

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON/NORTHERN/SANTA FE

AND

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

**Claimant:
Thomas R. Miller**

**CASE NO. 40
AWARD NO. 41**

On February 2, 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 one's desire for expedited handling of this 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.

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 substantiate 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 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, Thomas R. Miller, Sectionman, for Burlington Northern Santa Fe Railroad was charged with his alleged failure to be alert and attentive and his alleged failure to conduct a job safety briefing before performing new tasks and when working conditions change. These alleged failures occurred on Wednesday November 21, 2001 at approximately 1115 hours, at the Section House located in Newcastle Wyoming, which resulted in the personal injury of the Claimant's right shoulder while descending the steps on the back of a section truck, at or near MP 520.7, on the Black Hills Subdivision. An investigation of said events occurred December 5, 2001 in the Roadmaster's office in Newcastle, Wyoming at 100 S. Railway Ave. of the following rules:

Safety Rule S-1.2.3 Alert and Attentive:

Assure that you are alert and attentive when performing duties.

Maintenance of Way Operating Rule 1.1.2, Alert and Attentive:

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

Maintenance of Way Safety Rule S-1.1, Job Safety Briefing:

Employees must participate in a job safety briefing before beginning work and when work and job conditions change. The briefing includes a discussion of the general work plan, existing or potential

hazards, and ways to eliminate or protect against hazards. Outside parties and contractors involved in the work or who are in the work area must also be included in the job safety briefing.

Maintenance of Way Operating Rule 1.1, Job Safety Briefing:

Job Safety Briefing

Conduct a safety briefing with individuals involved before beginning work, before performing new tasks. When working conditions change, the job safety briefing must include the type of authority or protection in effect.

FINDINGS AND OPINION

The Organization asserts that this is the first non-serious incident for the Claimant who has been with the railroad for more than twenty-four (24) years, with an impeccable work record. Thus, the Organization reasons that this type of case is appropriate for the "Safety Incident Analysis Process" (SIAP), which includes: coaching, counseling and training. That is, the Organization asserts that alternative handling is designed for an employee who has never been disciplined and with a long-work record as this Claimant, not a disciplinary proceeding. The Organization contends that this type of injury could not be prevented. The Organization points out that it was the design of the last step which was indented, narrow and out of line with the other steps. Specifically, the Organization notes that it was not the mud that caused the accident and subsequent injury to the Claimant. Lastly, the Organization maintains that the Claimant was not warned of the presence of slippery conditions. Therefore, the Organization urges the Board to sustain this appeal.

The Carrier rebuts that this incident required a full investigation and all the questions could not be fully answered by such a cursory process. The Carrier counters that it had snowed earlier and the Claimant should have realized that it would be muddy and thus slippery. Thus, the Carrier argues that it should logically follow that, had the Claimant been alert and attentive when descending, he could have prevented his injury. Moreover, the Carrier adds more frequent briefings should have warned the Claimant of the changing working conditions. Based on all the above, the Carrier urges the Board to deny this appeal.

After a careful review of the record, the Board finds that the Claimant was attentive and alert and that it would appear from the record that his subsequent injuries could not have been prevented. The Board is also persuaded that the appropriate forum

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should have been SIAP because this Claimant is a veteran employee, without a disciplinary record. It is significant to note that both the Claimant and the Foreman corroborated that it was the unique design of the bottom, indented step that caused this accident. Both also agreed that the presence of mud was not a contributing factor to the Claimant's injury. The Board concurs with this assessment of events. Lastly, the record reflects that the Claimant used appropriate protective gear and was warned to be careful of his footing. Based on all of the above, the Board finds that this appeal should be sustained.

AWARD

This ten (10) day suspension shall be set aside and his record should be expunged. Accordingly, this claim is sustained.



A. Y. McKissick
Neutral Chair

Dated: February 19, 2002