

SBA No. 1112
BNSF/BMWE
Case No. 20
Award No. 21

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON NORTHERN/SANTA FE

AND

**CASE NO. 20
AWARD NO. 21**

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 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 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 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.

SBA No. 1112
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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 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 was employed by the Carrier on April 11, 1994 as a trackman and later as a gang trackman. His prior record shows that he was suspended in 1996 for being AWOL, again in 1997 for being intoxicated while on company lodging and for conduct unbecoming, and in 1999 for again being AWOL. Following notice of December 27, 1999 to attend a formal investigation, conducted on January 4, 2000, the Carrier suspended the Claimant for ten (10) days for violation of Maintenance of Way Operating Rules 1.15, which reads, in relevant part, as follows:

Rule 1.15 Duty – Reporting or Absence

Employees must report for duty at the designated time and place...

FINDINGS AND OPINION

At all relevant times the Claimant was assigned as a Group 3 Machine Operator on the RP08 Steel Gang 21302. On December 9, 1999 the gang foreman was contacted by the Division Maintenance Engineer who inquired whether the Claimant had been to work that day and who instructed the foreman to notify him if the Claimant were to fail to report for work any time thereafter. That same day, as well as on December 10 and 12, 1999, the Claimant's girlfriend contacted the foreman and/or other Carrier representatives to inform them that the Claimant would not be at work on those days or for the remainder of the work week. The Claimant's girlfriend also inquired whether the Claimant could obtain a leave of absence for this period. The foreman then inquired whether a leave of absence could be approved, however he was advised that no such request would be granted. As a result, the Claimant did not work on December 14 through 17, 1999, apparently because he was incarcerated for driving while under the influence.

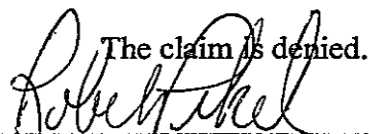
The Organization argues that the suspension should be set aside for both procedural reasons as well as the Carrier's failure to meet its burden of proof. The

SBA No. 1112
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Organization's procedural argument is that the notice of the investigation has the fatal error of being signed by a Division Engineer from outside the Division in which the Claimant was working. Although this appears to be correct as a matter of fact, we do not agree with the Organization's assertion that it somehow taints the investigation. First, the signator of the letter has nothing to do with the essential purpose of the notice, i.e. to place the Claimant on notice as to the nature of the charge and the essential facts to explain the alleged rule violation. Second, we see nothing in Schedule Rule 40, nor have we been referred to any other document, that would require that the investigation notice be signed only by one who is in the Division in which the Claimant works. Therefore, we reject the Organization's procedural argument.

On the merits, the Organization contends that the Claimant did in fact report his absence through his girlfriend and that the Carrier's failure to provide him a leave of absence was improper. Again, we disagree with these contentions. First, the Claimant is not charged with failing to report his absence, but rather that he failed to report for duty when his reported absence was not authorized. Similarly, although there is no question that the Claimant's girlfriend sought a leave of absence for the Claimant we find no support in the record that the Carrier violated the Agreement when it declined to approve any such request. Rather, the provision that the Organization points to in its argument does not support the claim because it provides only that a request for a leave will not be arbitrarily refused. In this case we do not believe that the Carrier acted arbitrarily when it denied the Claimant's requests, so that he may serve a jail sentence for DUI, in light of his record of two suspensions for being AWOL and another for intoxication while on company lodging.

AWARD

The claim is denied.


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

DATED: 