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

CASE # 78– AWARD #79 – Ryan H. Astley
[Formal Reprimand]

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

Ryan H. Astley, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on August 25, 2003. At the time of the incident that occurred on May 20, 2004, the Appellant worked as a Sectionman on Construction Gang CG01 in Seattle, Washington. The Appellant is represented by the Brotherhood of Maintenance of Way Employees.

C. The Charge at Issue

On or about September 3, 2004, following an Investigation conducted on August 5, 2004 by Wayne G. Lonngren, Roadmaster and Conducting Officer, the Appellant was charged with a violation of Maintenance of Way Operating Rules, Rule 1.1.2, "Alert and Attentive", when on May 20, 2004, at approximately 1230 hours, the Appellant sustained an injury to his right hand (thumb) which became pinched following the Appellant's placement of his hand in a possible pinch point location. The Carrier seeks to impose a Formal Reprimand as a result of the Appellant's alleged failure to comply with the foregoing Rule.

D. Facts Gathered from the April 27, 2004 Investigation

On August 5, 2004, a formal investigation was conducted by Mr. Wayne G. Lonngren, Roadmaster, for the BNSF located in Auburn, Washington, who served as the conducting officer. At all times during the investigation, the Appellant was represented by Mike Garisto, BMWE Vice President and General Chairman. The record created at this formal investigation established that:

- Chris Yeoman, Roadmaster, Commuter Construction, BNSF Railway, who served as the Appellant's supervisor, testified that on the date in question, the Appellant was performing his duties as a Trackman, on Gang CG01, installing a panelized turnout, described as an "extremely heavy" component that requires four to five front-end loaders to move about. (TR 7-8)[1]
- Mr. Yeoman described the incident giving rise to the Appellant's injury as follows: "Mr. Ryan Sstley was performing his duties as a trackman, on Gang CG01. They were installing a turnout, the panelized turnout into a location there approximately MP 4.3. And he was helping to hook the turnout panels up or

[1] References to the official transcript pages noted as "TR" followed by the appropriate page number(s).

remove the track panel, I should say, and when hooking the chain, the chain had gotten tossed onto the back of the bucket through his movement and so, so forth, when he went around and got in position on there, and Ryan was pulling the chain over the back of the bucket. And when the chain, the momentum of the chain increased because of the weight of it, you know, and your gravity of it, his hadn in harms way up there on top of the bucket, his right hand, and he was pulling with his left hand and it came over and smashed his finger." (TR 8) The chain was used to wrap around the rail on the track panel. The chain is then connected to the loader which then drags the track panel or switch panel out of the way. (Id.) Mr. Yeoman described the extent of the Appellant's injury as "significant." (TR 9) Mr. Yeoman admitted that he did not witness the event giving rise to the Appellant's injury, but was rather informed about the incident by the Appellant. (See TR 16, 20, 24)

- Mr. Yeoman noted that at the time of the incident, the Appellant had been employed for approximately 9 months, and been "[c]ounseled or coached personally by [him or his] subordinates about performing work safely." (TR 16) He described the correct procedure which, if implemented by the Appellant, would have avoided injury: "To pull the chain over and pay attention to where your hands are and what's going to happen in the event the chain does come over. You know, to be alert and attentive to the task at hand and to recognize that when that chain comes over that you have to have our hands and feet and other body parts our of harms way." (Id.)

- A three-man inspection of the equipment used by the Appellant was performed shortly following the accident. While the results of the inspection revealed no flaws with the equipment, Mr. Yeoman noted the presence of a mechanical "pinch point" at the point where the chain drapes over the front of the bucket. (TR 21) While Mr. Yeoman acknowledged that it was "standard practice" to identify pinch points with some type of marking, the pinch point located on the bucket was not marked, because it is simply not possible to do so. In this regard, Mr. Yeoman noted that "[w]e just have to use common sense to avoid putting our hands in the

pinch point area or other body parts." (TR 22) "[W]e just need to be focused." (TR 24)

- The Appellant testified regarding his recollection of the event. He noted that since the bucket of the payloader was approximately 10 inches higher than the top of his head, it was necessary for him to reach over the top of the bucket with his right hand in order to pull the chain over. The Appellant braced himself by placing his left hand to steady himself. The Appellant described the event: "But, I thought I'd given myself enough room for when the chain comes over I wouldn't get hit. I didn't see the ring that was hooked over on top of the bucket from my angle, and that's what got my finger. I think that I got the other four digits out of the way in time. I didn't get the thumb out of the way in time." (TR 27) The Appellant testified that it would not have been practical to have moved the loader since there was an attempt "[t]o get the panels out in one piece and the bucket had to be pretty much where it was." (TR 29)

- The Appellant testified that as the job was progressing, Mr. Yeoman appeared on the scene, and "[w]asn't happy with the way we were doing [the job] previous to that", and as a result, Mr. Yeoman instituted a change of procedure. (TR 30) This change of procedure was not followed by a job briefing to explain the change the Appellant noted. (Id., 31) In this same regard, Joshua Fulton, the foreman on the scene, testified that "What happened is Yeoman shows up and decides, basically, everything we were doing was wrong and wasting time, and we needed to do some shortcuts involved, basically, maneuvers with the loaders that we had never done before, none of the operators have ever done before. (TR 43)

