

**BNSF/BMWE
SBA NO. 1112
CASE NO. 6
AWARD NO.7**

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1112**

BURLINGTON NORTHERN/SANTA FE

and

**CASE NO. 6
AWARD NO. 7**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

On July 29, 1998 the Brotherhood of Maintenance of Way Employees ("Organization") and the Burlington Northern/Santa Fe Railway ("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 Railway 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, and 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 Railway 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 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 right 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 investigation, the transcript of 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

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should be upheld, modified or set aside, will determine whether there was compliance with the applicable provisions of 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

The Claimant, Bruce Carter, established seniority as a laborer on June 13, 1978 and was, at all material times, working as a machine operator.

The Claimant was the subject of two investigations, conducted on January 7 and January 22, 1999 for the purpose of establishing his responsibility for violating rules 1.5 of the Carrier's Operating Rules and/or Rules 21.2, 21.4 21.5, 21.5.2, 21.5.3 of the Carrier's Corporate Lodging Policy. Following the investigation the Claimant was removed from service for violating those rules. The rules in question read, in relevant part, as follows:

Operating Rules 1.5 Drugs and Alcohol

The use or possession of...controlled substances,...that may adversely affect safe performance is prohibited while on duty or on company property...Employees must not have any prohibited substance...when reporting for duty,...

Corporate Lodging Policy

21.1 Corporate Lodging Procedures (Generally)

BNSF provides hotel accommodations through corporate lodging for qualified track structures, electrical, roadway equipment, welding, telecommunications and signal employees. To qualify for the program, employees must be given written instructions and a check INN card.

21.4 Making Reservations

Corporate Lodging makes the necessary room reservations for all

employees and advises them of the confirmation number for those rooms. Foreman or Foreman's designated person is responsible for making reservations...

21.5 Check INN Cards

When you use the Check INN Card...you become personally liable for any charges that accrue for using the card for other than business purposes as provided in these instructions.

21.5.2 Using a Check INN Card

Qualified employees using a Check INN Card must do the following:

Use a Check INN Card only for lodging expenses on the dates service is performed and/or the night immediately preceding the start of the work week.

21.5.3 Report Lost or Stolen Check INN Cards

Immediately report lost or stolen Check INN Cards...

FINDINGS AND OPINION

As of July 15, 1998 the Claimant was assigned as a machine operator on SC27 and continued to be assigned in that capacity until September 23, 1998. From July 28 through 31, 1998 he was on vacation after which he went on a medical leave as of August 18, 1998 which was arranged through the Carrier's Employee Assistance Office (EAO). The Claimant sought the medical leave and assistance from the EAO because he was depressed as a result of his divorce and he feared for his safety as well as those who were working with him. On approximately thirty (30) separate days during his medical leave the Claimant used the Carrier's corporate lodging Check INN card for hotel stays, in an amount totalling \$833.36.

At some point thereafter the Claimant was arrested, apparently for failing to pay child support, and the Carrier's Employee Assistance Officer, Dane Freshour, rescinded the Claimant's voluntary medical leave. Special Agents of the Carrier were informed of the arrest and interviewed the Claimant on September 17, 1998 at the Box Butte County jail in Alliance, Nebraska. The Claimant willingly surrendered the Check INN card and did not deny using it for personal lodging. Subsequently, the Carrier's Special Agent obtained documentary evidence of the Claimant's use of

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the card while he was on medical leave.

The Claimant returned to duty on December 18, 1998, a Friday. He apparently did not work the next three days, but worked the following Tuesday, only to be off from work again on Wednesday, December 23, 1998. The next four days were Christmas holidays or scheduled weekend days off. Thus, on the next scheduled work day, Monday December 28, 1998 the Claimant submitted to a return-to-work urinalysis.

After the Claimant submitted to the drug screen he returned to work and continued to work until January 6, 1999. That day the Carrier's Assistant Division Engineer at Alliance was informed by the Carrier's medical office that the Claimant's drug screen tested positive for marijuana metabolites and that the Claimant should be removed from service. The Claimant was thereupon notified by the Assistant Division Engineer that he was removed from service and the Claimant was subsequently notified of the investigation, described above *supra* at page 2, which led to his dismissal and this claim.

