

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON/NORTHERN/SANTA FE

AND

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

**Claimant:
Lyle R. Miller**

**CASE NO. 48
AWARD NO. 49**

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 establishes 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, Lyle R. Miller, Machine Operator, was charged with the failure to be alert, attentive and to move at a speed which would allow stopping in one-half the range of vision. He was also charged with the failure to maintain a safe braking distance between his on-track equipment and other trains and engines, while operating the Stabilizer X86 - 000 40, resulting in a collision and subsequent extensive damage to the rear of the Train C - NAM SUD - OSSA. Train C had come to a complete stop at or near MP 211.6, Main Track 1 on the Sandhills Subdivision at approximately 1:30 hours on Wednesday, March 27, 2002 when this collision occurred. A subsequent investigation and hearing was held on April 23, 2002 in Grand Island, Nebraska. Based on this event, the Claimant was suspended for thirty (30) days as it was alleged that he violated BNSF Rules 1.1.2, 6.50 and 6.51.

These rules are as follows:

Rule 1.1.2 Alert and Attentive

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

Rule 6.50 Movement of On-Track Equipment

On-Track Equipment must move at a speed that will allow stopping in ½ the range of vision short of:

Train

Engine.

Railroad car.

People or equipment fouling the track.

Stop signal.

Or

Derail, moveable point frog or switch lined improperly.

Rule 6.51 Maintaining a Safe Braking Distance.

On-track equipment operators are responsible for maintaining a safe braking distance between their on-track equipment and other on-track equipment, trains and engines.

For purpose of this rule: activities.

Working mode while applied to on-track equipment stopped or moving slowly in the performance of maintenance activities.

Traveling mode will apply to on-track equipment moving to and from a work location or performing inspection activities.

On-track equipment operators must:

Insure that on-track equipment remains at least 300 feet behind a train and engine while in working or traveling mode, except when it has been determined by a job briefing that the train or engine is stopped and will not move.

It is the position of the Organization that the lack of radio communication is the real problem because the Claimant had no way of knowing that Train C had come to a complete stop, when he rear-ended it. The Organization contends that the Claimant was only traveling about 20 MPH and that he did "throttle down" when he went around the blind curve. Moreover, the Organization points out that the speedometer and the brakes were inoperative at the impact of the collision. The Organization argues that the Claimant was unfairly charged, as Foreman Casey and others were not similarly disciplined for their contribution to this accident. Lastly, the Organization adds that the Claimant has a perfect record, for approximately twenty-six (26) years. Thus, the Board should sustain the Claimant's appeal and expunge his record.

The Carrier rebuts the Organizations argument that the brakes were not inoperative, as they were inspected by three (3) persons. Moreover, the Carrier points out that five (5) of the six (6) axles have brakes on them and "all were working." In addition, the Carrier asserts that the Claimant was going well "over 30" MPH when the collision occurred.

The Carrier also notes that the detector, ten (10) miles away from the site of the collision, recorded the Claimant traveling thirty-eight (38) or thirty-nine (39) MPH. Moreover, a train re-enactment also substantiates the finding of the speed detector, solid evidence, the Carrier argues, revealing the presence of a "high-speed impact," as the "faceplate was pushed back". In addition, the "knuckle carrier" and "pin lifters" were also "knocked off." Repairs are significant, the Carrier asserts, as the stabilizer will cost \$23,559, the broom (\$54,000) and the BNSF 88 26 (\$6,100). The collective cost, the Carrier adds, is \$83,659. Based on all the above, the Carrier requests that the Board deny this appeal because Claimant violated the regulations, as cited.

After a careful review of the proceedings, the Board finds that the Claimant's appeal must be denied for the following reasons. Evidence reveals that the Claimant was exceeding the speed limit when the collision with Train C occurred. Evidence further reveals that the damage was extensive, the type of damage, which occurs only upon a "high speed impact." Based on the above, the Board finds that Claimant was not alert and attentive as he failed to maintain a safe braking distance between his train, the stabilizer, and Train C on March 17, 2002.

Although the lack of radio communication might have exacerbated the problem, the Board finds that had the Claimant been traveling at a lower and cautionary speed that this collision could have been averted. Damages, which amounted to \$83,659, are significant. The Board finds that but for the Claimant's lack of attentiveness and traveling at an excessive speed, this accident would not have occurred. Besides, the record reflects that the Claimant admitted that he only "throttled" down a little bit. The gravity of this offense and his negligent behavior, the failure to be careful in the presence of a hidden curve and blind spot, constitutes egregious behavior. This behavior outweighs the Claimant's past, exemplary work record. Accordingly, the Board finds that the Claimant violated the above-cited rules. Thus, his appeal must be denied.

Award

**The Claimant's appeal is Denied.
His thirty (30) day- suspension stands.**


Neutral Chair SBA No. 1112
Y. McKissick

8-4-02
DATE