

**SPECIAL BOARD OF ADJUSTMENT NO. 1112
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,**

Vs.

**BURLINGTON NORTHERN &
SANTE FE RAILWAY CO.**

**CASE # 81- AWARD #82 - Dean G. Posey
[30 Day Record Suspension]**

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

Dean G. Posey, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on September 10, 1969. At the time of the incident that occurred on August 18, 2004, the Appellant worked as a Machine Operator, running a Ballast Regulator on a production surfacing group at or near MP 102.82 on the Sumas

Subdivision located in Acme, Washington. The Appellant is represented by the Brotherhood of Maintenance of Way Employees.

C. The Charge at Issue

On or about September 15, 2004, following an Investigation conducted on August 26, 2004 by Wayne G. Lonngren, Roadmaster and Conducting Officer, the Appellant was charged with a violation of BNSF Maintenance of Way Operating Rule 6.50.2, "Approaching Road Crossing", when on August 18, 2004, at approximately 0955 hours, the Appellant became involved in a collision of the Ballast Regulator he was operating and a private vehicle. The Carrier seeks to impose a 30-day "Record" Suspension as a result of the Appellant's alleged failure to comply with the foregoing Rule.

D. Facts Gathered from the August 26, 2004 Investigation

On August 26, 2004, a formal investigation was conducted by Mr. Wayne G. Lonngren, Roadmaster, for the BNSF located in Bellingham, Washington, who served as the conducting officer. At all times during the investigation, the Appellant was represented by Mike Garisto, BMW Vice General Chairman. The record created at this formal investigation established that:

- At about 10:00 a.m., Sylvester Moran, Roadmaster and the Appellant's immediate supervisor, received a call from Dave Strube, the Mark IV operator, informing him of an accident that had taken place at a private crossing on the Sumas Subdivision. The accident involved a Ballast Regulator, operated by the Appellant, and a private automobile. No injuries resulted. (TR 4)¹

¹ References to the Official Transcript of the Investigation noted as "TR" followed by the appropriate page number(s).

- When Mr. Moran arrived at the scene of the accident, he observed a sheriff present. Mr. Moran inquired if any citations had been given, to which Mr. Moran testified that the Sheriff responded that “[h]e could have issued a citation to the lady for not stopping at the stop sign at the crossing, but it was on private property so they do not issue citations on private property.” (Id.) Mr. Moran also observed that the private vehicle had been knocked into a ditch after being hit by the Appellant’s machine. Mr. Moran assisted the female driver of said private vehicle out of the vehicle. (TR 5)
- Mr. Moran’s investigation revealed that two BNSF machines were traveling south on the Sumas Branch line. The first machine, a Ballast Regulator, was operated by the Appellant. The Second machine, a Mark IV Tamper, operated by Dave Strube, was behind the Appellant. (Id.) The driver of the private vehicle was traveling west. There are two stop signs placed on either side of the tracks for motorists to observe. There are no stop signs for track equipment or trains to observe. (TR 10) The track level is approximately eight feet higher than the road. (Id.) The Appellant had a line of sight of approximately 200 feet from the track to the intersection of the track and the road that crossed it. (TR 9, 21) Finally, there was a fair amount of vegetation in the vicinity of the crossing, something that constituted “[a] reduced sight distance” in Mr. Moran’s opinion. (TR 16) The private vehicle approached the tracks and failed to stop at the stop sign. When the driver of the vehicle reached the track level, she stopped and attempted to back up, apparently in an effort to avoid a collision with the oncoming Ballast Regulator operated by the Appellant. (Tr 5, 7, Exhibit C) To no avail, for the Appellant hit the vehicle. (TR 22) The driver of the private vehicle admitted error on her part following the accident. (TR 23) While the Ballast Regulator does not have a speedometer, it was estimated that the Appellant’s speed at the time of impact was approximately 10 mph. (TR 8)

