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

CASE #69 – Lee Edward Gerhardson (Termination of Employment)
AWARD NO. 70

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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 contain only the Referee's signature is considered "final and binding" subject to the provisions of the Railway Labor Act.

### B. The Appellant

Lee E. Gerhardson, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company on June 29, 1992. At all relevant times, the Appellant was assigned as a Grinder on the Staples Subdivision in Minneapolis, Minnesota. Prior to the instant investigation, the Appellant had been disciplined on four separate occasions – Twice in 2002, for absenting himself from duty without authorization, for which he

received a formal reprimand, and for his failure to be prepared to perform his duties as a grinder, for which he received a ten-day record suspension. In addition, and prior to the instant charges, the Appellant was reprimanded on two separate occasions in 2003 – for his failure to report for duty at the designated time while assigned as a grinder, for which the Appellant received a 20 day record suspension, and for sleeping, playing cards, and reading while on duty, for which he received a 30 day record suspension.

C. The Charge at Issue

On or about August 8, 2003, following a formal investigation conducted on July 16, 2003, The Appellant was served with following charge:,

> This letter will confirm that as a result of our formal investigation on July 16, 2003 concerning your alleged failure to acquire protection prior to fouling track and failure to complete a job briefing prior to fouling track on June 4, 2003 at approximately 1045 hours near MP 12.50 on the Staples Subdivision while assigned as a grinder, Minneapolis, MN, you are dismissed from employment for violation of BNSF Maintenance of Way Operating Rule 6.3.3, and BNSF Instruction Rule 1.1.1.

D. The Rules at Issue

**BNSF Maintenance of Way Operating Rule 6.3.3** provides:

> **Employees assigned to work as a lookout, and lone workers using individual train detection must complete the form entitled, "Statement of On-Track Safety" prior to fouling a track. The form completed must be in the employee's possession while the work is being performed.**

**BNSF Engineering Instructions, Rule 1.1.1. Fouling the Track**, provides:

> **Each roadway worker is responsible for determining that on-track safety is provided before fouling any track or assuming a position for which he or she could potentially foul a track while performing his or her duties.**

E. Facts Gathered from the July 16, 2003 Investigation

On July 16, 2003, a formal investigation was conducted by John Williams, General Director Line Maintenance in Minneapolis, MN. The Appellant was represented by Roger Bobby, BMWE Vice Chairman. At said Investigation, it was established that:

- James Wages, the Roadmaster in Indianapolis,, Northtown Yard, testified that on June 4, 2003, at approximately 11:30 a.m., FRA Inspector Michael Kulbacki informed him that the Appellant had approached he and Track Inspector John Witstine while he and Mr. Witstine were inspecting the class yards. Mr. Wages testified that Mr. Kulbacki inquired of the Appellant if he had completed a statement on track safety, or if he had a job briefing prior to fouling the tracks at that location. Mr. Kulbacki informed Mr. Wages that the Appellant's response to this inquiry was in the negative. As a direct result of this response, Mr. Kulbacki drafted and filed a FRA Violation. (TR 6)

- The relevant portion of the FRA Violation alleged as follows:
  **Description**: Roadway worker fouling a track without ascertaining that provision is made for on-track safety. No on track protection for Mr. Lee Gerhardson on EC #6, Track, Northtown Classification Yard at 10:45 a.m., Twin Cities Division, Staple Subdivision. Violation Recommended: Yes. Written notification FRA: Remedial action is required.
  **Description**: Incomplete job briefing. No job briefing for Mr. Lee Gerhardson on Track EC6 Northtown Classification Yard at 10:45 a.m., Twin Cities Division,

Staples Subdivision. Violation Recommended: Yes. Written notification: Remedial action is required.
(See Exhibit 4, TR 6) FRA Inspector Michael Kulbacki was not called to testify in the Investigation.

- Mr. Wages described the proper protection required when walking down a classification track as follows: "Protection would be to have a statement of on-track safety filled out or positive protection such as a switch lined and locked away from movement on the track, or temporary derail with red flag and lock placed on it to prevent movement on that track." (TR 7) Mr. Wages testified that the Appellant did not have the required protection in place on June 4, 2003, when he was observed by FRA Inspector Kulbacki. (Id.)

