

SBA No. 1112
BNSF/BMWE
Case No. 22
Award No. 23

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON NORTHERN/SANTA FE

AND

**CASE NO. 22
AWARD NO. 23**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

On July 2, 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 provision 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, and Organization Member, and a Neutral Referee, awards of the Board contain only 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 arranged 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 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 has been employed by the Carrier since 1974 as a trackman. He was suspended three times. The first suspension, in 1997, included a one year probation because he failed to wear a seat belt. In 1993 the Claimant was again suspended, this time for five days, for failing to comply with instructions. The final suspension, in 1988, was again for five days when he was away from duty without proper authority. Following notice of January 31, 2000 to attend a formal investigation, conducted on February 1, 2000, the Carrier issued a Level 1 Formal Reprimand to the Claimant for violation of Rule 14.3.3 of the Carrier's Engineering Instructions which read, in relevant part, as follows:

The operator is responsible for the...safety... of assigned Equipment. The operator must follow these requirements...

FINDINGS AND OPINION

On January 14, 2000 the Claimant was serving as a Group 3 Machine operator, a position he had filled since 1976. The record reflects that on that day the Claimant was required to operate a bobcat, a four-wheel device with a front-end loading bucket that is used to haul small loads. In the operator's area there are two hand-controlled levers that move the bobcat forward and backward. In addition there is a left foot pedal that is used to lift and lower the bucket while the right pedal is used to tilt the bucket.

Because the Claimant had just bumped into the position that day he had not operated a bobcat for a significant period of time. Thus, he first took the time to reacquaint himself with the equipment before he began to work.. While doing so the bobcat was parked in a shed in which there was approximately three feet of clearance between the equipment and the overhead door of the shed which was open. Once he became familiar with the equipment in question, and after he had determined that there

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were no equipment problems associated with the bobcat, the Claimant proceeded to back the bobcat out of the shed. He depressed the foot pedal in order to lift the bucket from its position on the ground, but when the bucket rose quickly it struck the overhead door and snapped the door off its hinges and broke the plexiglass inside the door. As the door and the plexiglass began to shower on the Claimant he turned his torso to avoid getting hit, but could not move his feet. Therefore, his foot remained on the pedals and the bucket continued to rise and lower, striking the overhead door and the roof of the shed.

Once the episode ended, the Roadmaster was informed and he inspected the scene and talked to the Claimant. In doing so the Claimant informed the Roadmaster that the bobcat got away from him and caused the bucket to rise and lower and strike the overhead door and roof. Ultimately repairs were made to the shed at an approximate cost of \$50. In addition, the repairs required the time of two employees.

The Organization raises several arguments as to why the formal reprimand should be rescinded that can best be categorized in three ways: first, that the Claimant did not have adequate notice and/or training on operating the bobcat; second, that the Carrier was negligent and that its negligence should excuse the Claimant's conduct; and third, that there are mitigating circumstances that require that the discipline be set aside. We disagree on all three counts.

On the first point, that of notice and training, the Organization argues that the bobcat operator's manual was unclear and that the Claimant was operating the bobcat for the first time on the day in question only after many years since he had operated one last. However, the record, including the Claimant's own testimony, does not support these arguments. First, the operator's manual is not in evidence therefore we are unable to assess its clarity or lack thereof. Secondly, and more importantly, the Claimant himself testified that he first took the time to familiarize himself with the operation of the bobcat. Thus, he presumably began to operate the equipment only when he felt that he could. Therefore, we conclude that the Claimant was in a position to operator the equipment in question.

The Organization next argues that the shed in which the bobcat was located was of such dimensions that it could not allow the bobcat to be properly operated within it. Again however, the is inadequate to allow us to make this assessment.

Finally, the Organization contends that because there was only minimal property damage and no personal injury, a Level 1 Formal Reprimand is excessive and/or arbitrary. We again disagree. The discipline meted out herein was of a low level and did

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not cause such hardship to the Claimant that it was disproportionate to the misconduct. As such it preserved the Carrier's legitimate right to take action to remedy misconduct and did so without undue prejudice to the Claimant. Under such circumstances we do not believe that the discipline was arbitrary and/or excessive.

AWARD

The claim is denied.



Robert Perkovich, Chairman and
Neutral Referee, SBA No. 1112

DATED: June 7, 2000