

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT**

BURLINGTON/NORTHERN/SANTA FE

AND

**BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES**

**Claimants:
Bennie Graham
David J. Mahoney**

**CASE NO. 52
AWARD NO. 53**

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 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 establishes 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's, David J. Mahoney, a truck driver, and Bennie Graham Jr., a trackman, have been charged with their alleged failure to be alert and attentive as well as the alleged failure to recognize potential hazards in a job briefing resulting in Graham's back injury when Mahoney was unloading track plates.

An investigation was held on September 12, 2002 at the Burlington Northern Santa Fe Roadmaster's Office, 1001 Joliet Ironwork Drive, Joliet Illinois to determine the Claimant's responsibilities.

The record reflects that Claimant Graham was struck in the back with a tie plate tossed from the grapple truck along Main 1 by its driver, Claimant Mahoney, on August 30, 2002. The track plate weighs between fifteen (15) to eighteen (18) pounds and the briefing seemed to indicate that physically tossing twenty (20) to thirty (30) plates would be a safer option than employing mechanical means to unload because of the heavy traffic in the area at that time.

The Claimant's are charged with the alleged violations of these following rules:

Maintenance of Way Operating Rule 1.1, Safety:

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

Empowerment.

All employees are empowered to and required to reviews, to violate any rule within these rules. They must inform the employee in charge if they believe any rule to be violated. This must be done before the work begins.

Job Safety Briefing.

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

Safety Operating Rule, 1.1, Job Safety Briefing:

Employees must participate in job safety briefing before beginning the work, when work or 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 or contractors involved (in the work or) who are in a work area, must also be included in the job safety briefing.

It is the Organization's position that the charges assessed by the Claimants lacked specificity. The Organization contends that the Carrier failed to mention that the plates needed to be unloaded and that the exclusive method for such unloading at any prior briefing. Thus, the Organization maintains that there was a lack of notice of a potential danger involving such a task. In addition, the Organization argues that the Carrier failed to provide a safe working environment for the Claimants. Lastly, the Organization notes that Claimant Graham is an excellent, long-term employee with an unblemished record. Therefore, his appeal should be sustained for all of the aforementioned reasons.

It is the Carrier's position that the Claimant Mahoney violated Safety Operating Rule 1.1 when he manually unloaded the plates that accidentally hit Claimant Graham in the back injuring him. Besides, the Carrier points out that it is mandatory that all employees attend all of the briefings – not just the initial one. Here, the Carrier notes that working conditions changed necessitating a new plan of action. However, Claimant Graham was not present for the second briefing, as required. Additionally, the Carrier argues that the unloading of plates is an act that can be hazardous; and this is the purpose of the subsequent briefings, in order to alert the Claimants of this potential hazard.

Based on all the above, the Carrier requests the Board to deny this claim.

After a careful review of the record in its totality, the Board finds that the Claimants, Mahoney and Graham, should be suspended for the following reasons.

First, the unloading of plates manually was not the safest method to accomplish this purpose. Claimant Mahoney, among others at the secondary briefings, made this unfortunate choice. Due to this decision, he inadvertently hit Claimant Graham in the back, injuring him. The Board finds that this hazardous act is a negligent act. Thus, Claimant Mahoney must now accept the consequences of his decision.

Second, the Board concurs with the Carrier, Safety Operating Rule 1.1 requiring that one "must" be present for all briefings. The record reflects that Claimant Graham was absent from subsequent briefing, as he was thus unapprised of the potential hazard that the unloading of the plates manually would present. Therefore, Claimant Graham's omission to be present for the secondary briefing was also negligent.

Third, it is significant to note that Claimant Graham also admits that manually throwing tie plates from the track was an unsafe act in his testimony during the investigation. Based on all of the foregoing, the Board finds that this appeal must be denied.

AWARD

Claimants, David J. Mahoney and Bennie Graham, shall be suspended for thirty (30) days for all of the aforementioned reasons.

1-24-03
Date

A. Y. McKissick
A. Y. McKissick
Referee