SPECIAL BOARD OF ADJUSTMENT NO. 1112

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,

Vs.

BURLINGTON NORTHERN &

SANTE FE RAILWAY CO.,

CASE # 55 - Dennis D. Flanagan (30-day Record Suspension)

AWARD NO. 56

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 contain only the Referee's signature is considered "final and binding" subject to the provisions of the Railway Labor Act.

B. The Appellant

Dennis D. Flanagan, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on May 8, 1975. At all relevant times, the Appellant was working as a Section Laborer, Broken Bow Section. The Appellant is represented by the Brotherhood of Maintenance of Way Employees.

C. The Charge at Issue

On or about January 31, 2003, as a result of a formal investigation conducted on Monday January 6, 2003, the Appellant was served with charges, seeking a thirty (30) day Record Suspension for his alleged violation of BNSF MOW Operating Rules 1.1.3, 1.2.7 and 1.2.5 for his failure to properly report by the first means of communication to the proper manager, a personal injury incurred to his right rib area, while on duty or on company property, while he was replacing ties in the East back track switch, at or near MP 175.8, Broken Bow, Nebraska on the Sand Hills Subdivision, on Friday, December 13, 2002, and the withholding of information from authorized supervisor regarding personal injury, while assigned as Section Laborer, headquartered at Broken Bow, Nebraska.

D. Facts Gathered from the January 6, 2003 Investigation

On January 3, 2003, a formal investigation was initiated by William C. O'Donnell, as investigating officer. At that time, The Appellant requested, and was granted, an adjournment until January 6th in order that he could be represented by his local chairman.

On January 6th, the formal investigation reconvened, at which time the Appellant was represented by R.I. Nickens, the Organization's Vice General Chairman. At such Investigation, it was established that:

- An Investigation Notice had been sent to the Appellant on December 27, 2002. The Appellant received this Notice on January 2, 2003;

- Rule 40 of the current Collective Bargaining Agreement (CBA) between the Employer and the Union mandates that an employee must receive five days written notice of an investigation.

- Ray Brennan, Roadmaster, Power River Division, testifying on behalf of the Employer, stated that on December 9, 2002, the Appellant stated to him that he was having a problem with his right side in the rib or ling area of his body. On

December 18, 2002, at approximately 16:45 hours, the Appellant called to inform him that he went to the Hospital's Emergency Room because he could not breath, sleep or lay on his right side. The Appellant informed Mr. Brennan that the Doctor indicated that he (Flanagan) had Pleurisy, and prescribed Ibuprofen and Lortab. (Exhibit 12) Mr. Brennan testified that the first indication he had that the Appellant's condition was work related was when the Appellant called him on December 19, 2002, to inform Mr. Brennan that he had returned to the emergency room, whereupon a different doctor diagnosed him as having "pulled muscles in the right rib area", and advised him to work light duty from December 20th to December 26th. It was during this conversation that the Appellant revealed, for the first time, that "[h]e probably hurt himself while he put ties in on Friday December 13th, six days following the Appellant's sustained injury.

- Mr. Brennan interviewed different section laborers, foreman and truck drivers that were working in the same area as the Appellant on December 13th. The individuals interviewed included Dale Scott and Kevin Rapp, truck drivers for the Broken Bow and Ansley Sections respectively, Mel Anderson and Steven Stabb, section foremen, each of whom gave statements to the effect that they neither heard nor saw anything that would have indicated that the Appellant had sustained a work-related injury on December 13th.

- The testimony offered by the Appellant was in substantial agreement with that offered by Mr. Brennan. The Appellant did, however, differ on one point – maintaining that he informed Mr. Brennan, by cell phone, on the evening of December 17th following his first visit to the Hospital's Emergency Room, that he had sustained a work related injury, more specifically "[t]hat it was result of this tie project on the 13th." (Transcript at page 26) In addressing this issue, Mr. O'Donnell resolved the credibility issue in favor of the position given by Mr. Brennan, who was able to produce contemporaneous notes he had included in his Day Planner (Exhibit 12). Respectfully, I find nothing in the record evidence to disturb this holding by Mr. O'Donnell.

POSITION OF THE PARTIES

A. The Organization's Position

Initially, it is the Organization's position that the Carrier's service of the Notice of Investigation fell short of the five (5) day written notice required under Rule 40. Such time is necessary, the Organization maintains, in order to properly prepare for the Investigation. By mailing the Notice on December 27, in the midst of the holiday season, the Appellant received the Notice on January 2nd, less than the five days required under Rule 40.

Next, the Organization maintains that pursuant to the Policy for Employee Performance Accountability ("PEPA"), employees who have had no serious incidents for three years or non-serious incidents for 12 months should be permitted to choose alternative handling in lieu of the discipline policy. The Appellant's request for alternative handling was denied. Pursuant to this same policy, doubts about how an incident should be handled by a supervisor should "[e]rr on the side of leniency." Since this was not done in this case, the Organization maintains that the Carrier violated its own policy, thereby tainting the instant proceeding.

