SPECIAL BOARD OF ADJUSTMENT NO. 1112

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,

Vs.

BURLINGTON NORTHERN &

SANTE FE RAILWAY CO.,

CASE #65 – Ron A. Clausnitzer (Termination of Employment)

AWARD NO. 66

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

Ron A. Clausnitzer, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company on May 16, 1994. At all relevant times, the Appellant was assigned as a Welding Foreman working the area of Shelby, Montana. Prior to the instant investigation, the Appellant had been disciplined on two separate occasions – For

the Misuse of Transportation in or about October, 2000, and for his Failure to Comply with Instructions in or about July 2001.

C. The Charge at Issue

On or about June 30, 2003, following a formal investigation conducted on June 12, 2003, The Appellant was served with following charge:,

> This letter will confirm that as a result of investigation held in the BNSF Roadmaster's office in Shelby, MT at 1000 hours on Thursday, June 12, 2003 concerning your falsification of time on May 13, 2003 while assigned as the Welding Foreman headquartered Shelby, MT, as evidence by documents reviewed on June 4, 2003, **you are dismissed from the employment of the BNSF Railway for violation of Maintenance of Way Operating Rule 1.4 – Carrying Out Rules and Reporting Violations, and Maintenance of Way Operating Rule 1.6 – conduct.**

(Emphasis in the original)

D. The Rules at Issue

Maintenance of Way Operating Rule 1.4, effective January 31, 1999, provides:

> **1.4 Carrying Out Rules and Reporting Violations**
>
> Employees must cooperate and assist in carrying out the rules and instructions. They must promptly report any violations to their supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers, or employees, and any misconduct or negligence that may affect the interest of the railroad.

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 June 12, 2003 Investigation

On June 12, 2003, a formal investigation was conducted by William Shulund, Roadmaster (Havre, Montana), and Conducting Officer in Shelby, Montana. At such investigation, the Appellant was represented by Gary Frank, BMWE Vice General Chairman, and by Dan Dennis, Local Chairman, BMWE, who observed the proceedings. It was established that:

- The Appellant had requested and received May 13, 2003 as a scheduled vacation day off. (TR 27) His request was approved by Larry Schlotfeldt, Welding Supervisor. Accordingly, he did not work that day. (TR 6, 27) Appellant returned to work the following day, May 14, 2003. (Id.)

- On June 4, 2003, Mr. Schlotfeldt received an e mail informing him of his responsibility to conduct a payroll query on his switch grinding crew. (TR 23) On or about that same date, Mr. Schlotfeldt reviewed the Appellant's Personal Activity Tracking System ("PARS") time report for May 13, 2003, and discovered that the Appellant had "[p]aid himself eight hours straight time, at a cost of $161.04, and 1 hour 30 minutes overtime at $45.29, a total of $206.33." (TR 6; See also Exhibit C) A Notice of Investigation issued to the Appellant that same day, alleging falsification of time on May 13, 2003. (Exhibit A)

- It was Mr. Schlotfeldt's testimony that the Appellant never informed him that he made an error in paying himself for May 13, 2003. (TR 6) Moreover, considering the time gap between May 16, 2003 when the Appellant entered his

time, and June 4, 2003, when the Notice of Investigation issued, Mr. Schlotfeldt maintained that the Appellant had ample opportunity to remove the time he entered for that date. (TR 7)

- The Appellant acknowledges that on or about May 16th or 17th, he did, in fact, enter 8 hours of straight time, and 1 ½ hours of overtime for May 13th. (TR 27) Appellant maintains, however, that he made a mistake in doing so. (TR 34) In support of this contention, Appellant maintains that he had continuing problems with the computer he was using. In this regard, Appellant stated: "I had several days to put in on that pay period I remember. And I was using the computer at Browning, it's a dial-up connection. Those dial-up connections, they're kind a hard to keep, keep the connection going. What I was doing, I was putting, I put a day in and when I get to end to save it, I'd lose the connection and all my time would be erased. So, I'd have to try to make my connection again, get back in there, redo it, and hopefully have it saved on that, you know, on the next attempt I tried. And I believe what happened is when I was on the 13th I thought I was on the 14th. So I tried putting in my time and it was supposed to be entered on the 14th on the 13th. That's the only thing I can think of that happened. I don't, it wasn't an intentional deal, just a mistake I made." (TR 27-28)

