

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

CASE #61 –Daniel E. Raymond (Level S – Thirty (30) Day Record Suspension)
AWARD # 62

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

Daniel E. Raymond, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company on April 25, 1978. At all relevant times, the Appellant was assigned as a Group 3 Machine Operator.

C. The Charge at Issue

On or about May 29, 2003, following a formal investigation conducted on April 30, 2003, The Appellant was served with following charge;

This letter will confirm that as a result of formal investigation held on April 30, 2003 in Douglas, Wyoming concerning your failure to be alert and attentive when performing ;your duties and your failure to be sure that all equipment components would clear before passing over the dragging equipment detector, at or near MP 123.11, East Fisher on the Orin Subdivision, resulting in extensive damage to dragging equipment detector, while operating BNX 06-00370 Ballast Regulator, on Wednesday, April 16, 2003 at approximately 1445 hours, while assigned as Group 3 Machine Operator, working on Mobile Surfacing Gang SC-27, near Douglas, Wyoming, **you are given a Level S – Thirty (30) Day Record Suspension as a result of violation of Burlington Northern Santa Fe Railway Maintenance of Way Operating Rule 6.50.3 and BNSF Railway Maintenance of Way Safety Rule S-1.2.3, effective January 31, 1999.** (Emphasis in the Original)

D. The Rules at Issue

Maintenance of Way Rule S-1.2.3, effective January 31, 1999, provides:

Assure that you are alert and attentive when performing duties.

Maintenance of Way Operating Rule 6.50.3, Equipment Components Clear, provides:

Before passing over crossings, switches, derails and frogs, be sure all equipment components will clear.

E. Facts Gathered from the April 30, 2003 Investigation

On April 30, 2003, a formal investigation was conducted by Wayne A. Meidinger, Roadmaster and Conducting Officer. At such investigation, the Appellant was represented by Roy L. Miller, Local Chairman, BMW. It was established that:

- On April 16, 2003, Alan Brown, Signal Supervisor at Guernsey, Wyoming was visited the scene of a Dragging Equipment Detector (“DED”) at MP 123.11 at approximately 3:00 p.m. (TR 4)¹ When at the scene, Mr. Brown observed that “[a] track machine had run into a static dragger at this location and damaged it . . . beyond repair.” (TR 5, See also TR 9) Exhibits 1 through 8 represent photographs taken of the damage caused to the Static Dragger. Later testimony offered by Jimmy Long, Assistant Roadmaster on the Powder River North, noted that at the time of the mishap, the Appellant was operating a 370 ballast regulator. (TR 10) Mr. Long testified that a Ballast Regulator is a machine used to regulate rock. It is used to bring rock from the side up into the track to fill any spots, (“Ballast”), between the ties. (TR 14) Mr. Brown testified that a DED is a safety device installed on the outside and between the rails to detect any type of dragging equipment that could cause damage to the concrete ties and/or cause a “major derailment.” (TR 6) Mr. Brown testified that he had been informed that the Appellant was operating a machine that struck the DED. Damage to the DED was estimated at \$3200, not including charges associated with the procurement and shipment of parts used for repair. (TR 7 See also Exhibit 11, page 4). The DED was out of service for a total of 8 days, during which time the area was left vulnerable to a potential derailment due to the lack of any device to detect dragging equipment.² (Id.)
- At Mr. Long request, the Appellant constructed a statement of the incident. Appellant related the following:

¹ References are to page numbers in the Official Record of the Investigation conducted on April 30, 2003.

² During such time, it was established that there were no derailments suffered by the BN in the immediate area while the DED was out of service. (TR 9)

I was regulating by dragging detector and had finished and to help the stabilizer broom out. I pulled forward about ten feet to start the broom and had the plow about six inches off the concrete ties and (clipped) the dragging detector, which bent the frame and paddles. (Exhibit 10)

Appellant noted that because he was nervous when he drafted his incident report, he originally wrote that he had the plow about five inches off the concrete ties. However, he crossed out the reference to "five inches", noting that the six inches was a more accurate estimate. (TR 21)

