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

CASE #62 – Rick Teniente (Level S – Thirty (30) Day Record Suspension)
AWARD NO. 63

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

Rick Teniente, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company on April 25, 1991. At all relevant times, the Appellant was assigned as a Foreman on Gang M-978 working the area of Alliance, Nebraska.

C. The Charge at Issue

On or about June 27, 2003, following a formal investigation conducted on May 30, 2003, The Appellant was served with following charge:,

> This letter concerns formal investigation held on May 30, 2003 in Alliance, Nebraska, concerning your dishonesty and falsification of payroll records on February 13 and 14, 2003, while you were assigned as Foreman, on Gang M-978 working the area of Alliance, Nebraska. (First knowledge of this incident bhy a BNSF Company Officer was Thursday, February 20, 2003). **You are hereby given a Level S – Thirty (30) Day Record Suspension as a result of violation of Burlington Northern Sante Fe Railway Maintenance of Way Operating Rule 1.6, effective January 31, 1999.** (Emphasis in the Original)

D. The Rule at Issue

Maintenance of Way Rule 1.6, effective January 31, 1999, provides:

> 1.6 Conduct
> Employees must not be:
> 4. Dishonest

E. Facts Gathered from the May 30, 2003 Investigation

On May 30, 2003, a formal investigation was conducted by Ray Brennan, Roadmaster and Conducting Officer. At such investigation, the Appellant was represented by Robert Nickens, BMWE Vice General Foreman, and by Roy L. Miller, Local Chairman, BMWE. It was established that:

- Randy Shaffer, a General Foreman, testified to the following chain of events relating to February 13 and 14, 2003: At approximately 12:30 p.m., Mr. Shaffer

received a call from Roadmaster Huddle who informed him that there had been a derailment in Scottsbluff, and that two Gangs of men were needed to assist. At that time, Mr. Shaffer was not aware when his presence in Scottsbluff would be required. At approximately 1:30 p.m., Mr. Shaffer held a briefing in order to inform those workers whose presence would be required to assist with the derailment. Later that evening, Mr. Shaffer called the Appellant who was at home and told him that he was to report to Scottsbluff at 5:00 a.m the following morning. Appellant testified that he and his crew of five men reported to Scottsbluff as directed, and arrived at approximately 4:30 a.m. (See TR 34, 54)

- On or about February 28, 2003, subsequent to the Appellant's work at the Scottsbluff derailment site, Terry Huddle, Roadmaster at Alliance Nebraska, and the Appellant's immediate supervisor, was directed by Division Engineer Steve Heidzig, the charging officer, to review the time records of all Gang members who rendered assistance in Scottsbluff. (TR 30) Upon review of said time records, Mr. Huddle testified that he discovered a discrepancy in the time the Appellant submitted. In this regard, Mr. Huddle noted that "[t]here's no break in the time showing that their [sic], that they'd gone off duty for any amount of time at all. They were paid straight through from the morning of the 13th straight through to end of the day on the 14th." (TR 20) As a result, Mr. Huddle noted that the Appellant "[p]ut in time on February 14, Paycode 20[1], for 7 hours and 30 minutes, which is double time twice." (TR 24) Upon further review, Mr. Huddle noted that other Gang members who worked in Scottsbluff did the same thing including Keith Bauersacks, Urrvano Gamez, Gene Simmons, William Bahrke and Roger Stein. (TR 22-23, Exhibit 16) Upon discovering this payroll discrepancy, Mr. Huddle admitted that he did not speak with the Appellant, the "timeroll maker", in order to solicit information from the Appellant. (TR 30)

- David Joynt, General Chairman of the Burlington System Division of the Brotherhood of Maintenance of Way Employees, gave testimony on behalf of the

[1] Paycode 20 is the designation used to denote double time payment.

Appellant. Mr. Joynt's testimony was solicited due to the fact that in his various Union held positions, as well as in his prior capacity as Foreman, Mr. Joynt had first hand experience in keeping and entering time into BNSF's payroll system. In addition, as General Chairman, it is Mr. Joynt's duty to interpret the Agreement of the Maintenance of Way. In this capacity, Mr. Joynt testified that on a regular basis, he gives counsel to both labor and management representatives in contract interpretation. (See TR 48, 52) In this later capacity, Mr. Joynt rendered an opinion on payroll and challenge procedures under Rules 29, 30 and 50 of the Collective Bargaining Agreement. The relevant portion of these Rules provide as follows:

RULE 29 OVERTIME

A. Except as otherwise provided in this Agreement, time worked preceding or following and continuous with a regularly assigned eight (8) hour work period shall be computed on actual minute basis and paid for at time and one-half rate, with double time computed on actual minute basis after sixteen (16) continuous hours of work in any twenty-four (24) hour period computed from starting time of employee's regular shift.

