

SBA No. 1112
BNSF/BMWE
Case No. 34
Award No. 35

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON/NORTHERN/SANTA FE

AND

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

**Claimant:
Nick N. Paz**

**CASE NO. 34
AWARD NO. 35**

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

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, Nick N. Paz, Group V Machine Operator, was suspended for a ten (10) day violation of Burlington Northern Santa Fe Maintenance of Way Safety Rule S- 1.4.7 as follow:

Employees must only use BNSF approved stretches when stretching at the beginning of the shift, before physical exertion, after rest breaks, and after a long period of sitting or maintaining the same posture. Employees are to stretch without exceeding personal capabilities, hut must participate to the extent of their ability or as directed by a physician. Stretches following rest breaks may consist of a subset of the approved stretches.

Always use safe lifting practices when lifting, carrying or performing other tasks that might cause back pain, injury or property damage. Do not use excessive force to accomplish tasks. If one person cannot manually handle a load safely, then use mechanical assistance. Where mechanical assistance is not readily available, request assistance or stop and obtain the mechanical means necessary to complete the task.

This incident came about when the Claimant was removing a McCay clip from a concrete tie, resulting in personal injury to Claimant's right shoulder and lower back. This injury occurred on or near MP 419.8. Main Track 2 on the Butte Subdivision, at approximately 1430 Hours on Friday June 22, 2001 while being assigned on the Crawford Maintenance Gang headquartered at Crawford, Nebraska. A formal investigation was held on July 1,200 1.

FINDINGS AND OPINION

It is the Carrier's position that the Claimant failed to follow the precise directions of § 1.4.7 which expressly prohibited the use of excessive force. If a mechanical assistance was unavailable, the Claimant should have stopped and requested his Supervisor for permission to continue later. In response to the Claimant's allegation of harassment or intimidation, the Carrier asserts that these allegations are without merit. Moreover, the Carrier asserts that the Claimant was not singled out for disparaging treatment.

It is the Organization's position that the Claimant was pressured to perform this task immediately. Since there was no blowtorch or saw available, the Claimant attempted to perform a difficult task of removing the McCay clip manually, a common way of removal. The Claimant is clear, and supported by another witness, that he was harassed and intimidated by the Foreman who frequently engaged in name-calling and exhibited disparate treatment against the Claimant. In sum, the Organization adds that the Claimant exerted sufficient force, not excessive for the reasons stated above.

Based upon the evidence adduced at the investigation, the Board finds that the record supports a finding that sufficient force was utilized by the Claimant to remove the McCay clip as opposed to "excessive" force. In addition, the Board is persuaded that an intimidating atmosphere at the work situs led to the Claimant's reluctance to request his supervisor to allow him to stop working until a blowtorch or other mechanical equipment could be obtained to facilitate the removal of the McCay clip. Moreover, the record substantiates the presence of name-calling coupled with the Supervisor's urgency of completing the task at hand contributed to this incident. Since the Claimant was a good worker with eight (8) years on the job, his penalty shall be accordingly reduced for the aforementioned reasons.

AWARD

This claim of a ten (10) day suspension is reduced to a reprimand.

A. Y. McKissick

A. Y. McKissick
Neutral Chair
SBA No. 1112

Oct. 30 2001

Dated