- Appellant completed an Employee Personal Injury/Occupational Illness Report. (Exhibit C) On this report, the Appellant acknowledged that he could, with a greater degree of care on his part, have avoided the accident noting "pull chain and move away six plus feet." (TR 11, Exhibit C) Immediately following the accident, the Appellant testified that he entered Mr. Yeoman's truck where Mr. Yeoman instructed the Appellant on ways to keep his accident a "non-reportable." This conversation took approximately 45 minutes. (TR 32) (The Appellant's

testimony in this regard was supported by that of Mr. Fulton, the foreman on the scene. (See TR 41))

- Joshua Fulton, the foreman for the sound transit construction crew, was called by the Appellant and gave the following testimony: (1) that, contrary to what Mr. Yeoman testified, (See TR 18) Mr. Yeoman was not at the morning briefing. (TR 41) (2) Following Mr. Yeoman's change of procedure, Mr. Fulton testified that "[t]here was constantly things like that, where people didn't quite understand what they were supposed to be trying to accomplish, or how they were supposed to go about accomplishing it, but we just jumped in and try it that way. . . There was a lot of people that were just walking away saying that I don't want to be a part of this. And it was getting really hectic, it was hard to tell what was going on. . . It should have been briefed that it was going to happen to me. So, I am sure nobody else was really briefed." (TR 43-44) Mr. Fulton attributed this "chaos" to a lack of briefing by Mr. Yeoman, and "[t]he lack of focus on safety." (TR 44)
- Finally, Mr. Fulton acknowledged that employees are authorized to exercise empowerment if they are convinced that the job they are performing is not safe. (TR 45)

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 Organization's Issue Regarding Compliance With Rule 40

While Mr. Garisto maintained that the investigation had not been conducted in a fair and impartial manner due to the fact that over the course of the investigation Mr. Lonngren failed to sustain his objections "[a] couple of times", there was no specific instance raised by Mr. Garisto that would justify a conclusion that a violation of Rule 40 occurred. In fact, the Appellant himself acknowledged that both he and the Organization had every reasonable opportunity to call and examine witnesses, as well as the right to introduce relevant evidence of its own choosing. (See TR 47)

Accordingly, I find that the Carrier has complied with Rule 40 in the instant matter.

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.

Turning now to the merits of the Charge, the Carrier maintains that the Appellant, by his actions on May 20, 2004, failed to adhere to the foregoing Maintenance of Way Operating Rule 1.1.2, a Rule the Appellant acknowledged he understood.[2] (TR 25) I find, on the basis of this record, that substantial evidence exists to support this charge. In reaching this conclusion, I took careful note of the Appellant's own, and honest admission that with a greater degree of care on his part, it is more likely than not that the accident could have been avoided.

[2] Rule 1.1.2, Alert and Attentive, provides: Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

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. In this regard, the Carrier seeks to impose a Formal Reprimand. As an initial matter, it should be noted that where, as here, substantial evidence exists to support the charges at issue, it is well accepted that the proposed penalty as suggested by the Carrier will not be disturbed unless it is "shocking" to ones sense of fairness.

In the instant matter, the record is replete with serious allegations that Roadmaster Yoeman, who, upon arriving at the worksite, elected to change the manner and method used to perform the job at hand, and in the process, created a chaotic situation. The record also reflects the fact that Mr. Yoeman failed to conduct a job briefing in order to explain his new procedure, as well as to invite questions from the workforce. Moreover, the record evidence supports the fact that Mr. Yoeman's failure in this regard, together with his lack of focus on safety, only added to an already chaotic situation.[3] However, Mr. Yoeman's deficiencies do not remove the obligation by the Appellant, or any other worker for that matter, to be mindful of their own obligation to remain alert and attentive to their duties with the goal of avoiding injury to ones self as well as others. Indeed, the Appellant himself acknowledged this obligation.

Accordingly, while I find that this case would have been better handled, and indeed was ripe for review under the Carrier's *Safety Incident Analysis Process*, ("SIAP"), particularly given the "chaotic" situation that existed at the time of the incident at issue, together with the Appellant's limited time as an employee at the time of this incident, I

[3] Mr. Yoeman's disregard for safety became all the more apparent when he chose to spend approximately 45 minutes advising the Appellant how to made the accident non-reportable, at a time immediately following the incident when the Appellant was in pain and should have been taken for immediate medical assistance. The claim made in this regard by the Appellant, as supported by the testimony of Mr. Fulton, remained uncontested throughout the investigation.

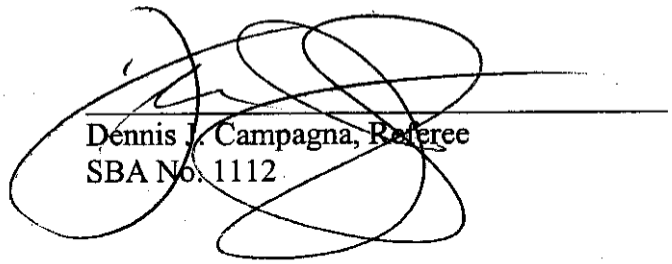
cannot find, on the basis of this record, that the Carrier's imposition of a formal reprimand is so shocking to ones sense of fairness that it should be disturbed.[4]

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. I find, on the basis of the record before me, an insufficient basis to disturb the penalty imposed by the Carrier in this case, consisting of a Formal Reprimand.

12-27-04
Dated



Dennis J. Campagna, Referee
SBA No. 1112

[4] Handling of this particular case through the SIAP would have been appropriate, particularly given that the "objective of SIAP is to identify and eliminate work practice risks that lead directly to an accident experience." In this regard, Mr. Yeoman's statement that since the time of the Appellant's accident "[w]e have since changed some of the configurations on some of these chains and are in the process of changing others" renders the circumstances giving rise to this incident ripe for review under the SIAP. (See TR 9)