SPECIAL BOARD OF ADJUSTMENT NO. 1112
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Vs.
BURLINGTON NORTHERN &
SANTE FE RAILWAY CO.

CASE # 75 – AWARD #76 – Sonny L. Bevers
[Level S 30 Day Record Suspension, 2 Year Probationary Period]

Dennis J. Campagna, Esq., Referee
William A. Osborn, Carrier Member
Roy C. Robinson, Organization Member

BACKGROUND

A. Special Board of Adjustment #1112

This Special Board of Adjustment was created pursuant to the provisions outlined in a Memorandum of Agreement ("MOA") between the Carrier and the Organization dated September 1, 1982. Appeals reviewed under this MOA are expedited, and the Award resulting from any appeal, bearing only the Referee's signature, is considered "final and binding" subject to the provisions of the Railway Labor Act.

B. The Appellant

Sonny L. Bevers, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on April 11, 1994. At the time of the incident that occurred on March 15, 2004, the Appellant worked as a vacation relief operator, Group 2, Lowboy Operator located in Tonville, Colorado. The Appellant is represented by the Brotherhood of Maintenance of Way Employees.

C. The Charge at Issue

On or about June 15, 2004, following an Investigation conducted on April 27, 2004 by Ron Rogen, ADMP and Conducting Officer, the Appellant was charged with a violation of Maintenance of Way Safety Rules S-1.1, S-1.2.1, S-16.2, S-16.8, S-25.1, Maintenance of Way Operating Rules, Rule 1.3.1, and BNSF Engineering Instructions 1.1.7 dated October 1, 2001 and 14.2.1 dated May 15, 2001 when on March 15, 2004, the Appellant sustained an injury to his left hand which became pinched while detaching a lowboy trailer from a tractor at approximately 9:45 a.m. The Carrier seeks to impose a 30-day Level S Suspension together with a two-year probationary period as a result of the Appellant's alleged failure to comply with the foregoing Rules.

D. Facts Gathered from the April 27, 2004 Investigation

On April 27, 2004, a formal investigation was conducted by Mr. Ron Rogen, ADMP for the BNSF located in Douglas, Wyoming, who served as the conducting officer. At all times during the investigation, the Appellant was represented by Roy Miller, Local Chairman, BMWE. The record created at this formal investigation established that:

- On March 15, 2004[1], Eddie Earle, Roadmaster on the Brush and Pikes Peak Division, received a telephone call from the surfacing gang foreman that there had been an injury at Tonville, Colorado sustained by the Appellant. Mr. Earle proceeded to Greeley Hospital where the Appellant had been transported where he reviewed the circumstances with the Appellant that led to the Appellant's injury. Mr. Earle testified that the Appellant told him that "[the Appellant] was going to lower the trailer off the tractor and that one of the . . hooks, when he released them to unhook, did not unhook. One did, one did not. And he said that he was going to, he used his left hand to bump the hook and when he bumped it

[1] All dates noted herein occurred in calendar year 2004 unless otherwise noted.

the hook activated, catching his glove and the tips of his fingers and causing them to be pinched." (TR 11)[2]

- On March 15th, the same date as his accident, the Appellant completed an Employee Personal Injury/Occupational Illness Report. (Exhibit G). Appellant described his mishap as follows: "Started little motor to unhook trailer. Flipped air switch to unlock locks. One side opened the other did not. I reached in to bump the lock with the heal of left hand. Upon bumping the lock, it opened and caught the glove and the tips of 2 middle fingers."

- Mr. Earle described the correct procedure for unhooking the lowboy and lowering it down as follows: "In this case, the trailer is equipped with hydraulic pony motor. And with a pony motor, you would need to start that to get your hydraulics. After it's started, and then you would lower the trailer to the, to allow the weight to get off the fifth-wheel, you would disengage the electrical and the air components from that. Then you'd pull the tractor forward leaving the trailer by itself. At that time you would raise the gooseneck to its maximum height, remove the tension pins, and then lower the gooseneck to the ground. And that would allow you to load equipment on that." (TR 14)

- The Appellant's fingers were pinched by the transport lock. (TR 15) In this regard, Mr. Earle surmised that the Appellant's injury was caused as follows: "looking at the block, [the Appellant] would have to, using the base of his had there, his front fingers would be in a downward position which would place him in front of the transport lock when it would activate. So, his fingers would be in between the block and the frame of the trailer when it activated." (TR 22)

[2] References to the official Transcript of the formal investigation referred to as "TR" followed by the page number.

