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

CASE # 59 – Darwin L. Halverson (Level S 30-day Record Suspension; Three (3) year Probationary Period)
AWARD NO. 60

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

Darwin L. Halverson, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on June 27, 1978. At all relevant times, the Appellant was assigned as a machine operator working on Steel Gang RP07, a highly mechanized production group consisting of approximately 35-40 employees who travel several seniority districts on the BNSF. Their task is to replace worn out steel associated

with ribbon rail curves, tangents and straight-aways. The Appellant is represented by the Brotherhood of Maintenance of Way Employees.

C. The Charge at Issue

On or about March 12, 2003, following an Investigation conducted by Craig Kemmet, Roadmaster and Conducting Officer, on February 24, 2003, the Appellant was charged with a failure to follow Maintenance of Way Operating Rule 1.6 and Chief Engineering Instruction 21.5.2 as a result of an alleged misuse of the Company credit card on June 21 through 26, 202 in Detroit Lakes, Minnesota while assigned machine duties as described above.

As a result of the foregoing Charges, the Appellant was issued a Level S Record Suspension of 30 days for his violation of BNSF Maintenance of Way Operating Rule 1.6 and Chief Engineering Instruction 21.5.2. Additionally, the Appellant was assigned a probationary period of three (3) years during which time he was warned that any future serious rule violation would result in his dismissal.

D. Relevant Rules at Issue

The relevant portion of the **Engineering Instructions Book, Chapter 21, Lodging Procedures, Section 21.2 (Showing Proper Conduct) and 21.5.2 (Using BNSF Lodging Identification Cards (IML))**, read as follows:

21.2 Employees using lodging facilities while on BNSF (premise or) business are representatives of BNSF Railway Company and should act professional and courteous.

Employees must follow all lodging facilities policies, such as not cook in rooms, showing proper conduct while on hotel property, paying for additional charges (meals, phone, movies, etc.) and paying for damages (grease on carpet, burns, etc.)

21.5.2 Qualified employees using a BNSF Lodging Identification Card (IML) must follow these guidelines:

Before checking out, BNSF employees must pay for expenses incurred during their stay, including food, phone, movies, damages, etc., in a manner satisfactory to the hotel management.

E. Facts Gathered from the February 19, 2003 Investigation

- On the dates June 21 through June 26, 2002, the Appellant was working with Rail Gang RP07 in Detroit Lakes, Minnesota. Appellant lodged at the Holiday Inn located in Detroit Lakes beginning June 21st. He was the only employee who occupied the Hotel Room. (TR 28)
- On June 26, 2002, Appellant checked out of the Holiday Inn. The total bill for Appellant's stay amounted to $334.03. Of such amount, $197.10 was attributed to the hotel room, and payable by Intermotel Leasing, and the remaining $136.93 were personal charges attributed to the Appellant as follows:

Movie:	$10.64
Food/bar:	$88.73
Long Dist. Calls:	$37.56

(See Exhibits 4 through 8)

- When Appellant checked out of the Holiday Inn on June 26th, his personal charges of $136.93 remained unpaid.
- Chuck Von Rueden, Roadmaster and Appellant's supervisor at all relevant times, testified that he received a phone call from the Holiday Inn on February 5, 2002. Mr. Von Rueden testified that the Holiday Inn inquired whether he knew the Appellant, which he answered in the affirmative. Mr. Von Rueden was then informed that the Appellant was responsible for "[s]ome unpaid charges from when he stayed in the motel." Mr. Von Rueden then requested that the Holiday Inn follow up their conversation in writing, detailing "[w]hatever information they had." (See TR 11)[1]
- By letter dated February 5, 2003, Lois Greenig responded to Mr. Von Rueden's request for written verification of charges owed by the Appellant. The letter noted that "Our Guest Service Manager, Justin Wegleitner has been in contact with you regarding the outstanding balance on Darwin Halvorson's account." The letter thereupon detailed the $136.93 balance due. (See Exhibit 4) This letter represented the first written verification of the balance due the Holiday Inn as attributed to charges made by the Appellant during his stay from June 21st to the 26th. (Id.) Mr. Von Rueden received this letter on February 11, 2003. (Id.)
- It was undisputed that the charges in dispute, attributed to the Appellant, are permissible. The Carrier's objection was created as a result of the Appellant's failure to pay the amount of $136.93 at the time he checked out of the Holiday Inn on June 26th, thereby leaving the Carrier potentially liable for said amount. (TR 16) The Appellant failed to leave any forwarding address in order that the Holiday Inn could contact him. (TR 31)
- For his part, the Appellant acknowledges the debt at issue as his own. (TR 24) However, since he acknowledged that he did not have the funds necessary to pay his debt, it was the Appellant's belief that at the time of his checkout from the Holiday Inn, his wife had paid the $136.93 balance at that time. In this regard, Appellant testified: "My wife came down there on the 26th and I told her to take

[1] Refers to page numbers in the official investigation report.

care of the bill and I thought it was taken care of until I received notice on the investigation papers that I had an outstanding bill at any time." (TR 24, 30)