- Mr. Wages described the proper way in which to foul a track so as to be consistent with applicable BNSF Rules as follows: "The proper way to be foul of the track when you're looking for a job briefing with a guy that already has protection on the track is to call that person off the track and be a minimum of four feet away from the nearest rail to receive your job briefing before fouling the Track B. The, the statement and, or the statement on-track safety and the foul of track rule reads that before fouling a track, all roadway workers will know the protection or have a job briefing before fouling the nearest rail of a live track." (TR 8)

- It was the Appellant's position that on June 4, 2003, following his briefing with Welder Gerald Montague, he noticed Mr. Witstine and FRA Inspector Michael Kulbacki (whose name the Appellant did not recall), across from he and Mr. Montague "[a]nd they were both on their knees looking down at a track." The Appellant testified that when he noticed that a train was coming down the track, he thought it in the best interest of Mr. Witstine and Mr. Kulbacki's safety to warn them of the oncoming train. Upon failing to get their attention, the Appellant testified that he then decided to "[g]o over there and tell them, warn

Mr. Witstine, the track inspector, and Mike, the FRA, that there's a train coming." Upon approaching Witstine and Kulacki, the Appellant testified that Mr. Kulacki interrupted him and inquired if he (the Appellant) had an on track safety statement, to which the Appellant answered in the negative. The Appellant testified that he never inquired of Messers. Witstine and/or Kulacki as to what they were finding. The Appellant did not produce Mr. Montague to give his testimony at the Investigation. (TR 12-13)

- Mr. Witstine gave the following relevant testimony at the Investigation: That he recalled the Appellant approaching he and Mr. Kulacki on June 4th; "And he [the Appellant] started walking toward me and I think his comment was something about did we find anything, or what did we find so far, or something, probably referring to defects." (TR 15) Mr. Witstine recalled seeing a switch engine working in an adjacent track. (TR 17) That as the Appellant approached him and Mr. Kulacki, Mr. Kulacki "cut [the Appellant] off right away and took the Appellant aside. (TR 18) that he recalled the Appellant inquiring about his and FRA Kulacki's authority *after* they had asked the Appellant for his. (TR 18)

- Subsequent to hearing Mr. Witstine's testimony, the Appellant testified as follows: That on June 4, 2003, he did not have authority "or anything to brief with Mr. Witstine and the FRA." (TR 22) In response to the question as to why the Appellant, as his initial remarks to Messrs. Witstine and Kulacki, he did not inquire about their authority, the Appellant indicated that he "[w]alked up to Mr. Witstine, [and inquired] about his authority and right away the FRA guy cut me off. Took me off to the side." (TR 23) The Appellant admitted that he did not have an on-track safety statement or anything like it. (Id.) That he was informed by FRA Kulacki that his actions would more than likely be cause for some type of "action taken". (TR 24) That the Appellant is "somewhat familiar" with Engineering Standards, and the requirements thereunder; (TR 25) understands Engineering Instruction Rule 1.1.1, (TR 27), and is "a little bit familiar" with Maintenance of Way Operating Rule 6.3.2, (Id.), and passed the Maintenance of

Way Operating Rules in 2003 (TR 26). In this same general regard, the Appellant acknowledged that he never sought clarification of any of the applicable rules from supervisory personnel (TR 27). The Appellant was evasive regarding his knowledge of Engineering Instruction 1.1.3, Job Briefings, choosing not to answer the question directly. (See TR 28)

## 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

During the Investigation conducted on July 1, 2003, neither the Appellant nor the Union raised or alleged a Rule 40 violation. Accordingly, the provisions of Rule 40 have been met.

C. The Appellant's Credibility

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.

For the reasons that follow, with particular emphasis on the evasive nature of the Appellant's testimony, particularly as it relates to the Appellant's knowledge of the applicable Rules and Instructions, and more particularly as to the Appellant's application of these Rules and Instructions on June 4, 2003, the findings of the Carrier on credibility issues will not be disturbed.

D. Discussion of the Charges at Issue

Turning now to the merits of the Charge, boiled down to its basic elements, the Carrier maintains that the Appellant was negligent as a result of his failure to acquire protection prior to fouling the track as well as in his failure to complete a job briefing prior to fouling the track on June 4, 2003, all in violation of BNSF Maintenance of Way Operating Rule 6.3.3, and BNSF Engineering Instruction Rule 1.1.1.