- Sidney Aamold, who worked with the Appellant, was aware that the Appellant did not work on May 13, 2003, and testified that in a conversation he had with the Appellant, he "[t]old him to, he needed to take his time out. That Rob, and Jim Barkley came to me and told me that he had paid himself for that day. So I took it in turn to call Ron [Clausnitzer] and tell him that he paid him for that day he wasn't there. . . .he told me that he would take care of it." (TR 16) Mr. Aamold testified that as best he could recall, he had this conversation with the Appellant the day he returned to work.[1] (Id.) Appellant acknowledges speaking with "Sid" and Rob Mattheisen on or about May 26th or 27th. (TR 28) In response to the

[1] Appellant's return to work in this regard refers to the May 26th or May 27th date referenced in the Transcript of the Investigation in this matter.

response to the Conducting Officer's question "Did you get it changed?", Appellant testified that he thought he corrected his time. (Id.)

- The essence of the Appellant's defense lies in his claim that he had difficulty maintaining a connection on the computer, and that the time he actually entered for May 13th was intended for May 14th, and that by May 30th, he thought he had corrected his error. (TR 31) Accordingly, it must be determined whether or not there is "substantial evidence" in the record to support this claim.

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 June 12, 2003, the Appellant, supported by Mr. Frank, his Union representative, asserted that in his opinion, the Carrier had exceeded the ten (10) day time limitation set forth in Rule 40. (See TR 25) The relevant portions of Rule 40 provide:

A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company . . .and except as provided in Section B of this rule.

B. In the case of an employee who may be held out of service pending investigation in cases involving serious infraction of rules the investigation shall be held within ten (10) days after the date withheld from the service. He will be notified at time removed from service of the reason therefore.

Mr. Frank's objection is based on the time frame governing the query of time records by supervisory personnel. In this regard, the testimony of Mr. Schlotfeldt established that Supervisors generally receive an e mail advising them to query their payroll, and that such e mail messages are received within four (4) days following the end of the payroll period. (TR 23) In the instant matter, Mr. Schlotfeldt testified that he received his e mail notification on June 4th, covering the payroll period from May 16th to May 30th. (TR 24) Accordingly Mr. Frank's asserted that Roadmaster Rudolph, Appellant's supervisor, should have received his e mail notification within four days following the end of the May 1st to May 15th payroll period, or by May 19th at the latest. Therefore, Mr. Frank argued, first notification by June 4th went beyond the time limitations set forth in Rule 40. (See TR 25)

The record evidence reflects that the Appellant was withheld from service upon receipt of the Notice of Investigation dated June 4, 2003. (Exhibit A) The Investigation was initially scheduled for June 11, 2003, but was postponed at the request of the Union. (Exhibit B) The Investigation ultimately occurred on June 12, 2003. Accordingly, regardless of whether June 11 or June 12 is used as a reference point, the ten day time limitation set forth in Rule 40 (B) has been met.

Moreover, the time limitation set forth in Rule 40 (A) has also been met. In this regard, the Appellant noted and the record evidence reveals that he entered his time for May 13th on or about May 16th. (See TR 27 and the documents following Exhibit F). Accordingly, the e mail sent to supervisory personnel, received on June 4th, was a notification to review time entered for the May 16th to May 30th time period, well within the fifteen day time frame set forth in Part A. However, even if this time frame had not been met, the allegations against the Appellant, falsification of time on May 13th, renders this case as one more in the nature of one involving "personal conduct", thereby mandating that the Investigation be held within fifteen days from the date information is obtained by the Carrier. Mr. Schlotfeldt first obtained information leading to the instant Investigation on June 4th. Accordingly, the Investigation, held on June 12th, satisfied the fifteen day requirement of Rule 40 (A).

C. The Criteria for Establishing Allegations of Theft or Dishonesty

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.

In reviewing the record in order to determine if the substantial evidence requirement has been met, it should be noted that this Referee 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.

D. There is Substantial Evidence in the Record to Support the Carrier's Allegation

For the reasons that follow, I find that there is substantial evidence in the record to support the allegation made by the Carrier..

