

SBA No. 1112
BNSF/BMWE
Case No. 29
Award No. 30

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON NORTHERN/SANTA FE

AND

**CASE NO. 29
AWARD NO.30**

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 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 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 was hired by the Carrier in 1959 and has been the subject of disciplinary action on three prior occasions. The first, a censure, was in 1983 for failure to check main line switches which resulted in a crane derailment. The second, in 1990, was a five day suspension for failure to comply with instructions and the third, another suspension but for a 15 day period, was for failing to submit expense account receipts.

Following notice and investigation the Claimant was dismissed from service for violating BNSF Maintenance of Way Rules 1.1, 1.1.3, 1.6, 1.9, and S-1.2.2, all of which provide, in relevant part, as follows:

Rule 1.1 Safety

Safety is the most important element in performing duties. Obeying the rules is essential to the job, essential to job safety and continued employment

Rule 1.1.3 Reporting and Complying with Instructions

Employees will report to and comply with instructions from supervisors who have proper jurisdiction...

1.6 Conduct

Employees must not be:

1. Careless of the safety of themselves or others.
2. Negligent...

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Rule 1.9 Care of Property

Employees are responsible for properly using and caring for railroad property...Employees must not use railroad property for their personal use.

Rule S-1.2.2 Authorized and Trained

Perform job tasks only when authorized and trained to perform them.

FINDINGS AND OPINION

On September 15, 2000 the Claimant was assigned to operate a CAT D6H vehicle to make a path so that a fencing crew could install a fence. Initially, the Claimant was sitting idle because he had adjusting the track on the equipment and the equipment was going to be moved elsewhere. While waiting, the Claimant was approached by a rancher who owned nearby land. The rancher, who was not an employee of the Carrier, explained to the Claimant that he was going to tear down a grain elevator near the railroad tracks. He further explained that he was going to destroy the elevator because the structure had deteriorated and become a risk both in his opinion and that of the Carrier. He then asked the Claimant if he could assist in the operation both by protecting the trains and by advising the rancher. The Claimant agreed to do so.

The Claimant then contacted one of the Carrier's track inspectors who arranged protection for the trains and the Claimant turned his attention to the elevator. The Claimant and the rancher studied the task and determine the best time and method to tear down the elevator so that there would no risk of damage or injury to those present as well as the track and subsequent train traffic. However, as the rancher and his crew began the demolition it became apparent that his equipment was not adequate to complete the task. Thus, the Carrier's CAT was pressed into service. The Claimant then used the CAT to pull on the elevator, but he did not do so until he placed a twelve foot railroad tie in front of the CAT to serve as a barrier. After two attempts they did not succeed in pulling the elevator down and in fact broke one or more cables or chains. However, after the third attempt the elevator fell to the ground and away from the tracks. After the elevator fell to the ground the Claimant used the CAT to clear the debris from the track.

At no point before, during, or after the operation, did the Claimant or any other party contact the Roadmaster or any other representative of the Carrier to either inform the Carrier of the work or to secure approval to do so. The Claimant received no compensation from the rancher for his efforts.

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Approximately two weeks later the Roadmaster conducted an investigation at which the facts described above were discovered. In addition, the rancher wrote a note on behalf of the Claimant noting his concern regarding the possible danger posed by the elevator and that the Claimant was "nice enough" to assist him when he asked the Claimant to do so.

The Organization first contends that the investigation conducted in this matter was not fair and impartial as required by Schedule Rule 40 because the conducting officer called the Claimant as a witness before other witnesses were called. The record of the investigation reflects however that when the conducting officer concluded his examination of the Claimant the Organization had only four questions and they went to subjects that were not in dispute i.e., whether the Claimant had protection, whether he did everything he could to ensure the safety and protection of those present, and that he assisted the rancher only because he was asked to do so and because he was not otherwise engaged. Thus, the nature of this line of questioning convinces us that because the conducting officer chose to question the Claimant before the others led to no harm or prejudice.

On the merits we are compelled to conclude, as we must given this record, that the Claimant did in fact act without authorization when he assisted the rancher and that there was some concern that he so acted when the CAT was in less than pristine condition. However, we are equally compelled to find, and we do, that he did so only before obtaining protection from train traffic, after carefully studying the potential for damage and safety and placing a barrier in front of the CAT so as to protect those present, and without any intent to profit by his actions. Therefore, we conclude that although the Claimant was less than prudent he violated only those rules which require that he have authorization and that he refrain from using Carrier property for personal use.

Having concluded that he did not violate all of the rules cited by the Carrier we must now consider if the penalty, dismissal, was appropriate. When we weigh that the Claimant is blameless with respect to some of the bases for dismissal and further consider his many long years of service we must conclude that dismissal is not appropriate. Thus, we find that the dismissal should be overturned and instead that the Claimant should be assessed a thirty (30) day suspension without pay.

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AWARD:

Claim sustained in accordance with the findings.



**Robert Perkovich, Neutral Chair,
SBA No. 1112**

DATED:

March 2, 2001