- Following the accident, Mr. Moran conducted a four man inspection to insure that the lights, brakes and the Ballast Regulator generally were in good working order. The inspection determined that everything was working properly. (TR 5)
- Mr. Moran testified that the Railroad industry treats road crossings as particularly dangerous locations. Accordingly, the dangerous nature of these intersections is emphasized in regular training exercises. (TR 11) While the incident at issue involving the Appellant is the first of its kind experienced by Mr. Moran in his 16 years as a Roadmaster, he testified that accidents of this nature are not "unique" in the railroad industry. (Id., TR 19)
- Rule 6.50.2 states : "When approaching and passing over a road crossing: Move in such a way as to avoid accidents. Remain in complete control of the on-track equipment. Stop if necessary. Provide protection against vehicle traffic, if necessary." In order to "avoid accidents" pursuant to this Rule, Mr. Moran indicated that an operator would need to move "[a]t a speed that would allow stopping in half the range of vision when approaching a crossing," to remain "[a]lert and attentive, watch for anything could dart out on the track ahead of you even, not even at a crossing, but anywhere somebody could run out in front of you, or a piece of track where you could have rock slides or trees blown down, you have to be able to be alert to not hit, run into that stuff." (TR 15) In this regard, Mr. Moran testified that the approach and rate of speed used as an operator approaches an intersection such as the one at issue is a "judgment call" the operator must exercise. (TR 18)
- Mr. Moran noted that while the driver in this case had a responsibility to heed the stop sign and stop her vehicle well in advance of the track, the driver's responsibility does not detract from the Operator's responsibility to approach the crossing anticipating the worst case scenario. (TR 18, 19)

- It was the Appellant's position that he exercised all reasonable caution as he approached the intersection, and that the accident was not his fault, noting that one "[c]an't account for somebody that doesn't abide by rules." (TR 23) In this later regard, the Appellant noted that he had previously observed situations where motorists failed to follow the rules. (TR 24)

It was the Appellant's position that the failure of the driver to comply with the stop sign, thereby literally darting out onto the track without warning, provided a mitigating circumstance that should remove him from his alleged violation of Rule 6.50.

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 Organization's Issue Regarding Compliance With Rule 40

The Organization has not alleged that the Carrier failed to comply with Rule 40 in this case. Accordingly, I find Carrier compliance with Rule 40.

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 August 18, 2004, failed to adhere to the foregoing BNSF Maintenance of Way Operating Rule 6.50.2, a Rule the Appellant acknowledged he understood. (TR 21-22)

When boiled down to its basic elements, it is the Appellant's position that he exercised all reasonable caution on the date in question, and that the carelessness of the vehicle's driver in failing to heed a stop sign should therefore absolve him of any wrongdoing. While noting the Carrier's sympathetic attitude toward this incident, the Carrier none-the-less concluded that Rule 6.50.2 requires an Operator of a train or on-track equipment to approach an intersection with extreme caution – that is, to expect the unexpected, and that given the circumstances of this case, the Appellant failed to comply with this Rule. Respectfully, a review of the record evidence reveals that the Carrier's conclusion in this regard was supported by substantial evidence.

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 30-day Record Suspension. 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 one's sense of fairness.

As an initial matter, 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 Appellant's 35-year honorable work record, marked with a commendation for his alert response when he removed a small child from the track, and the admitted failure on the part of the motorist to heed the stop sign.² However, the SIAP was not utilized and a review of the Carrier's proposed penalty must be assessed in light of all the evidence resulting from the investigation in this matter. And in so doing, while all parties can be thankful for the fact that no injuries resulted from this unfortunate mishap, the Carrier's concern for future cases where those parties may not be so fortunate cannot be ignored. Accordingly, I cannot find, on the basis of this record that the Carrier's imposition of a 30-day Record Suspension is so shocking to ones sense of fairness that it should be disturbed.

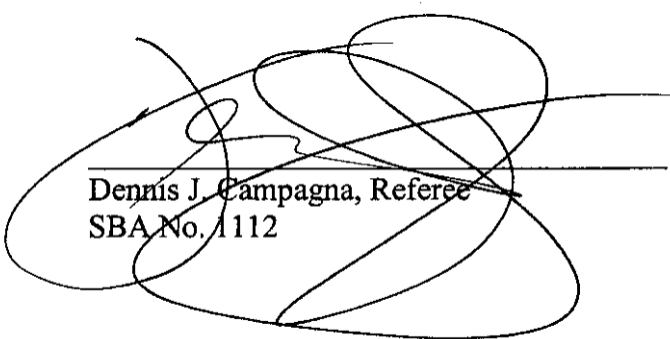
CONCLUSION AND AWARD

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 30-Day Record Suspension.

1-28-05

Dated


Dennis J. Campagna, Referee
SBA No. 1112

² 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.