- Mr. Long, who also conducted a site visit to examine the damaged DED (TR 13) testified that the "normal" height of a rail varies anywhere from 6 5/8" (in a worn state), to 7 1/4". Given the fact that the top of the DED is one inch below the top of the rail and that the Plow on the Ballast Regulator was five to six inches off the concrete ties, the Plow would have hit the DED in any event. (See TR 12, See also TR 22 where the Appellant acknowledged same.)
- Rick McNicholas, Supervisor of Roadway Equipment headquartered out of Alliance, Nebraska, authorized a full and detailed inspection of the Ballast Regulator operated by the Appellant at the time of the incident. Mr. McNicholas testified that the unit had been completely rebuilt on March 6, 2003, and reported the overall condition as "like new". (TR 16) Mr. McNicholas also testified that in his opinion, the Appellant could have avoided the incident noting: "[A]s with all equipment he could have placed the plow in the lofts and the equipment that we have as locks to lock up the components so they're not being used at the time of operation." (Id.) That is, if the plow was in the locked position, it would not have struck the DED.
- During his testimony, the Appellant admitted that he struck the DED, that he could not have done anything differently to have avoided the incident, and that it is his "[n]ormal practice to broom with [his] regulator plow unlocked", but

acknowledged that had the plow been up and in its locked position, it would not have hit the DED. (TR 19-20) The Appellant testified, however, that he has observed other machine operators operating Ballast Regulators, and that none of these operators placed their plows in the locked position each time they are brooming. (TR 21)

- Appellant testified that he was alert and attentive on April 16, 2003, and that he immediately informed his foreman once he discovered that he had hit the DED. (TR 21-22) Appellant also noted that he did comply with Maintenance of Way Operating Rule 6.50.3. (TR 24)
- Finally, it was undisputed that the Appellant was a punctual employee. (TR 15)

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 April 30, 2003, Mr. Miller maintained that in his opinion, the Investigation had not been conducted in a fair and impartial manner. In support of this position, Mr. Miller maintained that “[i]t’s not fair to just charge an employee with a rule violation and then provide no proof or even accurate coherent testimony toward that fact. It only works to intimidate employees.”

Rule 40 provides due process guarantees to bargaining unit employees. It does this by providing timely notice of alleged violations to the employee at issue and further provides that the appropriate local organization representative receive *at least* five (5) days advance written notice of the investigation. Accordingly, 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. This is the essence of due process - timely notice, the right to representation, the right to confront ones accusers, and the right to be heard under a fair and impartial procedure.

While giving due respect to Mr. Miller’s opinion, respectfully, his concern is more in the manner of the standard of proof offered by the Carrier, and not that the Appellant’s due process rights as outlined in Rule 40 have been violated.

In the instant matter, I find that timely notice was provided to the Appellant and his Union representative, and that his rights to confront his accusers, to call witnesses of his own and the right to present evidence were all honored by the Carrier. Accordingly, 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.

Given the nature of this proceeding, discipline, it is undisputed that the Carrier bears the burden of proof. In this regard, in this Appellate proceeding, it must be determined whether there is "Substantial Evidence" in the record to support the charges at issue.

Following a careful and thorough review of the Record, I find that there is substantial evidence to support the charges at issue. In reaching this conclusion, I am most persuaded by the Appellant's own admission – that he did, in fact, hit the DED, and that the DED was damaged by this incident. I am also moved by the Appellant's acknowledgement that had the plow been up and in a locked position, as Mr. McNichols suggested, it would not have hit the DED. (See TR 20) Even assuming, arguendo, that, as Appellant maintains, other operators would not raise and lock their plows under similar circumstances, by Appellant's own admission, and consistent with Mr. McNichols testimony, accident avoidance is assured through prudent action. Prudent action in this case was insuring that the plow was up and in a locked position.

Given the foregoing, I find and conclude that substantial evidence exists to prove the charge at issue – that under the facts of this case, the Appellant was not attentive when performing his duties on April 16, 2003, and that his action of striking and damaging the DED was unavoidable as noted and discussed above.

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 a thirty (30) day record suspension to be appropriate under the specific facts of this case.

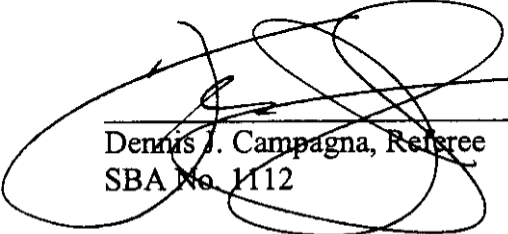
CONCLUSION AND AWARD

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 April 30, 2003 Investigation;
2. There is Substantial Evidence in the record to support the charge at issue. Accordingly, I find and conclude that the Appellant, by his actions on April 16, 2003, violated BNSF Railway MOW Operating Rule 6.50.3 and BNSF Railway MOW Safety Rule S-1.2.3.
3. Finally, I find the Carrier's suggested Thirty (30) day Record Suspension to be appropriate under the circumstances of this case.

08-28-03

Dated


Dennis J. Campagna, Referee
SBA No. 1112