Finally, with respect to the personal injury sustained, the Organization maintains that until the Appellant's symptoms reached the intolerable stage on December 17th, he was under the impression that his symptoms were nothing more than ordinary everyday stiffness and soreness. However, following his visit to the emergency room on December 17th, upon becoming aware that his symptoms represented something more than simple soreness, the Appellant maintains that he "promptly" reported the matter to Mr. Brennan, his supervisor.

Given the foregoing, the Appellant seeks to have the instant charges dismissed in their entirety.

B. The Carrier's Position

It is the Carrier's position that it has proven the underlying basis supporting the charge at issue. In this regard, given that the substantive facts are not in dispute, the testimony offered by Mr. Brennan, particularly following his interview with other individuals, provides conclusive evidence that the Appellant did not report his personal injury by the first means of communication to his proper manager, but instead, waited until December 19th, six days following its occurrence, to make his report to Mr. Brennan.

With respect to the Organization's challenge under Rule 40, the Carrier maintains that it was in substantial compliance with this Rule. In this regard, the Carrier notes that the Appellant's request was honored, thereby giving him additional time in which to secure a Union representative, and to prepare his case.

Given the foregoing, the Employer urges that the charge against The Appellant be upheld, and the 30 day Record Suspension ordered.

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.

(MOA, Paragraph 8)

B. The Issue Regarding Compliance with Rule 40

Rule 40 provides, in substantial part, that an employee and the appropriate local organization representative must receive *at least* five (5) days advance written notice of the investigation. The stated purpose of the Rule is two-fold: *first*, to enable the employee to secure proper representation, and *second*, to arrange for the presence of necessary witnesses the employee might desire.

In the instant matter, it is undisputed that while the Notice of Investigation was mailed on December 27, 2002, it was not received by the Appellant until January 2nd, one day prior to the Investigation. However, when he appeared at the January 3rd investigation, the Appellant requested an adjournment of the Investigation in order that he might secure proper representation. In granting his request, Mr. O'Donnell suggested that the matter reconvene on January 6th, and asked the Appellant: "Is that agreeable to you, The Appellant.", to which the Appellant responded in the affirmative. Had the Appellant requested a few more days for the purpose of preparing his case, there is nothing in the record indicating that Mr. O'Donnell would have denied his request. Moreover, there is nothing in the record demonstrating that the Appellant or the Organization acting on his behalf, did not have sufficient time in which to prepare their case, or call necessary witnesses.

Given the foregoing, I find that there was substantial compliance with Rule 40.

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.

Turning now to the merits of the Charge, Black's Law Dictionary, Fifth Edition, defines "Substantial Evidence" as follows:

> Such evidence that a reasonable mind might accept as adequate to support a conclusion. It is that quality of evidence necessary for a court to affirm a decision of an administrative board. Under the "substantial evidence rule," reviewing courts will defer to an agency determination so long as, upon an examination of the whole record, there is substantial evidence upon which the agency could reasonably base its decision.

Deferring to Mr. O'Donnel's determination as to credibility, I find and conclude that substantial evidence exists in the record to reasonably conclude that the Appellant's first report to his supervisor that he had sustained a job related injury occurred on December 19, 2002. The record evidence reveals that the Appeallant's physical condition was such that at some time prior to December 17th, a date when the pain became to intolerable to bear, his discomfort was such that he should have reasonably reported the situation to his supervisor. In this regard, it is clear that the Appellant was aware that his aches and pains were created by the work he had done given his admission that at first blush, he thought such aches and pains were normal given his age and condition together with the type and nature of the work he was performing. Accordingly, he was obligated to report, by the first means of communication, at a time prior to December 19th the circumstances leading to his discomfort. However, even assuming that he was truly unaware that the cause of his condition was work related, there is no reason why he could not have reported same to Mr. Brennan on December 17th, the date he went to the Hospital's emergency room.

Given the foregoing, I find and conclude that substantial evidence exists to prove the charge at issue.

D. The Appropriate Penalty

Having found and concluded that there is substantial evidence in the record to support the charge at issue, there remains a question as to the appropriate penalty. Following a careful review of the record in this case, I find and conclude that the Carrier's suggested thirty (30) day Record Suspension is too harsh a penalty.

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.

[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.

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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. That substantial evidence exists to support the charge at issue, and
3. The 30 day Record Suspension sought by the Carrier is too harsh a penalty. Accordingly, the Appellant shall receive the proper coaching, counseling and/or training, as the Carrier may determine appropriate, as if the instant non-serious incident at issue in this proceeding had been addressed under the Alternative Handling Procedure.

04-08-03
Dated

Dennis J. Campagna, Referee
SBA No. 1112