

NATIONAL MEDIATION BOARD  
SPECIAL BOARD OF ADJUSTMENT NO. 1112

BURLINGTON NORTHERN SANTA FE

AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

CASE NO. 106  
AWARD NO. 107  
CLAIMANT: J. M. NYBERG

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 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, 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 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.

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 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 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.

The Carrier hired Claimant John M. Nyberg on or about June 8, 1971 as a Trackman. At the time of the incidents leading to the instant Discipline, Grievant was working Section F Maintenance in Cass Lake, Minnesota. Claimant had previously received the following disciplines:

DATE	OFFENSE	DISCIPLINE ASSESSED
9/6/76	Failure to Comply with Instructions	5-day Suspension
12/10/87	Failure to Comply with Instructions	Censure

On October 4, 2007, Claimant was working with Russell Lembke on the Grand Forks Subdivision near Wilton, Minnesota. They were dispatched to change a frog on the railway. When they reached their destination, Claimant and Lembke determined that they had the wrong frog and could not perform the change. After a discussion with their Roadmaster, it was determined that they would switch out the frog with a piece of track. During the course of changing out the track, the piece of track dislodged and struck Claimant, resulting in a broken leg. This accident led to the instant investigation.

By letter dated October 8, 2007, the Carrier notified Claimant that he was to attend a formal Investigation at the Roadmaster's Office in Grand Rapids, Minnesota "...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged involvement in a rail change out accident at or near MP 84.1 on October 4, 2007, at approximately 0930 hours on the Grand Forks Subdivision near Wilton, Minnesota, that resulted in serious injury to a BNSF employee." After a number of postponements, the Hearing took place on January 4, 2008. Pursuant to that Investigation, on January 29, 2008, Claimant was notified that he was being disciplined and was issued a Level S Record Suspension of thirty days and a 1-year Probation on the BNSF Railway for violating Maintenance of Way Operating Rule 1.1.2, "Alert and Attentive". By notice dated February 19, 2008, Claimant exercised his right to appeal the decision to Special Board of Adjustment 1112.

According to the Organization, the discipline imposed upon Claimant was harsh and excessive. The Organization contends that the burden of proof in a discipline matter such as this is on the Carrier; that burden of proof has not been met. The Organization claims that the Carrier has abused its discretion and that the Carrier's determination to discipline Claimant was based on inconclusive evidence. The Organization claims that Claimant has not received a fair and impartial Investigation. The Organization claims that the Discipline imposed upon Claimant was improper. Claimant has a long history with the Carrier and has performed similar work numerous times without incident. In this case, when Claimant and his co-worker arrived at the scene of the change out and discovered that they had the wrong frog, the Roadmaster approved their plan to change out the frog with a piece of track; there was no negligence on the part of Claimant or his co-worker. The Organization asserts that the Carrier should now be required to overturn Claimant's Discipline and make Claimant whole for all losses. Conversely, the Carrier takes the position that it has met its burden of proof. Claimant was afforded a fair and impartial Hearing in accordance with the requirements of the

Agreement. According to the Carrier, Claimant was guilty as charged of violating the Carrier's safety policy. While it may be true that Claimant did have the permission of the Roadmaster, Claimant and his co-worker were nonetheless responsible for the event that occurred. Based on Claimant's offense, the Discipline imposed was appropriate.

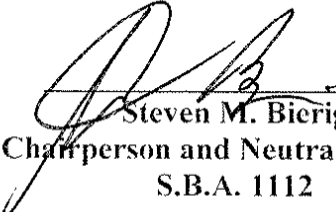
In discipline cases before this Special Board of Adjustment, the Board sits as an appellate forum. We do not weigh the evidence de novo. As such, our function is limited to the question of whether the discipline assessed should be upheld, modified, or set aside. This Board must determine whether there was compliance with 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.

This Board has not found substantial evidence in the record to sustain the Carrier's position. A review of the incident yields the conclusion that Claimant acted appropriately on the day in question. He and his co-worker, after receiving permission from their Roadmaster, were attempting to resolve a problem; the accident that followed could not have been reasonably anticipated. This Board cannot find that the accident was the fault of Claimant. Based on this conclusion, this Board has determined that Claimant did not violate Maintenance of Way Operating Rule 1.1.2, "Alert and Attentive".

Claim sustained.

AWARD

Claim sustained.

  
\_\_\_\_\_  
Steven M. Bierig  
Chairperson and Neutral Member  
S.B.A. 1112

Dated 6/10/08