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

CASE #63 – Philip R. Conklin (Level S – Thirty (30) Day Record Suspension)
AWARD NO. 64

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

Phillip R. Conklin, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company on April 13, 1977. At all relevant times, the Appellant was assigned as a Foreman on Gang MG02 working the area of Alliance, Nebraska. Prior to the instant investigation, it is undisputed that the Appellant had never been disciplined.

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, at approximately 10:00 p.m., Mr. Shaffer called the Appellant who was tied up at the Day's Inn in Alliance, Nebraska and told him that he was to report to Scottsbluff at 5:00 a.m the following morning. Scottsbluff is approximately 60 miles and a one-hour drive from Alliance. (TR 54) Appellant testified that he and his crew of four men reported to Scottsbluff as directed, and arrived at approximately 4:50 a.m. (See TR 66, 88)

- 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 58) 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 "I noticed that there was no break in the time that was put in. That there was no break between the days. They were showing they worked straight through. (TR 51) Mr. Huddle explained: "There should have been a break in the time at some time, at some point, there should have been break in the time that was put in. . . After finding, after investigating and looking into it, I found that there was an error. That they were either released and they worked, they didn't work straight through. There should have been a break in that time at some location, some time. . . .So their time should have either stopped when they were notified, or if they considered themselves to be released from duty before that, their time should have stopped and then it should have started again when they were called and told what time they needed to be at work the next day." (TR 52) "So, when Mr. Conklin was put on call and told that he would be called, he is still on call and still being paid

for that time. When Mr. Shaffer notified him of the time that he would be required to work, be at work the following morning, his time should have stopped." (TR 53) Accordingly, Mr. Huddle noted that the Appellant was released from duty at the time of Mr. Shaffer's call to him at approximately 10:50 p.m. on February 13th. (Id.) As a result, Mr. Huddle noted that the Appellant put in time on February 14, Paycode 20[1], for 7 hours and 30 minutes, which is double time twice. (TR 56) Accordingly, Mr. Huddle maintained that the Appellant's time record should have reflected the following: 8 hours of straight time for February 13th (7:30 a.m. to 4:00 p.m.), overtime (Code 12) from 4:00 p.m. to 10:50 p.m. at which time Mr. Shaffer called him. On February 14th, the Appellant should have been paid at an overtime rate from approximately 3:00 a.m. to 7:30 a.m., and then paid at a straight time rate from 7:30 a.m. until he was released that day at approximately 3:00 p.m. (TR 41)

- Upon further review, Mr. Huddle noted that other Gang members who worked in Scottsbluff had time records that reflected the same time as the Appellant's including Gary Himle, Julian Sanchez and Jimmy Uehling. (TR 39, Exhibit 12) 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 55. See also TR 92) Moreover, Mr. Huddle noted that the purpose of this Investigation was as follows: "What we are trying to find out in this investigation is was there, is there really actually an overpayment." (TR 58)

- In his testimony, Mr. Hudddle also noted that it was Mr. Teniente who first notified timekeeping about the double-double time overpayment issue. (TR 43, 58) Mr. Teniente was the Foreman who oversaw the second Gang reporting to the derailment site on February 14th. (See TR 57-58)

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

- David Joynt, General Chairman of the Burlington System Division of the Brotherhood of Maintenance of Way Employees, gave testimony on behalf of the 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 72, 79) In this later capacity, Mr. Joynt, who has handled literally "hundreds" of timekeeping issues during his career, 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 (Exhibit 16)

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 (Exhibit 13)

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 (Exhibit 15)

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 74-76) 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. (Exhibit 17, TR 77)

- In response to a question from Mr. Brennan regarding how payment was to be made to the Appellant and his men, Mr. Shaffer responded: "The guys asked me at the initial briefing at Mullen how, how they were going to get paid and what they were entitled to. And I told them I did not know, they needed to make some inquiries as to how to pay. I didn't know exactly what to tell them." (TR 68) Subsequently, Appellant noted that one of his Gang members called Mr. Joynt (who recalled receiving the inquiry at TR 79), seeking advice on how employee time would be paid. Appellant was standing next to this individual, able to hear Mr. Joynt's response. (TR 96) Appellant testified that Mr. Joynt recommended

that under the circumstances, given the uncertainty about being called at a moments notice by Mr. Shaffer to report to the derailment site before 5:00 a.m. on February 14th, that all Gang members were "on call" throughout the entire time period of February 13th and 14th, thereby accounting for the lack of any break time in the Appellant's time records. (TR 97. See also Mr. Joynt's consistent testimony on TR 79-80)

- The Appellant's testimony essentially confirmed that of Mr. Shaffer with respect to the timing relative to the assignment at the derail site at Scottsbluff. Appellant added, however, that in Mr. Shaffer's closing remarks in the telephone call made to the Appellant on the evening of February 13th, that Mr. Shaffer noted "[i]f we need you before 5:00 a.m., we will call you." (TR 90) Accordingly, it was the Appellant's belief that he remained "on call" throughout the entire evening of February 13th and into February 14th, in that he was "[t]o be available [on] a moment's notice and go to the derailment at Scottsbluff anytime." (Id.)

