

SBA No. 1112
BNSF/BMWE
Case No. ~~22~~ 31
Award No. 32

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON/NORTHERN/SANTA FE

AND

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

Claimants:

Spilinek, W. A.

Rath, P. G.

CASE NO. ~~22~~ 31

AWARD NO. 32

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 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.

Case No. 32
Award No. 32

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

Claimant, P. G. Rath, a Welder, and Claimant, W. A. Spilinek, a Grinder Operator, were jointly charged with failure to properly remove the Working Limits Red Flags at approximately 1515 hours on Monday, October 17, 2000. The omission was alleged to have occurred on the Sand Hills Subdivision at or near MP 223.9, resulting in the BNSF 9436 East striking the red flags and resulting in the BNSF 9436 East having to make an emergency brake application.

Both Claimants were assessed a Level S Thirty (30) Day Suspension for violation of BNSF Maintenance of Way Rule 5.4.8, effective January 31, 1999. Each suspension will be served as follows: Twenty (20) Day Record Suspension and Ten (10) Day Actual Suspension. A formal investigation was held on Tuesday, October 31, 2000 in Alliance, Nebraska based on the following violation.

Maintenance of Way Operating Rule 5.4.8 Flag Location, reads as follows:

Flags will be displayed on all main tracks and sidings leading to the track affected.

Flags must be displayed to the right of the track as viewed from an approaching train, except red flags or red lights may be displayed between the rails as outlined in Rule 5.4.7 (Display of Red Flag or Red Light). Flags will be placed in this manner unless otherwise specified by track bulletin, track warrant, special instructions, or general order. It is not permissible to display or affix red flags to on track equipment for the purpose of designating working limits.

When flags are displayed beyond the first rail of an adjacent track, the flags will not apply to the track on which the train is moving.

When removing track flags, the most restrictive flag should be removed first.

FINDINGS AND OPINION

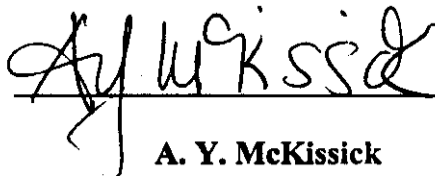
It is the position of the Union that both Claimants inadvertently left one flag and that such an omission has not occurred prior to this event. Both are long-term employees with no disciplinary record. In addition, the Organization argues that this omission did not create a serious accident such as: a derailment, or damage and/or injury to persons and property. Moreover, the Organization points out that the failure to pick-up one flag did not involve the usage of an emergency brake, as the Carrier maintains. Based on the above, the Organization requests that the Board make the Claimants whole, expunge their records of this investigation, and thus no discipline should result from this minor infraction.

The Carrier rebuts the Organization's assertions by arguing that this is a serious safety violation, which resulted in having to make an emergency brake application. The Carrier notes that the purpose of picking up the red flags is to protect one's work limits and keep trains and other equipment from entering the work limits while one is working on the track. Lastly, the Carrier points out that the Claimants were afforded a fair and impartial hearing with Union representation as well as opportunity to present witnesses. Based on the above, the Carrier requests the Board to assess the Claimants with the violation of BNSF Rule 5.4.8.

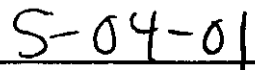
The Board finds that these charges shall be upheld for the following reasons. First, both Claimants admit to this said violation. Second, substantial evidence was presented by the Carrier to support the seriousness of this omission to pick up the red flags, as required. Third, the record reflects the possible consequences through the application of emergency braking created by this omission, such as: injury to the train crew, derailment, the popping of a wheel, etc. In compliance with Rule 40, G., the Board finds that the Claimants were not unjustly disciplined. The Carrier substantiated the charges against each Claimant. Based on the safety factors, the Board finds a violation of BNSF Rule 5.4.8 as to both Claimants for the aforementioned reasons.

AWARD

The charges shall be upheld as to both Claimants for a Twenty (20) Day Record Suspension and a Ten (10) Day Actual Suspension.



**A. Y. McKissick
Neutral Chair
SBA No. 1112**



Dated