B. Employees required to work continuously from one regular work period into another regular work period shall be paid for the second or succeeding period at rate of time and one-half for the first sixteen (16) hours of work commencing with the starting time of the regular work period and thereafter at double-time rate until the beginning of the next regular work period, except that when a majority of employees affected desire to continue to work the remaining hours of their regular work period instead of being released for rest, such remaining regular work period hours will be paid for at straight time rate.

RULE 30 CALLS

C. The time of an employee who is notified prior to release from duty to report for work will begin at the time required to report and end when released. The time of an employee who is called after release from duty to report for work will begin at the time called and will end at the time he returns to designated point at headquarters.

RULE 50 PAY

D. Employees required to make out time sheets and sign for themselves or gang will be promptly notified in writing when said time is not allowed and the reason therefore given, and such timeroll maker will notify the employees affected.

Referring to the foregoing provisions, it was Mr. Joynt's testimony that the interplay between Rules 29 and 50 provides that the Roadmaster or the Payroll Department who believes that a discrepancy might exists on a time sheet are required to so inform the timeroll maker in writing that because of such discrepancy, they will make a change in the time submitted. The timeroll maker, in turn, is then responsible to notify all members of his crew of such anticipated change. Where any affected employee believes that the change is incorrect, he has the option of notifying his local chairman or vice chairman who will review the matter. From that point forward, and where warranted, a grievance can be filed under Rule 40. (See TR 43-44) At the time of his testimony, Mr. Joynt noted that his office had handled over twenty such cases, having resolved an overwhelming majority of such cases. Moreover, he testified that while the Carrier may have challenged time submitted, none of the employees involved had been charged with a formal investigation. (TR 45)

- The Appellant's testimony confirmed that of Mr. Shaffer with respect to the timing relative to the assignment at the derail site at Scottsbluff. Appellant added that in response to a question posed to Mr. Shaffer as to how payment for this service would be computed, the Appellant noted that Mr. Shaffer "[p]ut us on standby. He said he would call us and that's why he took our phone numbers." (TR 56) With regard to the payroll discrepancy at issue, Appellant testified as follows: Donna Schooler from the payroll entered the Appellant's time for the 13th and 14th of February. (TR 61) The first time the Appellant noticed that 7 ½ hours of double time had been entered twice was on February 24th when he reviewed his paystub. When he noticed that he had been paid for 15 hours at double time, Appellant "[t]hought it was odd." (Id.) Accordingly, on February

25th, Appellant had a conversation with "Joe at timekeeping" and explained the apparent error to him. Appellant followed his conversation with Joe with an e-mail to timekeeping. Upon receipt of the Appellant's e-mail message, Ms. Schooler from timekeeping responded:

> "Received your email of Tuesday, February 25. What are you actually looking for? In doing a query in PARS I discovered both the 13th, 3/13/03 and 2/14/03 in the V condition. This means at this time it has been entered and saved in PARS but not submitted into PATS. (Due to me touching the record my last, excuse me.) Due to me touching the record last, my name is appearing on this email. (Part) My part (is) was only submitting the records to PARS. (See TR 62)

Appellant noted that the foregoing response from Donna Schooler was an indication that she, and not the Appellant, entered the Appellant's time for February 13th and 14th. (TR 65)

- Finally, the Appellant denied all allegations against him, taking strong exception to the Carrier's allegation alleging dishonesty.

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 outset as well as the conclusion of the Investigation conducted on May 30, 2003, Mr. Nickens and Mr. Miller asserted that in their opinion, the Investigation had not been conduced in a "fair and impartial manner". In support of their position, Mr. Nickens stated:

> "The problem is that the charge against Mr. Teniente was not specific as required by the agreement. And that's prevented Mr. Miller, Mr. Teniente, and myself from being prepared as we would, would like to be for this hearing. (TR 17, 71-72)

In similar fashion, Mr. Miller, speaking on behalf of the Appellant, noted:

> "[I] draw your attention to my letter of Mr. Heidzig, to Mr. Heidzig of March 2, wherein, I asked for specific charges, due to the vagueness of the charges, and for any documentation, be they accounting payroll or whatever, prior to the start of this investigation. Which I received no response from Mr. Heidzig either on specific charges, or of any records that may be entered into this transcript by the Carrier." (TR 17, 73)

In conducting Appellate review of Investigations, it must be determined whether the provisions of Rule 40 have been adhered to by the Carrier. Rule 40 provides due process guarantees to bargaining unit employees. At the outset, Rule 40 requires, as a prerequisite for any disciplinary action, a "fair and impartial investigation". (Rule 40(A)) Rule 40 also requires timely notice of alleged violations to the employee at issue, no later than 15 days from the date of occurrence, and further provides that the appropriate local

organization representative receive *at least* five (5) days advance written notice of the investigation. Moreover, Rule 40 mandates that the Charges lodged against any employee must "specify the charges for which investigation is being held." (Rule 40 (C)) The purpose for specificity is obvious – it enables the Appellant (and his representative) to adequately prepare a defense to the charges. Accordingly, the stated purpose of the Rule is three-fold: *first*, to specify the charges against the Appellant in order that the Appellant can prepare a proper defense, *second*, to enable the Appellant to secure proper representation, and *third*, to arrange for the presence of necessary witnesses the Appellant might desire. This is the essence of due process – specificity of the charges, timely notice, the right to representation, the right to confront ones accusers, and the right to be heard.

