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

CASE #56 -Bruce E. Carter (Termination)
AWARD NO. 57

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

Bruce E. Carter, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company on June 13, 1978. At all relevant times, the Appellant was assigned as a Laborer on the Alliance Daytime Switch Maintenance Crew.

C. The Charge at Issue

On or about January 10, 2003, following a formal investigation conducted on December 12, 2002, The Appellant was served with following charge:,

> This letter will confirm that as a result of formal investigation held on December 12, 2002 at Alliance, Nebraska concerning your failure to report for duty at the designated time and place on November 7, 8, 11 and 12, 2002, while assigned as Labor on Alliance daytime Switch Maintenance crew, **you are hereby dismissed from employment with the Burlington Northern Santa Fe Railway for violation of Rule 1.15 of the BNSF Maintenance of Way Operating Rules, effective Sunday, January 31, 1999.**[1] (Emphasis in the original)

D. Facts Gathered from the December 12, 2002 Investigation

On December 12, 2002, a formal investigation was conducted by Darrell D. Leibhart, Roadmaster. At such investigation, the Appellant was represented by Robert Arnold, Local Chairman, BMWE Local 1108. It was established that:

- Terrance Huddle, Roadmaster, Sand Hills Sub in Alliance Yards, testifying on behalf of the Employer, stated that on November 7, 2002 he was informed him that the Appellant, who had bumped a laborer, had not yet shown up for work. While the Appellant had attended a training program, he had been released as of November 6th. It is undisputed that the Appellant failed to show up for work that day. It is also undisputed that the Appellant failed to call his supervisor to inform his of his whereabouts. Mr. Huddle further testified that the Appellant was a no call/no show on Monday November 11th, Tuesday November 12th and

[1] Rule 1.15 provides: "Employees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority."

Wednesday November 13th. It was on November 13th that Mr. Huddle became aware, for the first time, that the Appellant had entered a rehabilitation program.

- Marvin Gorsuch, the foreman of the Switch Tender Gang, and the Appellant's immediate supervisor, confirmed the testimony given by Mr. Huddle, in that the Appellant was no call/no show on November 7, 8, 11 and 12. Accordingly, Mr. Gorsuch worked alone for each of these dates.

- James Mashek, Roadmaster, testified on behalf of the Employer and confirmed the testimony given by Mr. Huddle and Gorsuch. In this regard, Mr. Mashek testified that he had received a bump slip for the Appellant informing him that the Appellant was in his territory. However, Mr. Mashek received no information regarding the Appellant's whereabouts or if he was expected to work on the dates at issue.

- Finally, the Appellant admitted that he did not work on November 7, 8, 11 or 12, and that he did not make any attempt to contact anyone at the call desk to inform them that he would not report for work. He further acknowledged that he received his bump notice, obligating him to report for work on November 7th in Alliance, Nebraska on the switch tender job, but admittedly failed to do so. In this regard, the Appellant offered the following as his reason for neither reporting for work nor calling in:

"I felt the need that, that I go to treatment was much more important. . . I felt that, that was much far more important." (Transcript page 9) The Appellant testified that he was admitted to his treatment program on November 12th, and began treatment on November 13th. (Transcript page 10) While admitting that he did call and "left a message" with Mr. Heidzig, the Division Engineer, following notice regarding his admission to the rehabilitation program on November 12th, it was clear that neither Mr. Heidzig nor any other supervisor gave the Appellant permission for his prior absence, nor excused his failure to call. Finally, while the

Appellant acknowledged that he was familiar with Rule 1.15, and acknowledged that the Rule obligated him to "[c]all in and tell the proper people if I am not going to be there", he admitted non compliance. (Transcript Page 13)

POSITION OF THE PARTIES

A. The Appellant's Position

It is the Appellant's position that his need to seek help with his alcohol problem should be viewed as a "mitigating circumstance", excusing his non compliance with Rule 1.15. Indeed, by his own admission, the farthest thing from his mind was missing a few days of work. Indeed, the Appellant maintains, he made the correct choice in seeking help and getting his life together. And now that he has, he maintains that he will be a valued employee in the future.

