomas M. **Scully**, Sectionman and/or Track Inspector, was censured for: failure to be alert and attentive at his work location and walking conditions while unloading the Herzog ballast train on March 27, 2001. This incident resulted in injury to the Claimant's right ankle while walking on loose gravel along or between the two main lines (Track 1 and Track 2) during the unloading process.

A formal investigation was held on Tuesday, April 17, 2001 in Chariton, Iowa based on the following violation.

Maintenance of Way Safety Rules S1.2.3, Alert and Attentive, reads as follows: "Assure that you are alert and attentive when performing duties."

FINDINGS AND OPINION

It is the Carrier's position that the Claimant was negligent by failure to notice the debris, loose gravel, between the tracks. The Carrier points out that the weather was dry and clear at the time of this accident. That is, the Carrier argues that there was no presence or show of snow and ice or other adverse conditions, on March 27, 2001.

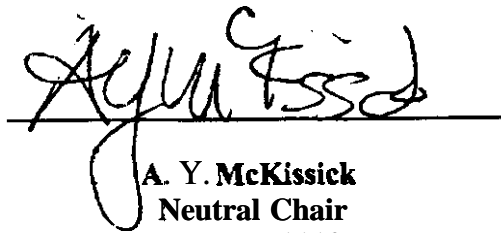
It is the Organization's position that the Claimant is a thirty (30) year employee with an impeccable work record and has never been disciplined. Although it was not snowing and icy at that time, the Organization argues that the ballast had to be dumped and he did so after a job briefing. It is the Organization's position that notwithstanding the Claimant's careful planning, he strained his ankle while performing his duties.

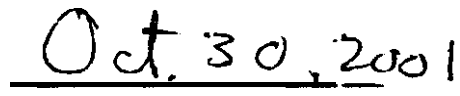
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Based upon evidence adduced at the investigation, this Board finds that the Claimant followed **all** of the necessary rules. He wore protective clothes and was properly shod. When he was injured, he was slowly walking along the tracks. The record reflects that he also engaged in job briefing. It would seem to this Board that although the Claimant was mindful of the circumstances, this occurrence ~~was~~ simply an unfortunate and unforeseeable accident. Accordingly, this Board **finds** that the Claimant's censure should be vacated and his record expunged.

AWARD

The claim is SUSTAINED.


A. Y. McKissick
Neutral Chair
SBA No. 1112


Dated