

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON/NORTHERN/SANTA FE

AND

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

Claimant:

Daniel E. Raymond

CASE NO. 44

AWARD NO. 45

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, Daniel E. Raymond, Group III Machine Operator, was charged with failure to be alert and attentive and failure to be sure that all equipment components would clear before passing over the failed equipment detector resulting in extensive damage to the failed equipment detector. This occurred on Monday, September 17, 2001 at approximately 0945 hours near MP 75.3, Main Track 3 on the Orin Subdivision while the Claimant was on SC-27 Super Surfacing Gang at Bill, Wyoming. Based on all the above events, the Claimant was issued a Level S Thirty (30) Day Record Suspension for the alleged violations of MOW Operating Rule 6.50.3 and Rule 1.1.2. Rule 6.50.3 is as follows:

6.50.3 Equipment Components Clear

Before passing over crossings, switches, derails and frogs, be sure all equipment components will clear.

Rule 1.1.2 states as follows:

1.1.2 Alert and Attentive

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

An investigation was held on October 3, 2001 at Broken Arrow, Nebraska.

FINDINGS AND OPINION

It is the position of the Carrier that the Claimant was negligent when he drove the track stabilizer with a double broom over the two (2) transducers, costing the Company approximately \$14,000. The Carrier points out that there was an initial job briefing and then a re-briefing over the radio designed to give the Claimant notice of the placement of the transducers. The Carrier maintains that the Claimant was neither alert nor attentive, as this type of accident could have been prevented with more caution. Based on the evidence presented, the Carrier requests that the Board deny the Claimants' appeal.

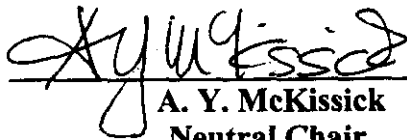
The Organization asserts that since the advent of the double broom attachment to the stabilizer, the Claimant's vision had been blocked. The Organization points out that the Claimant told the Carrier of his inability to see beyond the attachment prior to this incident. In addition, the Organization reasons that the Claimant must have inadvertently rolled over the transducer or scanner as it was only seven (7) inches by three (3) inches and was attached to the rail, which was impossible to see because of a two hundred-eighty (280) foot blind spot. In sum, the Organization adds that the Claimant is an excellent employee and has twenty-three (23) years with the Company. Besides, the Organization adds that within that time period the Claimant has had only one (1) prior infraction. Based on all the above, the Organization requests that the Board sustain this appeal.

After a careful review of the record, the Board finds that the Claimants' appeal must be sustained for the following reasons. First, the record reveals that the Claimant, with the supporting testimony of three employees, maintains the initial job briefing omitted to warn the gang of the presence and the approximate location of the equipment detector. Second, the record also reveals that it was the signalmen who were eyewitnesses to the accident and could have prevented it. Third, the evidence reflects that the Claimant informed the Carrier of his ongoing blocked vision due to the advent of the double broom attachment. Based upon all the above, the Board finds that the Claimant was not negligent. It would appear that the signalmen who watched the Claimant drive over the transducer could have warned the Claimant of the likelihood of this accident. Moreover, it seems that the Carrier was forewarned of the possibility of this type of accident. In response to the Carrier's argument that the Claimant failed to hear the re-briefing, this Board finds that it was a reasonable excuse as the Claimant was in the process of his normal routine of lubricating his stabilizer and missed the radio transmission. Thus, the Board finds that it must sustain the Claimants' appeal.

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AWARD

The Thirty (30) Day Suspension shall be set aside. This appeal is sustained for the aforementioned reasons.



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

Dated: March 11, 2002

C:(NMB)SANTA FE CASES