

SBA No. 1112
BNSF/BMWE
Case No. 13
Award No. 14

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON NORTHERN/SANTA FE

AND

**CASE NO. 13
AWARD NO. 14**

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.

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.

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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.

In the instant case this Board has carefully reviewed each of the above-captioned documents prior to reaching findings of fact and conclusions.

BACKGROUND FACTS

Claimant Slaughter was hired by the Carrier on June 27, 1979 and was at material times herein serving as a machine operator. His service record shows that on four prior occasions, with the most recent being June 15, 1998, he was disciplined, including one censure, one formal reprimand and two suspensions of five and ten days, for leaving his job without authorization.

Following notice and investigation the Claimant was issued a Level S suspension of 30 days, ten of which were served and 20 deferred. In addition he was placed on a probationary period of three years. The action was assessed in conjunction with the claim that he violated 1.3.1 of the Maintenance of Way rules and 9.1.1 of Engineering Instructions which provide, in relevant part, as follows:

A turnout is a collection of track work components, such as switch points,.. General requirements for turnouts include:

1. Install and maintain...according to BNSF standard plans...
2. Fully bolt turnout components with lock washers and cotter keys in place, if so required.
3. Make sure that bolts and nuts are tight.

FINDINGS AND OPINION

On March 17, 1999 the Claimant was working with two other employees in a weekend section to perform maintenance on Switch #3204, Kountry Line. He and the other crew members replaced the switch stand on Switch #3204 and during the course of their work they spoke with an unidentified individual who said that he once worked for the Carrier..

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After they completed their task, they gauged the switch and secured it by putting the pin in place with the cotter key. They then tightened the nut on the switch as well. As this was their last job of the day, they then completed their tour of duty.

Following the completion of the task and at various times before 8:00 a.m. the following day, at least one train used that switch with no complications. However, on that one occasion there was no need for the switch to be operated. Rather, the train simply ran over the switch.

At 8:00 a.m. the following day however a train derailed when there was an attempt to operate the switch. The Roadmaster was called to investigate the matter and he determined that the connection rod had not been bolted to the switch and that there was no cotter key in the switch.

The Claimant and his fellow crew members were interviewed by the Roadmaster about the incident and each asserted that they had secured the bolts on the switch and replaced the cotter key. None of the three said anything to him regarding the unidentified stranger with whom they talked while at work on the switch.

The Organization contends before this Board that the Carrier has failed to meet its burden of proof that the Claimant was responsible for the derailment by failing to properly secure the switch bolts and by failing to replace the cotter key in the switch. Rather, it asserts that some other individual or other cause is the explanation for the condition of the switch which led to the derailment.

As noted above the parties' agreement establishing this Board places on the Carrier the burden to prove the charges assessed against the Claimant with "substantial evidence." In our view, the Carrier has proved only that there was a derailment and that it was caused by the improper condition of the switch in question. However, the un rebutted evidence of the Claimant is that when they completed the switch maintenance the switch was properly secured and in condition for use. Although it is true that such an un rebutted assertion may be rejected, the record must disclose some reason for doing so. This record does not present that opportunity. At best, there is an inference that may be drawn that because the switch maintenance in question was the last task performed by the crew before the end of their work day they may have been negligent. However, that fact alone does not compel us to conclude that the Carrier has met its burden of proof. Similarly, one could draw an inference that because the crew members failed to inform the Roadmaster of the unidentified stranger there was no such individual. However, even if that inference were drawn, it ignores the fact that the burden of proof lies on the Carrier and does not shift to the Claimant until the Carrier has met that burden. Finally, we are

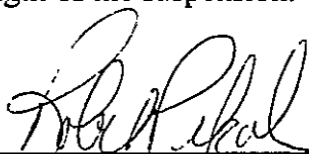
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Constrained to point out that the Claimant's assertions are corroborated by his fellow crew members and with respect to their assertions there also is no basis to reject their testimony.

AWARD:

The Claim is sustained. The Carrier is to revoke the Level S suspension of thirty days and the three year probationary period. Moreover, the Carrier is ordered to make the Claimant whole for any loss of pay or for any other detriment he may have suffered in light of the suspension.



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

DATED: September 9, 1999