

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

BURLINGTON NORTHERN SANTA FE

AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**CASE NO. 110
AWARD NO. 111
CLAIMANT: J. R. MOODY**

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 Jay R. Moody on or about October 9, 2006 as a Gang Trackman in Nebraska. At the time of the incident leading to the instant Discipline, Claimant was working as a Machine Operator in Thedford, Nebraska. Prior to the incident leading to his Dismissal, Claimant had received no disciplines.

On July 21, 2008, Claimant allegedly engaged in falsification and dishonest activity when he failed to comply with BNSF Corporate Policy regarding lodging. According to the Carrier, Claimant did not stay in a room that was reserved to him in Thedford, Nebraska and failed to cancel said reservation as required by the Policy. According to Claimant, he was unaware of the Thedford room reservation and had no intention to deceive the Carrier. Claimant lives approximately 30 miles from Thedford and when working in that area, stays at home. Claimant stayed in Broken Bow on August 18 and 19 and stayed at his residence on August 20. Claimant was completely unaware of any reservation in Thedford.

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 your responsibility, if any, in connection with your alleged falsification and dishonesty when you failed to follow BNSF Corporate Policy on room occupancy and booked rooms for three employees, Mr. McLaughlin, Mr. Moore & yourself at the Roadway Inn for August 18-22, 2008, while assigned as Truck Driver on Gang TMGX1080, temporarily headquartered at Thedford, Nebraska." The Hearing took place on September 15, 2008. Pursuant to that Investigation, by letter dated October 1, 2008, Claimant was notified that he was receiving a Level S 30-day Suspension as result of a violation of BNSF Corporate Lodging Policy and MOW Operating Rules 1.6 Conduct, Dishonesty. By notice dated October 22, 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 intent to deceive the Carrier. Claimant was completely unaware of any reservation in Thedford and therefore could not cancel a reservation of which he was unaware. 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 falsification and dishonesty. It is clear that Claimant was aware of the Corporate Policy and did not comply with said Policy when he did not cancel his reservation in Thedford. Based on Claimant's offense, the Level S 30-day Suspension 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 not found substantial evidence in the record to sustain the Carrier's position that Claimant violated BNSF Corporate Policy. The Carrier has been unable to prove that Claimant violated Corporate Lodging Policy when he did not cancel his reservation in Thedford, Nebraska. Claimant was unaware of the Thedford reservation. Because it has been unable to prove the violation, the Discipline must be overturned. Claimant shall be made whole for all losses and the record shall be expunged of said Discipline.

Claim sustained.

AWARD

Claim sustained. 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