- On March 15th, the same date as the Appellant sustained his injury, an inspection of the tractor and trailer was performed on site. The inspectors concluded: "No repairs were needed to properly release the lock, but if the operator did not activate the hydraulic valve to pick (up) the upper bar of the lower locking mechanism it would be very hard for the lock to (be) activated and unlatch itself." (TR 18, Exhibit I)

- Mr. Earle testified, and the Appellant did not dispute, that the Appellant had been trained on all applicable rules, including those at issue, had attended safety classes, and had successfully passed proficiency examinations. (TR 19-20) In this regard, Mr. Earle explained the "*lockout/tagout*" as a preventative measure designed to prevent injury to oneself through the proper application of Rules. (TR 21) Failure to apply the Rules associated with lockout/tagout is classified as a "serious offense". (Id.) In addition, Mr. Earle explained the purpose of a "*job briefing*" as "[a] tool for communication to identify risks and hazards, to prevent injuries." (TR 25) It is undisputed that all employees are required to perform job briefings, even when performing a job or task alone. Mr. Earle described this procedure as follows: "Well, he would have to do an assessment of the job area. Basically, you'd go over it your own self and identify any kind of hazards. If a hazard would arise and you couldn't take care of it, then you would need to communicate with another employee that might have the answers. Basically, if you identified a hazard, you'd not want to do it until you were sure of the right way and the hazard was no longer there." (Id.)

- The Appellant testified that on March 15th, he was the replacement driver for Dale Messens who was on vacation that day. (TR 29) Appellant started his run in Ft. Collins where he hooked the trailer to the tractor and then proceeded to Tonville. Appellant then recalled the procedure he followed in order to lower the lowboy: "I backed up and found a low spot. Got out I started the little motor, operated the air valve and my, I got, like I stated one valve open, one valve, or one lock

opened and one valve, one lock didn't. And I reached in and tapped it, it caught my fingers and you know the rest." (TR 31)

- With respect to how the Appellant's fingers got pinched, in response to the following question by Mr. Rogen, the Appellant testified as follows:

Q. So, how did your fingers, how did your fingers get behind the block to get pinched?

A. Well, that's a real good question. I've asked myself many times. I, I can't answer that. Because my fingers were in the raised position, and I don't know.

(TR 31)

- In addressing various alternatives as suggested by Mr. Rogen that were available to the Appellant, the Appellant testified:

  a. That he did not try to raise or lower the trailer slightly in order to remove pressure off the blocks; (TR 32)

  b. Did not attempt to call another operator or any other colleague who could have given the Appellant advice on how to proceed under the circumstances; (Id.)

  c. That it would have "possibly" been as safer course to use the handle available to jar the block rather than to have used the Appellant's hand; (TR 34)

  d. While the Appellant noted that he spoke with two individuals prior to the date at issue, who gave him some advice on how to remove the trailer, the Appellant testified that at the time of the incident, the Appellant did not brief with anyone. (TR 39-40)

  e. That he did not lockout/tagout the equipment as required by Engineering Instructions Section 14.2.2. In this regard, the Appellant noted that the rule only applied to circumstances associated with the maintenance of machinery or equipment. (TR 42) The Carrier found to the contrary.

f. Finally, the Appellant acknowledged that the removal of the trailer giving rise to the Appellant's injury could have been accomplished in a different, safer manner. (TR 47)

- While the Appellant was at times needlessly evasive in his responses[3], the Appellant demonstrated knowledge with the Maintenance of Way Safety Rules, Rule S.1.1 (Job Briefing), S.1.2.1 (Rights and Responsibilities), S.1.2.6 (Warning Signs), S.16.2 (Inspection for defects –tag and report any defect), S.16.8 (Use of Gloves), S.25.1 (Job Safety Briefing), Engineering Instruction (EI) 14.2.2 (Lockout/Tagout Procedures), EI 1.1.7 (General Requirements), EI 1.3.1 (Rules, Regulations and Instructions), and Maintenance of Way Operating Book, 1.1, Safety. (TR 35-44). Appellant testified that he was familiar with these rules. (TR 44)

DISCUSSION

A. The Role of the Referee in the Instant Matter

Pursuant to the Memorandum of Agreement between the parties dated September 1, 1982, the role of the Referee in this matter is three-fold:

1. To determine whether there was compliance with the applicable provisions of Schedule Rule 40;
2. To determine whether substantial evidence was adduced at the investigation to prove the charge at issue, and
3. To determine whether the discipline was excessive.