B. The Employer's Position

Simply stated, it is the Employer's position that the Appellant's own admission provides proof positive that he violated Rule 1.15. While acknowledging that it was a good thing for the Appellant to seek help, his failure to comply with the procedures of Rule 1.15 cannot be ignored. Given the lack of any mitigating circumstances, The Appellant's employment should be terminated.

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

At the conclusion of the Investigation conducted on December 12, 2002, The Appellant as well as Mr. Arnold, his Union representative, admitted that the Investigation had been conducted in a fair and impartial manner, and that the basic elements of due process had been met. Given this admission, together with the lack of any challenge to the operation of Rule 40, 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.

The Appellant's own admission regarding his failure to call the Carrier or to show up for work on November 7, 8, 11 or 12 is proof positive of a Rule 1.15 violation. The Appellant's proffered reason for non compliance with this Rule, seeking rehabilitation, will be discussed in the Penalty section below.

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 penalty of the Appellant's termination from employment to be appropriate under the specific facts of this case.

The Appellant's proffered reason for his no call/no show action on each of the four days at issue is tied to his desire to gain assistance with his alcohol problem. However, the record evidence reflects the fact that the Appellant was not admitted to the rehabilitation program until November 12, 2002, and became formally admitted on November 13, 2002. Clearly, the Appellant has not provided a substantive reason for his failure to call in on November 7, 8, 11 nor 12, each date occurring *prior to* his admission to the rehabilitation program. Mitigating circumstances such as a clear showing that an emergency existed thereby preventing him from calling in, or that he made a good faith effort to contact his employer are missing in this case. Finally, the Appellant's call to Mr. Heidzig on or about November 12th following notice the Appellant received regarding admission to the rehabilitation program was simply too late to save him in this case. Moreover, Mr. Heidzig's alleged statement to the Appellant that he (Carter) was

doing the correct thing in gaining treatment cannot, by any stretch of the imagination, be considered as tacit approval for his failures to call in or show up. Simply stated, therefore, the Appellant has not provided a sufficient reason for his no call/no show actions on each of the dates noted above.

A review of the Appellant's service records demonstrates that on more than one occasion, presumably with the aid and assistance of his Organization, the Carrier demonstrated leniency. Such examples included:

- An incident in 1979 where The Appellant had been dismissed for absenting himself from duty without proper authority, together with his failure to appear at an investigation. He was reinstated.

- In 1998, The Appellant received formal reprimands for "AWOL/Absent without Leave", and his abandonment of his job.

- Also in 1998, The Appellant received an initial termination as a result of a positive drug screen. His termination was "[r]educed to suspension time served leniency basis without back pay & must comply with all EAP requirements."

- In 1999, The Appellant was accused of a Misuse of Company property – "Misuse of BNSF lodging card during months of July, August and September 1998 – SBA 1112 also reduced this to suspension time served leniency basis without backpay."

It is clear, when reviewing the Appellant's service record that the Organization and the Carrier have, on numerous occasions, sought to give him yet another chance for incidents involving events substantially similar to that at issue in this case. Leniency, however, is a two-way street, and the Appellant has failed to demonstrate his ability to comply with even the simplest of rules – calling in when unable to report for work.

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CONCLUSION AND AWARD

For the reasons noted and discussed above, it is the conclusion of this Referee that:

1. There has been full compliance with Rule 40 in the December 12, 2002 Investigation;

2. There is Substantial Evidence in the record to support the charge at issue. Accordingly, I find and conclude that the Appellant, did, in fact, fail to either call in or report for duty on each of the following dates: November 7, 8, 11 and 12.

3. Finally, finding the absence of mitigating circumstances in this case, I find and conclude that the Appellant's employment with the Burlington Northern Santa Fe Railway shall be terminated, such termination to be effective on January 10, 2003.

04-08-03
Dated

Dennis J. Campagna, Referee
SBA No. 1112