

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

BURLINGTON NORTHERN SANTA FE

AND

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**CASE NO. 111
AWARD NO. 112
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 the instant 30-day Suspension, Claimant had been assessed a Level S 30-day Suspension for violating Corporate Lodging Policy; however, that Discipline was overturned in S.B.A. 1112 Case 110, Award 111.

On August 21, 2008, Claimant allegedly engaged in dishonest activity when, according to the Carrier, he allegedly falsified his hours for August 21, 2008. The Carrier claims that Claimant was paid for 8 hours of straight time and 3 hours of overtime on that date. However, in actuality, Claimant only worked 7 hours of straight time. According to Claimant, he had no intention to deceive the Carrier. Claimant admitted that he had only worked 7 hours, but further indicated that it was the responsibility of his foreman to report the correct number of hours that Claimant worked. Claimant was unaware that he had been paid for the hours of overtime. Claimant indicated that it is the general presumption that an employee works 8 hours of straight time, and additional hours are recorded only if reported by the employee to a supervisor. Claimant indicated that he never notified a supervisor of additional hours worked on the date in question.

By letter dated September 5, 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 dishonesty when you reported your hours worked for August 21, 2008, while assigned as Truck Driver on Gang TMGX1080, temporarily headquartered at Thedford, Nebraska." The Hearing took place on September 17, 2008. Pursuant to that Investigation, by letter dated October 13, 2008, Claimant was notified that he was receiving a Level S 30-day Suspension as result of a violation of 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 that he was paid for the overtime. Claimant admitted that he only worked 7 hours on the date in question, and that he forgot to report to the foreman the fact that he left work one hour early that day. 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 Dishonesty in reporting his hours worked for August 21, 2008. Claimant only worked 7 hours, but was paid for 8 hours of straight time and 3 hours of

overtime. 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 found substantial evidence in the record to sustain the Carrier's position that Claimant was dishonest in reporting his hours for August 21, 2008. It is clear that Claimant only worked 7 hours, but was paid for 8 hours of straight time and 3 hours of overtime. Claimant testified credibly that he was completely unaware of the 3 hours of overtime. However, regarding the hour that Claimant left early, the Carrier has been able to prove that Claimant was dishonest. Based on the transgression, I find that a 30-day Suspension was too severe. Therefore, the 30-day Suspension is reduced to a 10-day Suspension and Claimant shall be made whole for the additional 20 days served.

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

Dated: March 10, 2009