The Claimant's service record shows that he was discharged in 1979 because he was absent without leave and that, despite the fact that he failed to appear for the investigation, he was reinstated six months later. Since that time, and until the facts giving rise to this claim, the Claimant has been the subject of only one other disciplinary action, a formal reprimand for being absent without leave once again, on September 23, 1998.

The Organization first makes two procedural arguments which it contends justify reversal of the Claimant's discharge. The first argument is that the Carrier improperly admitted into the investigation record facts relating to the Claimant's medical condition in determining whether to discharge him. The second argument is that the Carrier charged him with at least one rule violation that was not pertinent to his discharge. With regard to the first, this Board does not see the error committed by the Carrier because, as noted below, in arguing that the Claimant should not have been discharged the Organization has itself relied upon the Claimant's medical condition and mental state of mind during the relevant period. Thus, the Organization has itself placed this issue into play and appears to argue that only it, but not the Carrier, may rely on the facts relevant to that issue. We disagree. With regard to the second issue, the Organization is correct that the Carrier charged the Claimant with violating Rule 21.5.3, that pertaining to reporting lost or stolen Corporate Lodging Cards, and that there is no evidence that the Claimant lost or had his card stolen. However, we do not view this as a procedural infirmity, but rather choose to view this issue in the context of determining what, if any, penalty should be assessed to the Claimant, discussed below. Accordingly, we find no procedural violations of Schedule Rule 40 by the Carrier.

This Board's next charge is to determine whether there is substantial evidence of the Claimant's guilt of the charges pressed against him. First, the Claimant was charged with having

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marijuana metabolites in his system while on duty. The evidence for the rule violation, the drug screen, was not attacked by the Organization, thus we conclude that there is substantial evidence to support this charge. The other rule violations relate to the Claimant's use of the Corporate Lodging Card. Again the un rebutted evidence is that the Claimant made reservations for himself while he was on medical leave and that he used the card to pay for those hotel stays. Thus, there is substantial evidence to prove that he violated Rules 21.4 and 21.5.2. However, there is no evidence that the Claimant's lodging card was lost or stolen. Therefore, the charge that he violated Rule 21.5.3 is not supported by any record evidence.

Having concluded that the record supports all but one of the charges made against the Claimant, this Board must finally review whether discharge under the circumstances was arbitrary and/or excessive. On this point we note first of all that the Claimant has established and held seniority for approximately twenty years. Moreover, although his record is not unblemished by virtue of his prior dismissal, we note that the prior dismissal was almost nineteen years ago and since that time his record has, until these recent incidents, indeed been free from any discipline. On the other hand, the charges that the Carrier has proven are substantial and serious, relating to the use of controlled substances while on duty and, in the case of his improper use of the corporate lodging card, relate to the Claimant's reliability, veracity, and trustworthiness.


Complicating this matter even further is that the Claimant's conduct relied upon to support his discharge was undertaken at a time during which he faced troubling personal circumstances arising out of a difficult divorce which left him homeless. This alone however is not the only reason militating against discharge. Rather, the Claimant also appears to acknowledge his difficulties, has admitted his guilt, offered to make restitution for the amount of lodging expenditures in question, and has made efforts to remedy his situation by seeking professional assistance and attempting to seek a Rule 1.5 waiver.

Thus, we must determine whether the corrective and rehabilitative aspect of discipline is possible under these circumstances for if it is not, then discharge is in order. In light of the Claimant's acceptance of his shortcomings and his efforts to remedy them we believe that his misconduct does not bar the possibility of rehabilitation. This is particularly true when we consider his long years of service that should not be disregarded. Accordingly, we find that discharge in this matter is indeed arbitrary and excessive.

AWARD: For the reasons set forth above we sustain the claim. However, the Claimant should not escape any liability at the risk that the need for his rehabilitation might be lost. Accordingly, the Claimant shall be reinstated once he has demonstrated his fitness for duty and

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pursuant to the relevant terms of a Rule 1.5 waiver. However, his discharge shall be converted to a suspension without pay to end upon his reinstatement.



**Robert Perkovich, Chairman and Neutral
Member, SBA No. 1112**