- Finally, the Appellant denied all allegations against him, taking strong exception to the Carrier's allegation alleging dishonesty. In this regard, Appellant noted that in his 20 years of service as a Foreman with the Carrier, he had never had a dispute over his time, and had never been disciplined. (TR 92-93)

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, the Appellant, supported by Mr. Nickens and Mr. Miller, asserted that in his opinion, the Investigation had not been conduced in a "fair and impartial manner". In support of this position, the Appellant stated:

> "Because I was never charged with a rule violation until you brought it up here a little while ago. On the paper work I got it was pretty vague, it proved nothing. And I just don't see why we're here in the first place." (TR 106. See also TR 28)

In similar fashion, Mr. Miller, in referring to his letter to Mr. Heidzig dated March 2, 2003, at paragraph 2, noted:speaking on behalf of the Appellant, noted:

> Second point of protest in this matter is the vague nature of the charges. Again, Rule 40 of the current agreement stipulates that the Carrier must be specific in the charges that are filed against an employee. In order to provide an adequate defense for these gentlemen, I need to know specifically what they did to falsify payroll records on February 13th and 14th, 2003. These are serious charges, and to simply state these gentlemen were dishonest and falsified payroll records gives me no idea what the Carrier hopes to prove. I will need a detailed accounting of the payroll records submitted by these employees for the dates in question prior to proceeding with these investigations. (TR 28)

It was undisputed that the Carrier never responded to Mr. Miller's inquiry. (Id.)

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, 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 in light of 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 MG-02 working (in) the area of Alliance, Nebraska." (See TR 20)

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, and for the reasons noted below, substantial evidence does not exist to support the charges against the Appellant.

It is well established arbitration precedent that in order to discipline an employee for dishonesty or theft, an employer, here the Carrier, must establish and prove, by accurate, reliable, and credible evidence, that there has been some "intentional wrongdoing" on behalf of the employee. As used in the context of employee relations, this "intent" is present when the employee, for personal gain, "knowingly and willfully" takes something that does not belong to him, or to which he is not entitled. The terms "knowing and willful" serve to distinguish an act of dishonesty or theft from situations in which the employee exercised poor judgment, made and inadvertent error, was excusably ignorant, committed a good faith mistake or had implied permission. Accordingly, the record of Investigation must be reviewed in order to ascertain whether the Carrier established that the Appellant's time records were knowingly and willfully falsified. For the reasons that follow, I find that the Carrier has failed in its required burden.

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. Initially when reviewing Mr. Huddle's testimony, it is apparent that while he was able to vocalize the discrepancies he believed existed in the Appellant's time records, he was not willing to accuse the Appellant of dishonesty. In this regard, Mr. Huddle, who acknowledged that the relevant portion of his testimony was based on hearsay, testified that he ascertained the purpose of the May 30th investigation as follows: "What we are

trying to find out in this investigation is was there, is there really actually an overpayment." (TR 45, 58) Mr. Huddle further noted that "Looking at the time the way it is in here, that time could actually happen." (TR 45) In this similar regard, Mr. Conklin testified that if the Appellant "correctly" understood that he was on duty throughout the evening of February 13th into the morning of February 14th, "If, the way he interpreted it to be correct, if he felt that he was on call until then, yes, you could say he was correct. (TR 56) Moreover, as noted above, Mr. Huddle never spoke to the Appellant, the timekeeper, in order to ascertain his version of what transpired.

In his testimony, Mr. Shaffer acknowledged the Appellant to be "an honest person, an honest foreman". Moreover, Mr. Shaffer acknowledged that rather than a question of dishonesty, the instant case is more of a "[m]isunderstanding of how time is turned in paid." (TR 69) Accordingly, Mr. Shaffer noted that: "In my opinion, I think this could have been handled a lot differently and not in a formal state. I think, just in my opinion, a set down with the disagreeing parties would have probably solved as much as this", and in a much shorter time. (Id.)

Given the foregoing statements from Carrier representatives who were called by the Carrier to give testimony in this Investigation, I find that the Carrier has not established, under the Substantial Evidence rule, a basis for demonstrating that the Appellant was indeed dishonest.

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 69). Perhaps the Carrier might consider the suggestion made by Mr. Nickens – that proper training on the correct

procedures associated with timekeeping requirements might very well help to avoid future problems of the same nature. (See TR 104)

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.

09-03-03
Dated

Dennis J. Campagna, Referee
SBA No. 1112