

SBA No. 1112
BNSF/BMWE
Case No. ~~31~~ 30
Award No. 31

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON/NORTHERN/SANTA FE

AND

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

**Claimants:
Didier, D. E.
Cooper, L. R.**

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On February 1, 2001 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 Railroad 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 Railroad 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

Case No. 31
Award No. 31

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 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

Claimants, L.R. Cooper and D. E. Didier, were jointly charged with failure to follow the manufacturer's instructions regarding inspection and maintenance of hy-rail Unit No. 15200. This alleged omission resulted in the derailment of hy-rail No. 15200 and subsequently causing damage to the hy-rail on Friday, October 20, 2000, at 1035 hours. This derailment occurred near MP 25.4 on the Angora Subdivision while the assigned Claimants operated as the Relief Track Inspector and Track Inspector, which is headquartered at Bridgeport, Nebraska.

Both Claimants were given notices of a ten (10) day suspension in a letter sent to each, dated January 11, 2001. The effective date of suspension was December 16, 2000, after a fair and impartial hearing, with Union representation. These suspensions were processed under Rule 40, H. of the September 1, 1982 Agreement.

Claimant, Don E. Didier, was first employed with the Carrier on April 1, 1974. He held his present position as Track Inspector since April 1999.

Claimant, Larry R. Cooper, commenced employment with the Carrier approximately twenty-one (21) years ago. Although he is now a Surfacing Gang Foreman, he was Relief Track Inspector when this charge was brought.

BNSF Rule 15.20.9 (at 15 - 41) reads as follows:

A. Daily Inspection and Maintenance, No. 4:
Pay close attention to the force exerted to the lift handle when placing the vehicle on the track as this could be a quick indication of potential problems with the hy-rail gear.

FINDINGS AND OPINION

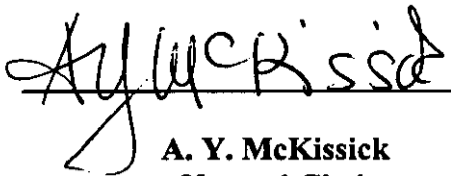
It is the position of the Carrier that the Claimants were afforded an opportunity to question all principals and have witnesses present at the investigation. Moreover, the Carrier points out that the hearing was conducted in a fair and impartial manner as to both Claimants. In addition, the Carrier notes that the Claimants were granted the right to counsel and all recesses desired. Nonetheless, the Carrier argues that it was still the responsibility of the Claimants to prevent derailment and damage to hy-railer vehicles. Lastly, the Carrier notes that Claimant Cooper may have contributed to this event by exceeding the speed limit.

The Union retorts the Carrier's assertions by maintaining that both Claimants were familiar with the rules and both attended periodic training. Most importantly, the Union argues that both Claimant's complied with the safety instructions designed for the hy-rail motor vehicle. Specifically, the Claimant Didier noted in his BN logbook the installation of new tires. In response to the Carrier's contention that Claimant Cooper's speed may have been the contributing factor that brought about the derailment, the Union strongly rebuts the accuracy of this assertion.

Based on all of the above, the Board finds that these charges must be dismissed for the following reasons. We are persuaded that both Claimants complied with the safety instructions, as required. It would seem that Claimant Didier fully complied with all safety regulations as evidenced by the notation in the BN logbook. It is significant to note that a notation generally constitutes a business record, evidence relied on in the normal course of business because such compliance was probably completed contemporaneously with such physical evidence. In addition, the record reflects that both Claimants had years of experience on the job and both daily inspected the vehicles to the best of their abilities for over twenty (20) years. Looking at the totality of evidence, substantial evidence was presented by the Union to rebut the charges. Thus, the Carrier failed to meet the burden of proof to substantiate these charges. In compliance with Rule 40, G. of this Agreement, these charges shall be set aside and expunged from their records. Accordingly, we find that there are no violations.

AWARD

The charges are set aside as to both Claimants. Their records shall be expunged. Both Claimants shall be compensated for their loss due to the ten (10) day suspensions.



A. Y. McKissick
Neutral Chair
SBA No. 1112

5-4-01

Dated