

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

BURLINGTON NORTHERN SANTA FE

AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CASE NO. 108

AWARD NO. 109

CLAIMANT: JOSHUA SHORTHILL

On July 29, 1998, the Brotherhood of Maintenance of Way Employes ("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 Joshua C. Shorthill on or about September 4, 2007 as a Gang Trackman in Washington State. At the time of the incident leading to the instant Discipline, Claimant was working on a Maintenance Gang in Tacoma, Washington. Prior to the incident leading to his Dismissal, Claimant had received no previous disciplines.

On July 21, 2008, Claimant allegedly engaged in dishonest activity when he indicated that he had incurred an on-the-job injury to his finger. According to the Carrier, Claimant did not sustain an on-the-job injury and in fact had received the injury while off-duty. Claimant insisted that he had no intention of deceiving the Carrier.

By letter dated July 24, 2008, the Carrier notified Claimant that he was to attend a formal Investigation "... for the purpose of ascertaining the facts and determining responsibility, if any, with your alleged dishonest conduct, regarding personal injury to yourself, at approximately 1700 hours, July 21, 2008, at MP 134.1 on the Seattle Subdivision while working as Laborer on Maintenance Gang TMGX-0427, on duty 0700 hours, July 21, 2008 at Vancouver, Washington." The Hearing took place on August 26, 2008. Pursuant to that Investigation, by letter dated September 4, 2008, Claimant was notified that he was being dismissed for violation of Maintenance of Way Operating Rule 1.6 Conduct. By notice dated September 8, 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 unwarranted 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 contends that the Carrier has abused its discretion and that the Carrier's determination to discipline Claimant was based on inconclusive evidence. The Organization further claims that Claimant had no intention of deceiving the Carrier. In addition, the Organization claims that even if Claimant did engage in the alleged violations, the penalty of Dismissal was too severe. 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, a review of the transcript makes it clear that Claimant was guilty as charged of violating Rule 1.6. It is clear that Claimant did not sustain his injury while on the job, although he informed the Carrier that his injury did occur while on duty. Claimant informed the Carrier that he was injured while setting flags on July 21; however, he told the doctor at the Emergency Room that he had injured himself while pulling an individual out of the way of an approaching train. Based on Claimant's offense, Dismissal is the appropriate penalty.

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 found substantial evidence in the record to sustain the Carrier's position that Claimant violated Rule 1.6. The Carrier has proven that Claimant did violate said Rule when he reported an off-duty injury as an on-the-job injury. However, while Claimant did engage in said violation, we find that the penalty imposed, Removal, was too severe. Based on this determination, we find that the Removal shall be reduced to a Long-Term Suspension. Claimant is reinstated, but without back pay.

Claim sustained in accordance with the findings.

AWARD

Claim sustained in accordance with the findings. The Carrier is ordered to make the Award effective on or before 30 days following the date of the Award.

**Steven
Bierig**

Digitally signed by Steven Bierig

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

Dated: March 10, 2009