

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

CASE # 71 – AWARD #72 – Thomas K. Mills
(10 Day Record Suspension – Rules Violation)

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

Thomas K. Mills, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on March 27, 1995. At all relevant times, the Appellant was working as a Douglas Section Foreman performing tasks, described below, in Douglas, Wyoming. The Appellant is represented by the Brotherhood of Maintenance of Way Employees.

C. The Charge at Issue

On or about February 18, 2004, following an Investigation conducted on January 29, 2004 by Darrell D. Leibhart, Roadmaster and Conducting Officer, the Appellant was charged with a failure to follow BNSF MOW Safety Rule S-27.13 when on December 17, 2003, while unloading insulated joints from the trailer of a truck, the Appellant sustained an injury to his right hand, causing him to be removed from service in order to seek medical treatment. The Carrier seeks to impose a ten-day record suspension as a result of the Appellant's alleged failure to conduct a proper job briefing before performing said tasks, as well as his alleged failure to properly lockout/tagout the remote boom on BNSF vehicle #18229.

As a result of the foregoing Charges, the Appellant was issued a Ten (10) Day Record Suspension, and that notice of such Suspension is to be placed in his personal file.

D. Facts Gathered from the September 24, 2003 Investigation

On January 29, 2004, a formal investigation was conducted by Mr. Darrell D. Leibhart, Roadmaster for the BNSF in Douglas, Wyoming, who served as the conducting officer. At all times during the investigation, the Appellant was represented by Roy L. Miller, Local Chairman, BMW. The record created at this formal investigation established that:

- On the morning of December 17, 2003, at approximately 7:50 a.m., Scott Norman Lockwood, Assistant Roadmaster, requested that Mr. Mills, the Appellant herein, unload insulated joints that were located on a truck trailer bed located in the parking lot. Mr. Mills agreed to do so. (TR 12)

- Mr. Mills solicited the assistance of Jeff Galutia, a Section Laborer. (TR 29) Mr. Mills and Mr. Galutia then proceeded to the truck in order to begin the unloading process.
- Once at the truck, Mills and Galutia noticed that the joint plugs that they were to unload were insulated. Under these circumstances, it was agreed that they would not be able to use rail tongs to accomplish the task. Accordingly, Messrs. Mills and Galutia decided to use a chain in order to perform the unloading. In order to prevent the chain from slipping, Mr. Galutia suggested the use of two anchors to be placed at the opposing ends of the joint plugs. (TR 29)
- Mr. Mills retrieved two anchors from the truck, and Mr. Galutia placed the first anchor in place using a sledge hammer. As Mr. Galutia began his placement of the second anchor, it fell off of the base of the rail onto the bed of the truck. At this point in time, Mr. Galutia was standing on the bed of the truck, and Mr. Mills was positioned to the side of the truck. Mr. Mills had the remote operator that was used to operate the boom slung around his neck. As Mr. Mills bent over to pick up the fallen anchor, "[t]he remote control for the boom activated and very quickly pulled the rail toward him [Mills] and striking him." (TR 29, Exhibit 4)
- As a result of this mishap, Mr. Mills suffered a fracture to the second metatarsal in his right hand. (TR 12) He was taken to the Emergency Room for treatment where he was given "[t]hree shots of morphine and a shot of Demerol." (TR 41)
- On the same day as the mishap, Mr. Lockwood interviewed Mr. Mills and thereafter completed an "Employee Personal Injury/Occupational Illness Report". (See Exhibit 7) During his testimony, Mr. Mills denies the accuracy of said report, maintaining at the time he was interviewed, he was very sedated. (See TR 20, 41)

- When asked about whether a job briefing took place, Mr. Galutia submitted a "job briefing statement" which stated as follows:

Tom Mills & I discussed what had to be done when we both got in the section truck that was parked in the shop. After we drove up the hill to the rail storage area, we both noticed that the center of the rail was where the insulated joint area was, meaning we were unable to lift with tongs. I suggested using the fork lift, and Mr. Mills said we were unable to do that. We agree that a chain in a center, (or) both sides of bars would work. I hooked the chains and asked Tom for anchors to keep chain from sliding. (Exhibit 5)

- When asked about how, if at all, the job briefing dealt with the issue of the sensitive nature of the boom, Mr. Galutia responded that he and Mr. Mills discussed the matter "the day before", noting that he [Mills] explained to him that "[t]his boom was very touchy and not to stand too close to the (inaudible)." (TR 34)
- Mr. Mills explained that he and Mr. Galutia were unable to use the forklift to unload the insulated joints because neither had been trained to operate it. (TR 38) In response to the following question asked by Mr. Leibhart, Mr. Mills gave the following response:

Q. And in your job briefing, did you discussed all aspects of what you was [sic] going to unload, where you were going to unload it, the anchor tools you was [sic] going to use. Did you talk about the remote control itself or, or you know, Mr. Galutia stated that the previous day you was [sic] concerned about the boom moving too fast. Did you discuss that at all before you moved these insulated joints?