In such cases, Referees will sustain disciplinary action where it is shown that an employee failed to exercise a reasonable degree of care in performing his duties, or failed to do what a reasonably prudent employee would have done in the same or similar circumstances. Referees generally require an employer to establish one or more of the following factors to sustain allegations of negligent action:

1. The employee had an obligation or requirement to perform the act at issue;
2. There was actual or potential damage to persons, property or the Carrier;
3. The act or omission was unreasonable under the circumstances;

4. The employee was trained and capable of performing the act alleged to be negligent;

The record evidence supports the conclusion that each of the foregoing points was met in that:

- Initially, it is beyond dispute that the applicable Rules and Instructions at issue in this matter were designed to promote safety. In addition, there is no dispute that the Appellant had an obligation to follow these Rules and Instructions on June 4, 2003. In support of this conclusion, the Appellant testified that "I guess if it involved safety I guess I would, you know, I want to go by the book." (See TR 29) The Appellant also acknowledged that he was qualified on the Maintenance of Way Operating Rules, having successfully passed testing in 2003. Accordingly, Points 1 and 4 have been met.

- Point 2 has also been met. In this regard, using the Appellant's own testimony, upon noticing an oncoming train, his action in fouling the track was allegedly caused by his fear for the safety of Messrs. Witstine and FRA Kulacki.

- With respect to the Third Point, the Appellant maintains that his action was not unreasonable. In support of this conclusion, the Appellant testified that his action was in accord with his teachings while having served on numerous gangs over the last ten-year period, wherein the Appellant noted: "I've worked on gangs for ten years and, you know, we are supposed to go to that individual and let them know, you know, give a, ask them if they've had a job briefing and if they, you know. And if they haven't, then I'd tell them the track authority or, or track limits and, and that's what I've done for ten years." (TR 12) The Appellant was unable to identify any specific instances in this regard. The Appellant also testified that he believed his disputed actions on June 4th were in Compliance with Company

rules. (TR 14) Consistent with this testimony, the Appellant testified that he was taught that "[w]e're supposed to go to them and ask them if they've been briefed. And if not, we're supposed to brief them." (TR 21) However, when asked if he had any authority "or anything to brief with Mr. Witstine and the FRA", the Appellant answered in the negative. (TR 22) In the final analysis, the record evidence demonstrates that the Appellant's first inquiry of Mr. Witstine and FRA Kulicki was whether or not they had found anything, or what they had done so far, or something, probably referring to defects.", and not, as the Appellant maintains, a warning about the oncoming train. (TR 15) Accordingly, the record evidence supports the Carrier's conclusion that the Appellant acted in violation of applicable BNSF Rules an Instructions, particularly Rule 6.3.3 and Engineering Instruction Rule 1.1.1. Accordingly, the Appellant's actions at issue were unreasonable.

E. The Appropriate Penalty

While Rule 40 provides that it is within the Referee's prerogative to determine "whether the discipline assessed is excessive", numerous decisions issued by Referees under this Board's authority have established that the Referee should not disturb disciplinary actions of the Carrier that are made in good faith, that are free from discrimination, and that bear a rational relation to the misconduct in question.

Following a determination that the Appellant was guilty of the Charges at issue, the Carrier reviewed his personal file in its determination of an appropriate penalty. The Carrier's action is in keeping with a line of arbitral authority lending consideration to the past record of an employee. In this regard, it is undisputed that an offense may be mitigated by a good past record, and it may be aggravated by a poor one. Indeed, the employee's past record is a major factor in the determination of the proper penalty for a proven offense.

In the instant matter, regretfully, the Appellant's record lends support to the Carrier's determination to terminate his employment. This record demonstrates that over the last two-year period, the Appellant has experienced some form of discipline on four separate occasions. A review of these instances reveals that a common thread associated with each such instance reflects the Appellant's failure to take the responsibilities of his job seriously. Indeed, by leaving his job without authority, failing to be prepared to perform his duties, his failure to report for duty at the designated time, and sleeping, playing cards and reading while on duty, the Appellant has demonstrated his inability to learn from his prior charged actions. It is clear, when reviewing the Appellant's service record that as a result of the combined efforts of the Organization and the Carrier, the Appellant has, on numerous occasions, been given yet another chance, with appropriate warnings designed to impress upon him the seriousness of his misconduct, designed to assist the Appellant at improving his overall performance. Leniency, however, is a two-way street, and the Appellant has failed to demonstrate his ability to comply with even the simplest of rules – following Rules and Instructions designed to insure the safety of all employees, including him. Accordingly, I find the Carrier's penalty determination to be rationally related to the proven offenses, and clearly not shocking to ones' sense of fairness.

## CONCLUSION AND AWARD

For the reasons noted and discussed above, there is substantial evidence in the record to support the Carrier's allegations, as well as the Carrier's determination that the Appellant's termination is an appropriate penalty. Accordingly, the Appellant's claim herein is denied.

11-14-03
Dated

Dennis J. Campagna, Referee
SBA No. 1112