In assessing the allegation noted, it must be determined whether the Appellant failed to do what a "reasonably prudent person" would have done, or not done, under the same or similar circumstances. The more common factors associated with this analysis include:

1. The Appellant had an obligation or requirement to perform the act at issue, defined here as making honest entries reflecting his time;
2. The adverse consequences or damages that could have reasonably resulted from the Appellant's failure to perform the act at issue;
3. The Appellant's action was reasonable under the circumstances;
4. The Appellant was, under the circumstances at hand, capable of performing the act at issue, and
5. The Appellant knew or should have known of the disciplinary consequences of the failure to perform the act at issue.

Clearly, the first factor has been met. Appellant acknowledged this fact. Moreover, the Maintenance of Way Operating Rules, Rule 1.6, prohibits conduct of a dishonest nature. Similarly, the second factor has been met. In this regard, the Carrier and all employees have a mutual obligation to prohibit acts of dishonesty. While the Operating Rules, particularly Rule 1.6, addresses this fact, arbitration precedent provides a long line of cases sustaining employee termination for theft or dishonesty, even in the absence of a rule to this effect. Factor 4 has been met in that the Appellant acknowledged his ability to enter time using the Personnel Activity Tracking System, ("PARS"). Finally, Factor 5

has been met in that it was established that the Appellant was re-qualified on February 12, 2003 in the Maintenance of Way Operating and Safety Rules. (TR 7, 26).

Given the foregoing, we are left to determine whether the third factor has been met, that is, whether the record supports the Appellant's contention that his action was reasonable under the circumstances. For the reasons that follow, I find that he was not. The record reveals the following relevant facts:

- That the Appellant admitted entering the time at issue for May 13, 2003;
- That the Appellant entered the time using the PARS on May 16, 2003 at 11:16 hours. This is the only evidence of the Appellant's time entry for the May 13th date.
- That on or about May 26th or 27th, Sidney Aamold called the Appellant to inform him that Robert Mattheisen, a grinder operator, and James Barkley, a welding foreman, were aware of the fact that the Appellant had entered time for May 13th. The Appellant was therefore on notice of this fact, and indicated to Mr. Aamold that he would take care of it. However, there is nothing in the record evidence to show that he even attempted to do so.
- Appellant maintains that difficulties with the computer caused his time to be entered incorrectly – in that his entry for May 13th was really intended for May 14th. His claim that computer difficulties caused the incorrect entry for May 13th in the first instance, and prevented his efforts from correcting this error in the second instance is not supported by the record however. In this regard, while Mr. Aamold indicated that he has problems on a fairly regular basis (TR 15), he did not indicate that these problems prevented him from entering accurate and correct time. Mr. Barlkey also acknowledged having problems with the computer on occasion, but noted that "It's real easy to do in the current time period that you're on. Then after pay closes it may be a little bit more difficult then maybe. I think you can still go back one pay period to edit." (TR 19) Mr. Mattheisen also acknowledged that he has made errors when entering time in the PARS system but noted that it was not a complicated task to correct the error, generally taking

no more that ten minutes to do so. (TR 20) Finally, Mr. Schlotfeldt testified, without contradiction, that the Appellant had ample opportunity between his knowledge of the error on or about May 27th, and the time the Investigation Notice issued on June 4th to correct his error, but that he did not do so.

From this point forward, a reasonably prudent person in the shoes of the Appellant would have sought supervisory assistance in order to assist him in correcting the time error. Appellant, however, acknowledges that he did not call a supervisor, maintaining that he thought he could correct the error on his own (TR 28). Appellant also acknowledged that "a supervisor is a good source of information", but that he failed to use this resource because "[I] guess I was more intimidated on my, him knowing that I'd screwed up on my time, figuring that I'd get discipline action that way. And I thought I could correct it myself." (TR 30) However, as noted above, beyond the Appellant's entry of his time on May 16, 2003, there is nothing in the record demonstrating even a feeble attempt to correct his error. This absence lends support to the Carrier's claim herein, particularly given the fact that the Appellant had been warned about his time by Mr. Aamold on or about May 27th, with ample time to correct it.

For the reasons noted and discussed above, it is the conclusion of this Referee that there is substantial evidence in the record to support the Carrier's conclusion that the Appellant falsified his time on May 13, 2003, thereby violating Rule 1.6 and 1.4.

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. In the instant matter, there has been no showing to the contrary.

SBA 1112
Awd 66

CONCLUSION AND AWARD

For the reasons noted and discussed above, the claim herein is denied.

17 October '03
Dated

Dennis J. Campagna, Referee
SBA No. 1112