A. We discussed it. He, we talked earlier how the boom moves, and it just, it's real touchy boom, and we talked about it, how fast it swings and stuff like that. (TR 37)

- With respect to the issue regarding the lockout/tagout, Mr. Mills testified that he had been trained in this operation. (TR 39) In addition, Mr. Mills acknowledged that the remote box, used to operate the boom, as well as the on and off switch located on the remote, could be a form of lockout/tagout. (TR 39) At a later point during his questioning, Mr. Mills stated that his understanding of the use of the lockout/tagout was "mainly for machines, to work on machines, or maintenance the machines . . .so that nothing, so that everything is turned off, it doesn't move; nobody can touch the buttons." (TR 40) Given this understanding, Mr. Mills expressed his continued uncertainty as to how the lockout/tagout would apply to his particular situation. (See TR 48-50)

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. The Issue Regarding Compliance With Rule 40

During the formal investigation, Mr. Miller maintained that the Carrier failed to follow the requirements of Rule 40, in that the Carrier failed to supply the required specificity in their charges. Accordingly, Mr. Miller maintains that as a direct result of this omission, he was unable to properly prepare his defense. (See TR 10, 51)

Rule 40 states, in relevant part, that “[T]he notice must specify the charges for which investigation is being held.”

A review of the notices sent to the Appellant dated December 19, 2003, December 22, 2003 and December 26, 2003 reveals that the Carrier was sufficiently specific in its notice in that it specified the date of the incident, the place where it occurred, the approximate time, and the allegations maintaining that the Appellant failed to conduct a proper job briefing before performing the tasks at hand, and his alleged failure to “[p]roperly lockout/tagout the remote for the boom on BNSF vehicle 18229 . . . “

Given the foregoing, I find the Carrier in substantial compliance with Rule 40.

C. Substantial Evidence Exists to Support the Instant Charge¹

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.

Turning now to the merits of the Charge, the Carrier maintains that the Appellant failed to conduct a proper job briefing before tackling the job at hand. In this regard, Maintenance of Way Safety Rules, dated January 31, 1999, Rule S-1.1, provides as follows:

Employees must participate in a job safety briefing before beginning work and when work or job conditions change. The briefing includes a discussion of the general work plan, existing or potential hazards, and ways to eliminate or protect against hazards. Outside parties or contractors involved in the work or who are in the work area must also be included in the job safety briefing.

¹ As an initial note, the Organization has not alleged that the Carrier’s violated Rule 40 in the manner and/or method used in conducting this investigation. Accordingly, I find that there was compliance with Rule 40 in this matter.

A review of the record evidence supports the Carrier's conclusion that the Appellant failed in his obligation to conduct a proper job briefing. In addition to the fact that neither Mr. Mills nor Mr. Galutia indicated that the "private truck driver" was included in the briefing, I find Mr. Galutia's testimony that he and Mr. Mills discussed the sensitive nature of the Palfinger boom a day earlier implausible. Clearly, neither he nor Mr. Mills knew that use of this boom would be required to unload the insulated joints the following day. Moreover, their general discussion in the truck as they approached the trailer truck where the joints were located does not satisfy the requirement of Rule S 1.1.

Given the foregoing conclusions, I find that substantial evidence exists to support the charge regarding a violation of Rule S 1.1.

Turning now to the allegation of the Appellant's failure to conduct a proper tagout/lockout, Rule S-16.17, Lockout/Tagout of Machinery, provides: "When machinery is being repaired, cleaned, or adjusted, ensure that the control switch or power source is locked in the OFF position and tagged." While the Appellant maintained that this rule was inapplicable because he was operating the boom not repairing it, it is apparent when reviewing the Charges that the Carrier was concerned that given the sensitive and unpredictable nature of this piece of equipment, a fact acknowledged by the Appellant, the Appellant should have taken the necessary precaution to insure that the remote was "locked out" before leaning forward to pick up the fallen anchor. (See TR 40) It is apparent that he failed to do so.

Given the foregoing conclusions, I find that substantial evidence exists to support the charge maintaining his failure to properly lockout the boom.

The Appropriate Penalty

Having found and concluded that there is substantial evidence in the record to support the charges at issue, there remains a question as to the appropriate penalty. In this regard, the

Carrier seeks to impose a ten (10) day record suspension.. Under the specific circumstances of this case, with particular emphasis on the need to promote a safe work environment, I find that the penalty imposed by the Carrier to be a reasonable one.

As a final point, I note the protest lodged by Mr. Miller who maintained that the proper venue for review of the allegations herein was for such review to be performed pursuant to the Alternate Handling procedure. (Referring to the Revised Policy for Employee Performance Accountability) Reference to such Policy reveals that it is the Carrier who determines when and if referral to this procedure is appropriate. (See General Information, part (b)) Accordingly, while it may have been reasonable for the issue at hand to have been referred for Alternate Handling, this Referee is without authority to so direct.

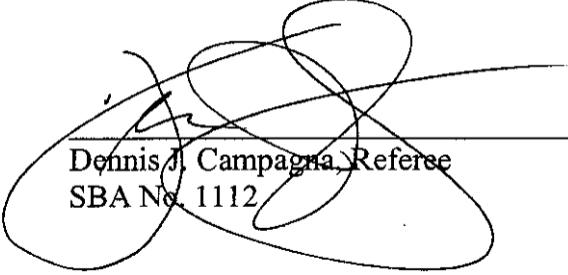
CONCLUSION AND AWARD

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. The penalty imposed by the Carrier, consisting of a Ten (10) Day Record Suspension is, under the circumstances of this case, just and reasonable.

21 May 2004

Dated


Dennis J. Campagna, Referee
SBA No. 1112