

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON/NORTHERN/SANTA FE	}	Claimant:
	}	Robert S. Martens
AND	}	
	}	CASE NO. 43
BROTHERHOOD OF MAINTENANCE	}	AWARD NO. 44
OF WAY EMPLOYEES	}	

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 one's desire for expedited handling of this 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 substantiate 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 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, Robert S. Martens, Truck Driver, was charged with failure to be alert and attentive. Claimant was also charged with failure to conduct job safety briefing that included identifying potential hazards and ways to eliminate or protect against hazards, which resulted in the personal injury to Miller's right shoulder. The injury occurred on Wednesday, November 21, 2001 at approximately 1115 hours at Newcastle, Wyoming while Miller was descending the steps on the back of the section truck at or near MP 520.7 on the Black Hills Subdivision. Maintenance of Way Safety Rule S-1.2.3 states as follows:

Assure that you are alert and attentive when performing duties.

Maintenance of Way Operating Rule 1.1.2 states as follows:

**Employees must be careful to prevent injuring themselves or others.
They must be alert and attentive when performing their duties and
pan their work to avoid injury.**

Maintenance of Way Safety Rule S-1.1, Job Safety Briefing:

Employees must participate in a job safety briefing before beginning work and when work and job conditions change. The briefing includes a discussion of the general work plan, existing or potential hazards, and ways to eliminate or protect against hazards. Outside parties and contractors involve in the work or who are in the work area must also be included in the job safety briefing.

Based on the alleged violations, the Claimant was issued a Ten (10) Day Suspension. An investigation was held on Wednesday, December 5, 2001 at Newcastle, Wyoming.

FINDINGS AND OPINION

It is the position of the Organization that the Claimant conducted three (3) job briefings. The first briefing was in the morning to discuss the tasks. The second one, when the rail was loaded. A third briefing occurred when the rail was unloaded. Thus, it is the Organization's position that he fully complied by conducting job briefings before performing new tasks and when working conditions changed. The Organization further contends that the Claimant did not notice any mud until after Miller had injured himself. Based on the above, the Organization requests that the Board sustain the Claimant's appeal.


It is the position of the Carrier that the Claimant failed to warn the gang of muddy areas, especially the walking conditions around the truck. The Carrier maintains that there were no design defects with the truck. However, the Carrier admits that the bottom step has "tall grading" on the "edge of the step." In particular, the Carrier points out that Miller descended the steps from the back of the truck into a very muddy area next to the rail pile which caused his shoulder injury. In addition, the Carrier adds that the Foreman also admitted that "an inch of snow" had recently fallen and "had melted." Based on all of the above, the Carrier requests that the Board deny the Claimant's appeal.

After a careful review of the record, the Board finds that Claimant triggered a chain of successive events into action, which resulted in the direct injury of Miller's shoulder. Although he gave three job briefings, the Board also finds that the Claimant omitted the salient details as he omitted to specify "potential hazards" such as: muddy conditions on the ground, in the immediate vicinity of the truck. Had the Claimant not parked the truck next to the rail pile, it might have prevented Miller's injury and his descent into the muddy area on the passenger's side. The Board finds that the Claimant's positioning of the truck coupled with his omission to specifically warn of "potential hazards," the muddy conditions present at the situs, brought about the above described injury. Thus, the Board finds that the Claimant violated Rule S-1.2.3, Rule 1.1.2 and Rule S-1.1. Based on all the above, the Board is compelled to deny the Claimants' appeal.

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AWARD

**The Ten (10) Day Suspension is affirmed. Accordingly,
this appeal is denied for the aforementioned reasons.**



**A. Y. McKissick
Neutral Chair
SBA No. 1112**

Dated: March 11, 2002