- Appellant's belief that his wife had paid his outstanding bill was, in Appellant's opinion, confirmed when, the following week, he lodged at the same Holiday Inn who made no mention of any outstanding balance. (Id.)
- On or about February 13, 2003, Appellant received a statement of charges. Upon receipt of said statement, he purchased a money order in the amount of $136.93, and mailed it to the Holiday Inn with a letter of apology. (TR 24, 26; Exhibit 9)
- It was undisputed that the Appellant, as well as other employees, were schooled on BNSF's Corporate Lodging Policy. Appellant acknowledged that he was familiar with the Maintenance of Way Operating Rule Book as well as the applicable BNSF Engineering Instruction Procedures. . (TR 10, 22-23)

F. The Organization's Rule 40 Challenge

During the Investigation, the Organization lodged two separate Rule 40 challenges as follows:

- The Carrier violated Rule 40 (A) in that the notice of February 12, 2003 issued approximately eight (8) months following the alleged violation, and clearly more than fifteen (15) days from the date of occurrence. Moreover, the Organization notes that Mr. Von Reuden had knowledge of the incident giving rise to the charges on February 5, 2003, 19 days prior to Investigation of February 24, 2003. (TR 7, 14)
- The Carrier violated Rule 40 (C) in that "[t]he notice received by the charge employee failed to cite a specific charge lodged against him. . . .The lack of a specific accusation, lack of a mention of any act on the part of the charged employee from which we could construe no alleged wrong, or the lack of the mention of any rule from the vast rules by which the Carrier and the Maintenance of Way Employees are governed, deprived him of his right of fundamental

fairness. In fact, this notice of investigation's so general neither I nor Mr. Halveson could develop any type of a defense n his behalf." (See TR 8-9)

Given the foregoing, the Organization urges the dismissal of all charges, together with the elimination of all references contained in the Appellant's record. (TR 9)

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 Alleged Rule 40 Violations

Rule 40, Investigations and Appeals, provides, in relevant part:

A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of occurrence, except that personal conduct cases will be subject to the

fifteen (15) day limit from the date information is obtained by an officer of the Company . . .

C. At least five (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which the investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employee involved.

While it is the Organization's burden to establish a Rule 40 violation in the first instance, it remains the Carrier's burden to strictly comply with Rule 40's mandate since it is the Carrier who determines the extent, nature and timing of any Investigation.

Following a careful review of the relevant facts in this case, it is clear that the *date of occurrence* was the date the Appellant became obligated under the Engineering Instruction 21.5.2 to pay all charges incurred during his stay at the Holiday Inn. The record established this date as June 26, 2002. Clearly, therefore, the Investigation, held on February 24, 2003, exceeded the fifteen day mandate under Rule 40 (A).

Notwithstanding the foregoing conclusion, Rule 40 provides an exception for cases involving "personal conduct"[2]. Assuming, for the sake of discussion that the Appellant's personal conduct is at issue here, it is clear that Mr. Von Rueden, by his own admission, obtained information regarding the Appellant's debt to the Holiday Inn on February 5, 2003. While it may be true that said information was ultimately formalized by letter dated February 5, 2003, and received by Mr. Von Rueden on February 11, 2003, this does not change the fact that his first day of awareness was on February 5, 2003. Given the fifteen day mandate under Rule 40, with particular emphasis on the severe nature of the

[2] Rule 40 does not define what is meant by "personal conduct".

charges at issue, he could have requested the Holiday Inn to fax or e-mail verification that same date, but it appears that he did not. Accordingly, the Investigation of February 24, 2003 occurred beyond the 15 day mandate, in violation of Rule 40 (A).

Rule 40 (C) provides that the notice of charges must specify the charges for which the investigation is being held. Said notice, dated February 12, 2003, provides, in relevant part:

> Attend investigation at the Roadmaster's office . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged misuse of company credit on June 21 through June 26, 2002 in Detroit Lakes, MN, while assigned as a machine operator on RP07.

A close reading of Rule 40 (C) reveals that its purpose is to sufficiently apprise the Appellant of the charges against him in order that he might prepare a defense. The Appellant's testimony makes clear the fact that the charges were of sufficient clarity so as to apprise him of the nature of said charges. In this regard, the Appellant acknowledged that upon receipt of said charges, he became aware that his debt to Holiday Inn remained unpaid. His action was to pay the debt on the same date he received the charges, and to extend an apology to the Holiday Inn for his delinquent payment. (See TR 24) Accordingly, I find no violation of Rule 40 (C) in this matter.

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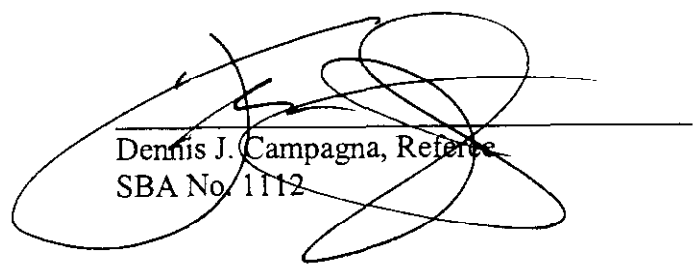
CONCLUSION AND AWARD

Given the foregoing discussion and analysis, it is the determination of this Referee that the Carrier has failed to comply with Rule 40 (A). Therefore, and pursuant to Rule 40 (J), "[t]he charges against the employee shall be considered as having been dismissed." Accordingly, I direct that said charges be dismissed, and that any and all references to said charges as may appear in the Appellant's personal record be expunged.

06-10-03
Dated



Dennis J. Campagna, Referee
SBA No. 1112