[3] For example, in response to Mr. Rogen's inquiries regarding the Appellant's knowledge of the applicable Rules, the Appellant responded: "Define what you mean by a job briefing" (TR 35), "What [do] you mean by thorough inspection (TR 37), "What do you mean by the time of the incident" (TR 39).

B. The Organization's Issue Regarding Compliance With Rule 40

During the formal investigation, Mr. Miller, maintained that the Carrier failed to comply with Rule 40 due to the fact that the Carrier failed to provide the him or the Appellant with the specific charges at issue regarding the precise nature of the charges at together with the Rules alleged to have been violated. Accordingly, Mr. Miller maintains that the Appellant's due process rights were violated because: "the due process must include specificity of charges, timely notice, the right to representation, the right to confront ones accusers, and the right to be heard." (TR 49) Moreover, Mr. Miller noted, the Carrier displayed its prejudgment to the charges at issue by denying the Appellant's request for alternative handling under the Safety Incident Analysis Process (SIAP) (See Exhibit C)

The due process element associated with Rule 40 requires that "[t]he notice must specify the charges for which investigation is being held." This requirement mandates that the Carrier must provide any employee facing disciplinary action sufficient information about the charges so as to apprise the employee about the nature of the charges in order that he/she might prepare a defense. Accordingly, by way of example, the mere listing of rules with no particulars of the infraction is not sufficient notice. However, as noted below, this has not been the case in this matter.

Turning now to the notice provided the Appellant, the Carrier specified:

- The date of the alleged action – March 15, 2004
- The action at issue – "[d]etaching a lowboy trailer from a tractor at approximately 9:45 a.m. on March 15, 2004"
- The location – Tonville, Colorado
- The circumstances – "while assigned as vacation relief, Group 2 Lowboy Operator headquartered at Fort Collins, Colorado."
- The *specific* rules alleged to have been violated. Moreover, the Carrier also supplied copies of these rules to the Organization.

It is the conclusion of this Referee that the notice supplied in this case was of sufficient specificity so as to allow the Appellant to prepare his defense. Moreover, it should also be noted that the Carrier changed the date of the Investigation from March 26, 2004 to April 27, 2004 as a result of the Organization's request.

Turning now to the hearing, it cannot be said that the Carrier deprived either the Appellant or the Organization the opportunity to call and examine witnesses, or the right to introduce relevant evidence of its own choosing. Indeed, the Appellant himself acknowledged this. (See TR 47)

Finally, while the Organization maintains that the instant matter would have been more appropriately handled under the Carrier's Safety Incident Analysis Process ("SIAP"), it is clear from a reading of this Process that its use is discretionary on the part of the Carrier. Accordingly, while use of the SIAP may have been the wiser process, this Referee is without authority to so direct. As a result, I leave the future application of this process to discussions between the Carrier and the Organization.

For the reasons noted and discussed above, it is the determination of this Referee that the Carrier has complied with Rule 40 in this matter.

C. Substantial Evidence Exists to Support the Instant Charge

Initially, this Referee notes that he sits as a reviewing body and does not engage in making *de novo* findings. Accordingly, I must accept those findings made by the Carrier on the Property, including determinations of credibility, provided they bear a rational relationship to the record. In the instant matter, it is apparent that the Carrier made its credibility determination against the Appellant, and I find that its decision to do so was supported by the record.

Turning now to the merits of the Charge, the Carrier maintains that the Appellant, by his actions on March 15, 2004, failed to adhere to the foregoing Maintenance of Way Safety

Rules and BNSF Engineering Instructions. I find, on the basis of this record, that substantial evidence exists to support these charges. In addition to those facts extracted from the Investigation of April 27, 2004 as noted and discussed above, it is telling that the Appellant admitted that indeed, the removal of the trailer giving rise to the Appellant's injury could have been accomplished in a different, safer manner.

The Appropriate Penalty

Having found and concluded that there is substantial evidence in the record to support the charges at issue, there remains a question as to the appropriate penalty. In this regard, the Carrier seeks to impose a Level S 30 Day Record Suspension, together with a probationary period of two years. As an initial matter, it should be noted that where, as here, substantial evidence exists to support the charges at issue, it is well accepted that the proposed penalty as suggested by the Carrier will not be disturbed unless it is "shocking" to ones sense of fairness.