In ascertaining whether the Carrier substantially complied with Rule 40, given the Organization's challenges noted above, we begin with the Charges at issue. In this regard, the Carrier's charge to the Appellant noted that the Investigation would be held:

> "[f]or the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged dishonesty and your alleged falsification of payroll records on February 13 and 14, 2003, while you were assigned as Foreman on Gang M-978 working (in) the area of Alliance, Nebraska."

Reviewing the foregoing allegation, and without more, a "reasonable person" cannot tell what specifically was done to result in the Charges made against the Appellant. This concern is magnified by the fact that the Carrier has alleged dishonesty on the part of the Appellant – a very serious charge. Accordingly, it was reasonable for the Organization to request more specifics in order that they could prepare a proper defense. Under these circumstances, therefore, the Carrier's failure to respond to the Organization's multiple requests for specifics was unreasonable. Accordingly, I find that the Carrier failed to comply with Rule 40 in this case.

C. The Lack of Substantial Evidence to Support the Charges

Putting aside for a moment the Carrier's failure to comply with Rule 40, it is apparent, when reviewing the transcript of the Investigation conducted, that the Carrier too was having difficulty understanding exactly what the Appellant was charged with. Accordingly, for the reasons noted below, substantial evidence does not exist to support the charges against the Appellant.

As an initial matter, while I find both Mr. Huddle and Mr. Shaffer to be honorable individuals, their testimony fell woefully short of providing a basis for the charge at issue. When reviewing Mr. Huddle's and Mr. Shaffer's testimony together, it *appears* that the Carrier has challenged the Appellant's time records for two different reasons, *neither* of which was clearly stated: First, the Carrier disputes that the Appellant worked straight through from 7:30 a.m. on February 13th through 4:30 p.m. (1630 hours) on February 14th. In this regard, while the record fails to develop facts to support this first concern, it *appears* that the Carrier has taken the position that the Appellant was put on standby following the completion of his shift at 1630 hours on February 13th, and remained on standby until approximately 9:50 p.m. (2150 hours) at which time Mr. Shaffer called him and told him to report to the derailment scene at Scottsbluff at 5:00 a.m. on February 14th. Accordingly, from approximately 2150 hours until the Appellant left to go to Scottsbluff, the Carrier apparently maintains that his time should have stopped. The Appellant's time would begin again the following morning on February 14th when he left for Scottsbluff, and continue, on an overtime basis until his normal start time of 7:30 a.m. From 7:30 a.m. forward on February 14th, Appellant should have been paid on a straight time basis. While these suppositions may indeed be true, more is required to prove the serious allegation of dishonesty. Indeed, I cannot support charges of such a serious nature that have neither been fully developed nor supported by the record evidence. Moreover, further review of Mr. Huddle's testimony, which he acknowledged was "secondhand", reveals that he too did not understand the paycode meanings, stray user numbers and their relevance to the charges at issue. It is clear,

therefore, that both Mr. Huddle and Mr. Shaffer had a difficult time acknowledging the breath, scope and nature of the Charges.

The second reason for the Carrier's dispute lies in its allegation that the Appellant allegedly charged the Carrier for double time twice, for a 7 ½ hour time period worked on February 14th. Indeed, the thrust of the Carrier's Investigation of the Appellant focused on this second concern. However, the record evidence shows, and it was undisputed that it was not the Appellant who entered this challenged "Code 20" time, but the timekeeping office. Moreover, it is also undisputed that once the Appellant became aware of this error, it was he who notified timekeeping, a fact acknowledged by their response to his email message to them. Accordingly, even assuming, arguendo, that the Carrier complied with Rule 40, the record evidence fails to support the charge herein under the Substantial Evidence rule.

As a final note, while it cannot be denied that the Carrier has every right to insure the honesty of its workforce, in the instant matter, given the vague and uncertain nature of the Carrier's charges as they relate to the Appellant's time records, it is clear that the concerns raised by these charges were ripe for review pursuant to the procedure suggested by Mr. Joynt during his testimony. Indeed, this it precisely the scenario Rules 29, 30 and 50 were designed to address and resolve. This conclusion is supported by Mr. Shaffer's testimony, who agreed that such a procedure would have been a more productive way of dealing with the Carrier's concerns. (See TR 35).

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CONCLUSION AND AWARD

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

1. The Carrier has failed to comply with Rule 40;
2. Even if the Carrier had been found to have complied with Rule 40, substantial evidence does not exist to support the Charges lodged against the Appellant.

Given the foregoing conclusions, the Charges against the Appellant are hereby dismissed in their entirety, and the Carrier is directed to purge the Appellant's personnel file of any and all references thereto.

09-02-03
Dated

Dennis J. Campagna, Referee
SBA No. 1112