

SBA No. 1112
BNSF/BMWE
Case/Award No. 1

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

BURLINGTON NORTHERN/SANTA FE

and

**CASE NO.
AWARD NO. 1**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

On July 29 1998 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 provision 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, 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 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 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.

The Agreement further establishes 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 proceedings and are to be reviewed by the Referee.

In the instant case, this Board has carefully reviewed each of the above-captioned documents prior to reaching findings of fact and conclusions. In addition the Board convened for a meeting on

December 7, 1998 at which time Carrier and Organization representatives, as well as the Claimant himself, engaged in oral argument followed by an executive session of the Board. Under the terms of the Agreement the Referee, prior to rendering a final and binding decision, has the option to request the parties to furnish additional data, including argument, evidence, and awards.

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 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.

BACKGROUND FACTS

The Claimant, Mr. R.A. Cauthen, established seniority and held the classification of Track Inspector with approximately seventeen years of service. At all times material herein he was employed by the Carrier as a relief Track Inspector headquartered at Denver, Colorado.

The Claimant was censured and dismissed from service on March 3, 1995 as a result of an investigation which was held on February 14, 1995. At the investigation the Claimant was represented by the Organization. The Carrier censured and dismissed the Claimant based upon its findings that he violated Rules 1.6 and 1.13 which read, in relevant part, as follows:

1.6 Conduct

Employees must not be:

* * *

3. Insubordinate

* * *

- 6. Quarrelsome
- or
- 7. Discourteous

1.13 Reporting and Complying with Instructions

Employees will report to and comply with instructions from

supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

FINDINGS AND OPINION

On January 9, 1995 the Claimant reported late for duty under the supervision of Roadmaster Theret. Upon his arrival Roadmaster Theret met with the Claimant and an Organization representative. In that conversation Theret explained that because they had worked together in the past he was aware of the Claimant's habit of reporting for work and then proceeding to take time to eat breakfast before commencing his assignment for the day. Roadmaster Theret then told the Claimant that he should not engage in such conduct and that instead he should report for duty and proceed directly to his assignment.

The following day the Claimant reported on time for duty and received his assignment which included working with Laborer Duke. The Claimant and Duke then proceeded to prepare for the work of the day and once completed, left for duty. However, instead of going to their assigned task the Claimant and Duke had coffee and doughnuts at a local cafe. A short time later after they left the cafe the truck in which they were driving lost a wheel and they informed the appropriate Carrier representative of the mishap.

Subsequently Roadmaster Theret learned of the mishap and asked Duke what had happened. When Duke informed him of the time and location at which he and the Claimant lost the wheel from the truck, Roadmaster Theret asked Duke what they had been doing between the time they left for work and the mishap. Duke then informed Theret that he and the Claimant stopped at the local cafe for coffee and doughnuts in that interim period. Roadmaster Theret then confronted the Claimant who at first said only that they had spent the time in question preparing for the day's assignment. Only when Theret pressed the issue further did the Claimant admit that he and Duke had stopped for coffee and doughnuts.

The following day Roadmaster Theret gave written notice that the Claimant was to attend an investigation "...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged being insubordinate to Roadmaster Theret on January 10, 1995, at approximately 0800 hours in the vicinity of Denver, Colorado, while assigned as a track inspector, Denver, Colorado."

The Organization first attacks the investigatory process utilized by the Carrier, asserting that it did not conduct a fair and impartial investigation. Alternatively, it contends that the Carrier failed to meet its burden of proof that the Claimant was insubordinate on the day in question. The Carrier

on the other hand denies that its investigation failed any due process requirements and that there is substantial evidence of the Claimant's guilt.

