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

CASE # 74 -- AWARD #75 – Boyd L. Oppegaard
[Suspension (5-13-04 through 6-15-04) , Level S 3 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

Boyd L. Oppegaard, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on November 18, 1974. At the time of the incident, the Appellant worked as a machine operator in Grand Forks, North Dakota. 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 May 21, 2004 by C.E. Wendt, Superintendent of Operations and Conducting Officer, the Appellant was charged with a violation of Maintenance of Way Safety Rule 1.6 and General Notice No. 215, Violence in The Workplace Policy when on May 12, 2004, the Appellant engaged in an altercation with Dale Jarombeck, which resulted in personal injury to Mr. Jarombeck. The Carrier seeks to impose a Level S three year probationary period together with a period of unpaid suspension covering the period May 13, 2004 through June 15, 2004 as a result of the Appellant's alleged failure to comply with the foregoing Rule 1.6 and General Notice 215.

D. Facts Gathered from the February 24, 2004 Investigation

On May 21, 2004, a formal investigation was conducted by Mr. C. E. Wendt, Superintendent of Operations for the BNSF located in Grand Forks, North Dakota, who served as the conducting officer. At all times during the investigation, the Appellant was represented by Roger Bobby, Vice General Chairman, BMWE. The record created at this formal investigation established that:

- On May 13, 2004[1], Dale Jarombek, who has served with the BNSF for approximately 30 years as a truck driver, filed a report with Craig Kemmet, Roadmaster at Grand Forks, North Dakota, that as a result of "an altercation" between he and the Appellant on May 12th, he had sustained a back injury. Mr. Kemmet thereinafter filed a "Supervisor's Report of Employee Injury" in which he stated as follows:

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

"Employee [Jarombek] came to supervisor and alleged that he is experiencing reoccurance of back pain as a result of an altercation with another employee the day before. Injured employee relates that they were in the section office after completing their work for the day and were waiting for foreman to complete timeroll. Injured imployee was seated on one end of a bench and got into an argument with another employee at the other end of the bench approximately ten feet away. The second employee lifted his end of the bench from the floor and let it fall back to the floor. Injured employee claims that bench was lifted one to two feet off the ground and the impact jarred his person resulting in back pain. Three separate witnesses have stated that the far end of the bench was raised approximately one inch from the floor. No mention of the incident or any injury was made at the time. (Exhibit B)

Mr. Kemmet reported that the "second employee" was the Appellant, and related two different versions of the incident, one from Mr. Jarombek and the other from the Appellant, and noted that the Appellant became angered over Mr. Jarombek's references to "casting of a magnet".[2] Mr. Kemmet testified that there were two witnesses at the scene, Donald Morvig and John Peterson, each of whom he interviewed. He found Mr. Morvig to have been "very evasive, using a lot of the statements: I don't recall. I don't remember . . [and] was not very forthcoming with information." (TR 10) Mr. Kemmet testified that his interview of Mr. Peterson revealed the following: "[T]hey were all present there in the lunchroom as the other interviews concurred. He stated to me that there was profanity, ther was name calling. There was attempt on Mr. Jarombek's part to directly antagonize Mr. Oppegaard. And that the bench in question was lifted by Mr. Oppegaard and he also stated between an inch to two inches and dropped to the floor. He said that, he had also stated there was anger there present he felt on both parties." (TR 12)

[2] Mr. Kemmet described "casting of a magnet" as follows: "If you'd try to imagine a crane with a boom, the lines coming down, a magnet on the bottom of that. The crane has the capability of swinging back and forth which in turn would get your magnet on the end of that swinging till you got, you swing back and forth timing it to where the magnet would come swinging across, then you can release the lines, which would give it a casting effect like a fishing rod." (See Transcript "TR" page 11) This procedure or practice is not condoned by the Carrier.

Finally, Mr. Kemmett testified that both Mr. Jarombek and the Appellant filed written statements indicating that neither Mr. Morvig nor Mr. Peterson had involvement with the incident at issue. (See Exhibits C and D respectively.)