The Employee Accountability guidelines referenced by the Organization in this matter provide for a 30-day Record Suspension, a penalty the Appellant was apparently prepared to accept. (See Exhibit F) Accordingly, it is the addition of the two year probationary period that has given the Appellant concern, as it should. However, I cannot find the penalty sought to be imposed by the Carrier is shocking to ones sense of fairness. Indeed, the injury sustained by the Appellant was serious, and by his own admission, the circumstances giving rise to his injury were avoidable. Accordingly, the two-year probationary period will give the Appellant cause to practice his day-to-day tasks in a manner which conforms to the Safety Rules noted.

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CONCLUSION AND AWARD

Given the foregoing discussion and analysis, it is the determination of this Referee that:

1. The Carrier has substantially complied with Rule 40;
2. Substantial evidence exists to support the charges at issue, and
3. I find the penalty imposed by the Carrier, consisting of a Level S 30-Day Record Suspension together with a two-year probationary period to be, under the circumstances of this case, just and reasonable.

10-28-04
Dated

Dennis J. Campagna, Referee
SBA No. 1112

LABOR MEMBER'S DISSENT
TO
AWARD 76 OF SPECIAL BOARD OF ADJUSTMENT NO. 1112
Referee Campagna

One school of thought adhered to by certain railroad industry advocates is that writing dissents is an exercise in futility because they are neither read nor considered by subsequent Referees. This Organization does not belong to that school. For, to accept the theory that dissents are meaningless, is to necessarily accept the conclusion that reason does not prevail in railroad industry arbitration. Despite all the faults built into this system, the Organization Member of this Board is not ready to conclude that reason has become meaningless. Therefore, the Organization Member has no alternative but to file this emphatic dissent.

The events that prompted this dissent is that in Award 56 of this Board, rendered by this referee, he made the following determination:

> "During his representation of the Appellant in this matter, the Organization questioned why this case was not handled under the Alternative Handling Procedures. The PEPA Policy, governing the procedures used in cases of this nature, provides that its intent is to '[s]upport BNSF's vision of becoming injury- and accident-free.' In addition, the Policy provides that where a rule violation might occur, the policy '[p]rovides a process at arriving at an understanding of improvements needed to prevent similar rule violations.' Consistent with this stated objective, the policy further provides that 'Alternative handling may be offered by an employee's supervisor for a second or subsequent non-serious incident.'[1] Respectfully, the Record does not contain any reason or rationale as to why the Carrier chose to avoid review of this case under the Alternative Handling Procedures. Accordingly, we are left with the Organization's unchallenged position on this issue.
>
> A review of the Appellant's Employment History reveals that while he has experienced disciplinary action since his employment in 1975, the instant matter represents the first time he has been charged with a failure to report a personal injury by the first means of communication. Moreover, given the recognition that his personal injury was of the non-serious nature, there is no reason why alternative handling was not considered as an appropriate procedure to drive home the importance of this Rule, as well as to advise the Appellant of the need to prevent similar rule violations.
>
> Given the foregoing, it is the determination of this Referee that this incident be treated as if it had been processed under the Alternative Handling procedure. Accordingly, the Appellant shall receive the proper coaching, counseling and/or

"training, as the Carrier may determine, consistent with this method of addressing the instant non-serious incident at issue in this proceeding.

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[1] It should be noted that the PEPA Policy calls for a 10, 20 or 30 day record suspension for instances involving a second, third or fourth non-serious rule violation respectively. In the instant matter, the Carrier's 30 day record suspension for a first non-serious violation transcends well beyond the bounds of its policy."

Subsequently, within Award 76 of this Board, this referee stated:

"Finally, while the Organization maintains that the instant matter would have been more appropriately handled under the Carrier's Safety Incident Analysis Process ('SIAP'), it is clear from a reading of this Process that its use is discretionary on the part of the Carrier. Accordingly, while use of the SIAP may have been the wiser process, this Referee is without authority to so direct. As a result, I leave the future application of this process to discussions between the Carrier and the Organization."

While the PEPA and SIAP are unilaterally implemented Carrier policies, once the Carrier relies upon them for the implementation of discipline under the controlling collective bargaining Agreement brings them out into the open for consideration by this Special Board of Adjustment. It is clear that the referee did intervene in Award 56 and determined that the Carrier should have handled that case under the alternative handling procedures of its unilaterally implemented policy. Rather than following the sound reasoning he expressed in Award 56, the referee in this case digressed into an ignominious hands off position of failing to follow his previous reasoning. Because the Board did not follow the sound reasoning expressed in Award 56 in deciding this case requires a dissenting opinion.

Respectfully submitted,

Roy C. Robinson
Employe Member