With regard to the contention that the Claimant did not receive a fair and impartial hearing, the Organization points to what it regards as three critical flaws in the Carrier's investigation. First, it argues that the notice of the investigation was inadequate to enable the Claimant or his representative to mount a defense to the charge. We disagree because the charge letter clearly sets forth the date, time, and location of the alleged misconduct and characterizes it as insubordination. Thus, the Claimant and his representative were only required to explore the nature of his interaction with Roadmaster Theret on the date and at the time and location in question in order to glean what actions that he had taken were called into question. Secondly, neither the Claimant nor the Organization sought a continuance of the investigation so that further preparation could be made nor did they fail to vigorously and completely contest the matter at the hearing. Under such circumstances other referees, in cases involving these same parties, have held that the notice of investigation was adequate. See, **Third Division Award No. 26276, BMW v. BN (Referee Benn)**. Accordingly we reject this first procedural attack on the Carrier's investigation.

The Organization's second procedural argument is that the Conducting Officer at the hearing engaged in leading questions posed to Carrier witnesses and in doing so provided suggested testimony to those witnesses. Again, we disagree with this characterization of the proceedings. Rather, because witnesses were sequestered at the request of the Organization the Conducting Officer merely posed questions to witnesses referencing the testimony of other witnesses and seeking confirmation of that testimony. Although questions that would have permitted each witness to describe his or her knowledge directly might have been preferable, the process engaged in by the Conducting Officer was not prejudicial. This is particularly true where, as is the case herein, the Claimant did not deny that he and Duke stopped for coffee and doughnuts. Thus, the critical point on which the witnesses might have been led by the Conducting Officer was not really in dispute. Accordingly, we do not find that the Claimant was deprived of his right to a fair and impartial hearing.

The final procedural argument is that the Carrier did not decline the Claimant's appeal of this dismissal within sixty (60) days of the appeal of March 23, 1995. However, the record clearly shows that on April 24, 1995 the Carrier forwarded a letter of declination to the Organization. Therefore, this argument must necessarily fail.

On the merits of the allegation the Organization's principal argument is that although the Claimant and Duke did indeed stop for coffee and doughnuts they did so in order to conduct a safety briefing which the Carrier requires all employees to do. As a result the Organization argues that the Claimant did not ignore or fail to follow Roadmaster Theret's order for the order was simply that he should not stop for breakfast before going to work and that he should proceed directly to work.

Therefore, when the Claimant and Duke stopped at the local cafe for a safety briefing they did in fact go directly to work.

The un rebutted evidence is that indeed the Claimant and Duke discussed safety matters and the work of the day while they ate at the local cafe. In fact, the record shows that they had not worked together before so it could be inferred that the need for a safety briefing might be greater than under other circumstances. Thus, when they conducted the safety briefing the Claimant was in fact compliant with Roadmaster Theret's order to proceed directly to work after reporting for duty. However, the Claimant made the unfortunate choice to conduct the safety briefing at a location which was not fully compliant with Roadmaster Theret's orders. Indeed, one could conclude that this choice was deliberate, particularly when the Claimant himself admitted at the hearing that there were other alternative locations to conduct the safety briefing.

Thus, this Board concludes that the appropriate penalty should be one that will clearly send the message to the Claimant that compliance with the reasonable and proper orders of management must be followed and not in a fashion that suits his desires as well as the legitimate interests of the Carrier. In our view dismissal exceeds this purpose for it ignores that the Claimant conducted the safety briefing and was therefore in fact complying with Roadmaster Theret's order. Accordingly, a severe penalty short of dismissal will in our view achieve the purpose set forth above. Therefore, we will convert the dismissal to a suspension, with censure for insubordination, for the period that he has been out of service but for one year. In light of this finding the Grievant is to be reinstated with back pay for a period of one year and his seniority and other benefits are to be adjusted accordingly. We believe that a suspension of this extended period should, on the one hand, serve to convince the Claimant that the orders of management are to be taken seriously and followed without alteration to suit his convenience and/or desires. In addition, this serious penalty is warranted because insubordination is not minor offense but also because the Claimant's service record shows that he received a prior five day suspension for failing to follow an order of a Roadmaster. Clearly this second instance of such action calls for serious discipline.

AWARD: The claim is sustained in accordance with these findings.



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

DATED:

December 31, 1998