- On May 13th, Mr. Morvig filed a written statement at the request of Mr. Kemmett, in which he noted: "On 5-12-04 at about 14:14 at G.F. Lunchroom a bench about 10' long was lifted and dropped a few inches by Byod [sic] Oppegaard who was at the east and Dale Jarombek was seated at the west end." (Exhibit E) During his testimony, Mr. Morvig added that while he and Mr. Jarombek were conversing in the lunchroom, the Appellant entered the room from the bathroom "[a]nd said something to me about there, all the cranes are pretty much the same. And I said well, they're all a little different. I think that's when Dale [Jarombek] said something to [the Appellant] about yeah, we all know your record about casting magnets and something to that effect." (TR 30) Mr. Morvig also noted that Mr. Jarombek did not express that he had been injured at the time the Appellant picked up and dropped the table. (TR 34) He also noted that he did not see Mr. Jarombek provoke the Appellant, "[e]xcept for the mention about casting." (TR 36)

- On May 13th, Mr. Peterson, who works in the Maintenance Department at BNSF, and who was also a witness to the event, filed a written statement at the request of Mr. Kemmet, in which he noted: "Boyd Oppegaard lifted east end of bench Dale Jarmbek was sitting on west end of bench. The bench was lifted about 1 ½ ins. off floor then dropped it. This took place in Grand Fork Siction [sic] lunch room at about 1440 5-12-04. (Exhibit F) Mr. Peterson testified that Mr. Jarombek was seated about four feet to his right, and he recalled the Appellant entering the room from the bathroom. He testified that while he heard name calling, he could not recall what it consisted of, but testified that he could not recall the Appellant saying anything. (TR 42) He noted that Mr. Jarombek's reference to "casting" hit a sour note with the Appellant who, at that time, had been disqualified as a

crane operator. (See TR 44) Finally, while Mr. Peterson testified that he never used the word "argument" to describe the event that occurred between the Appellant and Mr. Jarombek on May 12th, he noted that the event involving these two gentlemen could appropriately be described as an argument. (TR 46)

- Mr. Jarombek described the event on May 12th as follows: "I was still looking to the north at Don [Morvig]. And I asked him about unloading the panels. He said that he couldn't do it because he was heading right through. And [the Appellant] said the statement of 30 or 50 ton, it doesn't really matter. I can unload them. They're all the same. Talking about cranes. I said, or Don Morvig, or he said, 'Right, Don?' Don Morvig said, kind of shrugged his shoulders and says no they're kind of different, all a little bit different. And without even looking towards [the Appellant], other than I know he was over there because I'd heard him talking, I said I don't want to hear this. Let's see, I don't want to hear this and I wasn't talking to you. At that time he said, oh let's see. At that time John Peterson was sitting to the left of me, replied, 'Are you talking to me?' And I said no. Then [the Appellant] said, 'I will have you know I'm, I'm fucking smart, not God damn stupid like you. You're a dumb son-of-a-bitch.' Just then he grabbed the bench, or I felt the bench lift and then fall to the ground. I couldn't tell you, and as I stated with, on my report, on one of these reports that I have been reading, I stated one to two feet. But because I wasn't sure, I told the roadster I wasn't sure exactly hew it was . . ." (TR 52) Following the Appellant's dropping of the bench, Mr. Jarombek stated that he looked at the Appellant and said: "What the hell did you do that for you, I don't know, son-of-a-bitch or fuck it, or something like that." (TR 52, 55) Mr. Jarombek testified that he made his "casting" comment to the Appellant "[b]ecause he [the Appellant] made me mad. I was hurting. And I figured I was going to hurt him by saying that." (TR 53. See also TR 55) Mr. Jarombek described the effect of the dropping bench as creating a "zing" going up his back. (Id.) He testified that he felt the true effect on his back the following day following the completion of an 80 mile truck run, at which time he experienced pain in his back. (TR 56-59)

- The Appellant described the events on May 12th as follows: At approximately 1440 hours, in the lunch room located at Grand Forks, ND, and in the presence of Mr. Morvig and Mr. Peterson, he testified that "[t]he part I played in the discussion is, is that the subject was brought up about, about the sluing of what they call casting of the crane. When I first came in [the room] I said hello. I introduced, I said hello to Don [Morvig]. That's what I, what I first did. And then afterwards then, then was brought up that I slued the magnet. Which I have to say I have done in my life, yeah." (TR 65) The Appellant denies that he made "strong allegations" about how smart he was and how lacking Mr. Jarombek was, and noted that while there was "strong language" used, he did not use any such language, but testified that he recalled Mr. Jarombek using strong language back at him. (Id.) In the end, the Appellant testified that his actions in lifting and dropping the bench Mr. Jarombek was sitting on was due to the fact that "[D]ale is out there interrogating me, getting me disgusted, getting me mad. He's know [sic] to do that a lot, about, about my crane operating, cause I can't run cranes. And like Peterson was talking here, or Morvig, anybody in this room here, including Mark Weyrauch, would probably, you know, could probably answer yes to that, that it does bother me." (TR 66) The Appellant testified that Mr. Jarombek said nothing to him following the bench incident. (TR 67)

