

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

CASE # 79 – AWARD #80 – Rocky M. Wilhelm  
[Ten (10) Day Record Suspension]

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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

Rocky M. Wilhelm, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on June 22, 1978. At the time of the incident that occurred on Thursday August 19, 2004, the Appellant was assigned as a Laborer on Mobile Maintenance Gang #978 in Douglas, Wyoming. The Appellant is represented by the Brotherhood of Maintenance of Way Employees.

### C. The Charge at Issue

On or about October 27, 2004, following an Investigation conducted on October 5, 2004 by Scott N. Lockwood, Assistant Roadmaster and Conducting Officer, the Appellant was charged with a violation of Burlington Northern Santa Fe Railway MOW Safety Rule S-17.5.2, effective January 31, 1999, when on August 19, 2004, the Appellant sustained an injury to his shoulder. The Carrier seeks to impose a 10-day Record Suspension as a result of the Appellant's alleged failure to comply with the foregoing Rule.

### D. Facts Gathered from the October 5, 2004 Investigation

On October 5, 2004, a formal investigation was conducted by Mr. Scott N. Lockwood 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, BMW. The record created at this formal investigation established that:

- On August 19, 2004, the incident giving rise to this Investigation occurred, as herein described by the Appellant in his testimony: "Well, I was told to go load that rail. . . I didn't see no tag line, so did as I was told. So if I'd had a tag line it would not have mattered whether I had a tag line or not 'cause I had to get up in that truck and position that rail so we could tie it down anyway. And that's when, that's when it happened when I was up on top where the tag line had nothing to do with my injury." (TR 18)<sup>1</sup> The Appellant sustained an injury to his shoulder, and was taken to the Douglas Wyoming Hospital, treated, and released. (Exhibit 13)
- On his Personal Injury Report, the Appellant was more detailed in his description of the task that led to his injury: "Loaded rail on truck – boom was lifting the rail

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<sup>1</sup> References to testimony taken from the official Transcript of this proceeding noted as "TR" followed by the relevant page number.

and I was on top holding it and it pulled to the opposite side of the truck and I pulled in rail trying to hold it." (Id.)

- On August 24, 2004, pursuant to the "common procedure" employed following an accident, a three-man inspection team was assembled for the purpose of re-enacting the incident in order to determine its root cause with the aim of preventing future occurrences. (TR 8) The inspection team, led by Casey Turnbull, Roadmaster from Guernsey, Wyoming, described the inspection procedure as follows: "We positioned the vehicle and the rail in the same position that it was in at the time of the incident. The boom truck operator was on the opposite side of the truck that the rail's being loaded. He had no visual, he could not see the rail that was being loaded or the employee that was holding or guiding the rail. There was no, no tag line in use. The, again, he couldn't see the employee or the rail being lifted until it was up at least head high. And they proceeded to load it onto the truck. Mr. Wilhelm was at the, followed the rail up into the truck and as guiding it into the rail rack. And it's my understanding that the rail did swing outward away from the truck and Mr. Wilhelm had a hold of it, of the rail loaded and the rail rack as it swang out away from the truck it overextended his arms I guess if you will, and that's about all I can tell you at this point in time. (Id.)
- The Report of Inspection filed by the team concluded with the following comment: "No repairs needed however loading and unloading procedures with boom will be revisited and the use of tag lines. Due to the fact that there is no remote operator for this boom a 3<sup>rd</sup> man may be needed to give hand signals and/or direction due to operator site limitation." (Exhibit 12)
- Mr. Turnbull noted that the procedure employed by the Appellant was neither the proper nor the acceptable manner of loading rail onto a boom truck. He described

the acceptable procedure as follows: "The procedure is now for loading rail to use a tag line or which is basically just a piece of rope, there's several different kinds, or tools that can be used. There are poles but basically it's a rope to guide the rail to keep the employee out of harms way." (TR 10-11) When comparing the procedure used by the Appellant to the proper procedure, Mr. Turnbull described the later he would follow: "Well either by having a tag line long enough to where I could position myself to where the operator could visually see me. Or, well by rule, we're supposed to have a tag line. So we should have a tag line on there. If that's not available then the 3<sup>rd</sup> man should have been there to give them directions and if it couldn't have been done safely then it shouldn't have been done at all." (TR 14)

- During his testimony, the Appellant stated that he believed that he was performing the task at issue in a safe manner, and that it would not have altered the result had a tag line been used. (TR 18) This statement, however, is contrary to the position the Appellant took when completing his Personal Injury Report where he noted that using a tag line would more than likely eliminated the incident causing injury to his shoulder. (See Exhibit 13)
- Finally, the Appellant acknowledged his understanding and awareness of the "empowerment rule", giving employees the right to refuse performing any task they believe is unsafe. (TR 24)

## 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. Compliance With Rule 40

During the formal investigation, Mr. Miller introduced Rule 40 into the record, and requested that the Hearing Officer conduct the Investigation pursuant to Rule 40. The record does not reflect any impropriety, alleged or actual, relative to the Appellant's Rule 40 rights. Accordingly, it is the determination of this Referee that the Carrier has complied with Rule 40 in this investigation.

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 August 19, 2004, failed to adhere to BNSF MOW Safety Rule S-17.5.2, effective January 31, 1999.<sup>2</sup> The Appellant acknowledged both his awareness as well as his understanding of this Rule. I find, on the basis of this record, that substantial

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<sup>2</sup> Rule S-17.5.2, Guiding the Load, provides, in relevant part: "Use only tag lines, poles or load hooks to guide a load. Use guides or fixtures, where available, for precision placement. Exception: When necessary for precision placement and following risk assessment, gloved hand or hands may be used to guide a load into final position provided that no part of the body is placed between the load and any obstruction that would create a pinch point. The valid implementation of the "exception" was not established, and there was no evidence that the Appellant conducted a "risk assessment" as required by the exception.

evidence exists to support these charges. In support of this determination, it is noteworthy that the Appellant, in his Personal Injury Report (Exhibit 13), acknowledged that with the exercise of more care on his part, particularly with the use of a tag line, the injury may very well have been prevented.

### The Appropriate Penalty

Having found and concluded that there is substantial evidence in the record to support the charges at issue, there remains the question as to the appropriate penalty. In this regard, the Carrier seeks to impose a Ten (10) Day Record Suspension. 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.

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.

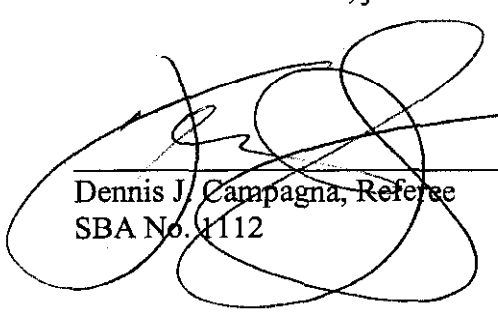
### CONCLUSION AND AWARD

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 Ten (10)-Day Record Suspension, to be, under the circumstances of this case, just and reasonable.

12-26-04

Dated

  
Dennis J. Campagna, Referee  
SBA No. 1112