

SBA No. 1112
BNSF/BMWE
Case No. 4
Award #5

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1112**

BURLINGTON NORTHERN/SANTA FE

AND

**CASE NO. 4
AWARD NO.5**

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 of 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 only contain 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 claim 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.

The Agreement further establishes 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 investigation, the transcript of investigation, the notice of discipline and the disciplined employee's service record to the Referee. These documents constitute the record of proceedings and are to be reviewed by the Referee. Under the terms of the Agreement the Referee, prior to rendering a final and binding decision, has the option to request the parties to furnish additional data, including argument, evidence, and awards. In the instant case, this Board has carefully reviewed each of the above-captioned documents prior to reaching findings of fact and conclusions.

Finally, 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 the applicable provisions of 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.

BACKGROUND FACTS

The Claimant, Larry Smalley, has established and held seniority as a B&B foreman for approximately 34 years. His service record shows no prior discipline.

On December 22, 1998 the Carrier issued a twenty (20) day suspension, served between December 27, 1998 and through January 22, 1999 for violating Rules S-1.2 and 1.1.2 and S-12.1 with respect to a vehicle accident that took place on September 25, 1998. Those rules read, in relevant part, as follows:

Rule S-1.2 Rights and Responsibilities

We have the right and responsibility to perform our work safely. Our training skills, work experience and personal judgment provide the foundation for making safe decisions about work practices.

Rule S-1.2.3 Alert and Attentive

Assure that you are alert and attentive while performing duties.

Rule S-12.1 Operating a Motor Vehicle

Every Company driver must:

* * *

Know and obey local, state and federal laws for operating a vehicle both on and off Company property.

Operating Rules 1.1

Safety is the most important element of performing

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duties. Obeying the Rules is essential to job safety and continued employment.

Operating Rules 1.1.1

In case of doubt or uncertainty take the safe course.

FINDINGS AND OPINION

On September 25, 1998 the Claimant was operating a company vehicle northbound on 54th Street near Omaha, Nebraska. That morning there was heavy fog which made the road slippery. In addition, the road had been reopened only one week after it had been newly repaved with asphalt. Moreover, the advance warning signs of a stop sign at the intersection of 54th Street and Highway 1 had not been replaced and the stop sign at that intersection was approximately 20-22 feet from the curblin when, by Nebraska law, it was to be 10 feet from the curblin. Finally, near the corners of the intersection was a bean field and some farmhouses. Despite these conditions the Claimant was familiar with the road, and more specifically the intersection, because he had used it on other occasions.

While travelling at approximately 35 to 40 miles per hour, as opposed to the posted speed limit of 55 miles per hour, the Claimant could not see the stop sign at the point he might have ordinarily if the foggy conditions had not been present. By the time that he did see the stop sign and applied the brakes, his vehicle slid past the stop sign and into the path of a vehicle travelling eastbound on Highway 1. The two cars collided with one another and police and emergency personnel were called to the scene.

The Claimant notified his supervisor by cell phone from the scene after which he was taken to a hospital. The Claimant was treated for pulled muscles in his back, deep cuts to his left elbow, ear, and the left side of his head from cut glass, and deep bruises to his rib cage and shoulder. After he was treated the Claimant was released to return to his home.

The following day the Claimant completed the Carrier's Personal Injury Report. In doing so he described the accident as "struck by sand truck at intersection after not seeing stop sign in time account severe fog" and answered affirmatively the question "Could you, by more care on your part, have prevented your injury" adding that he could have prevented the accident by "not driving in

severe fog."

The Organization contends that the Claimant's suspension must be overturned because he did all that he could to prevent the accident when he drove well under the posted speed limit and kept


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close watch on traffic and road conditions. Thus, according to the Organization, the conditions over which he had no control, the fog, the damp road surface, and the misplaced stop sign were the causes of the accident and the Claimant did not violate the applicable rules of the Carrier that form the basis for the suspension.

Although a conclusion that the Claimant was indeed negligent might seem harsh, we believe that no other conclusion should be reached. First, the Claimant admitted that he had driven that road before and that he was aware of the fact that there was a stop sign at the intersection in question. Therefore, an even slower rate of speed and greater caution than that he exercised on the day in question were in order. Moreover, even the Claimant himself, when he completed the Carrier's Personal Injury Report indicated that he had other alternatives available to him that he chose not to utilize. As a result we conclude that there is substantial evidence that the Claimant violated the rules relied upon by the Carrier in support of the suspension.

There remains then only the question whether the twenty (20) day suspension was arbitrary and/or excessive. On the one hand the Claimant has a long service record that is unblemished. In addition, there were extenuating circumstances to the accident that although insufficient to lead us to conclude that he was not negligent, are sufficient to enable us to conclude that he was not willful or wanton in his misconduct. On the other hand there is no record evidence that the penalty meted out is not in accord with other similar instances of misconduct. Finally, we must consider whether this Board should disturb disciplinary decisions of the Carrier made in good faith that might differ from those that this Board might make if we were in that position in the first instance. On this point we conclude that those decisions made in good faith, free from discrimination, and which bear some rational relation to the misconduct in question, should not be disturbed.

AWARD: The claim is denied.


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

DATED: April 16, 1999