- The Appellant testified that he was familiar with System Notice 158 ("Violence in the Work Place Policy"), as well as the Maintenance of Way Operating Rule 1.6. (See TR 71-74)

- Finally, Mr. Peterson was recalled as a rebuttal witness. In response to the following question by Mr. Bobby, Mr. Peterson responded as follows:

Q. Do you recall Mr. Oppegaard saying directly to Mr. Jarombek in a, cursing at him and, and to the effect that I don't want to hear this. I wasn't talking to you. I'll have you know I'm smart, not fucking dumb like you, you dumb son of a bitch? Did Mr. Oppegaard make that comment to Mr. Jarombek?

A. That does sound familiar. Yeah, I, I think, yeah. I didn't think he said anything but . . . after you read that it sounds like that's something like what he said." (TR 78)

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.

B. The Issue Regarding Compliance With Rule 40

During the formal investigation, Mr. Bobby, on behalf of the Appellant maintained that the Carrier failed to comply with Rule 40, specifically Rule 40A and C, because: the Appellant had already been determined by the Carrier to be guilty of the allegations made as a result of his removal from service, as well as the fact that the Notice received by the Appellant was not specific enough so as to apprise him of the precise nature of the charges against him. (See TR 4-5) However, the Appellant acknowledged that the hearing had been conducted "[i]n a fair and impartial manner under the rules of your

present agreement", and both the Appellant and Mr. Bobby noted on the record that they had been afforded full opportunity to ask questions of witnesses and principals at the investigation. (TR 86) In addition to the fact that neither Mr. Bobby nor the Appellant could state how, if at all, the alleged lack of specificity hampered the Investigation, neither could advise the Conducting Officer of anything that was not covered during the investigation, despite being given the opportunity to do so. (Id.) Finally, as discussed below, General Notice No. 215 permits the Carrier to remove any individual from service where it has determined that the individual "[e]ngaged in violent or threatening behavior".[3]

Given the Appellant's and the Organization's responses noted above, I find and conclude that the investigation at issue complied with Rule 40 in all respects, and therefore respectfully reject any allegation by the Organization to the contrary.

C. Substantial Evidence Exists to Support the Instant ChargeNat

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 May 12, 2004, failed to adhere to Rule 1.6, Conduct, of the Maintenance of Way Operating Rules, and also failed to adhere to General Notice No. 215, Violence in the Workplace Policy. The relevant portion of these Rules provides:

[3] Naturally, a finding by this Board to the contrary would result in a make whole award to the Appellant.

Rule 1.6:

Employees must not be:

1. Careless of the safety of themselves or others

6. Quarrelsome

7..Discourteous

System Notice 158 provides, in relevant part:

> BNSF is committed to providing a safe (and) respectful workplace that is free (of) from violence or threats of violence. For (the) purpose of this policy, workplace violence is any violent or potentially violent behavior that arises from (an occurrence) in the workplace that affects BNSF employees, contractors, customers, or public. Individuals who engage in (a) violent or threatening behavior may be withheld from service pending formal investigation, and may be subject to dismissal or other disciplinary actions, arrest and/or criminal prosecution.
>
> Definitions:
>
> Threats of violence include any behavior that it's very nature could be interpreted by a reasonable person as intent to cause physical harm (to other or another) or another individual.
>
> Acts of violence include any physical action, whether intentional or reckless, that harms or threatens the safety of another individual in the workplace.

In concluding that substantial evidence exists to support the charge at issue, I note the Appellant's actions, as supported by the testimony of Mr. Jarombek and Mr. Peterson (during his rebuttal testimony), rose to the level where the Carrier determined that a violation of the foregoing had occurred. It should also be noted, that having made that

determination, the Carrier elected to take both the Appellant and Mr. Jarombek out of service pending the outcome of the Investigation, an action permitted by System Notice 158. Their action in this regard is supported by the testimony of Peterson who noted that while no one present at the scene called the event an "altercation", it was indeed "an argument", as well as the Appellant's testimony wherein he described himself as being "disgusted" and angry.

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 three year probationary period, as well as a period of suspension for "actual days served from May 13, 2004 through June 15, 2004." Under the specific circumstances of this case, with particular emphasis on the need to promote a safe and violent-free work environment, I find that the penalty imposed by the Carrier to be a reasonable one.

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 three (3) year probationary period together with a suspension period beginning May 13, 2004 through June 15, 2004 to be, under the circumstances of this case, just and reasonable.

9-20-04
Dated

Dennis J. Campagna, Referee
SBA No. 1112