

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

CASE # 60 – AWARD #61 - John D. Harris
(30-day Level S Record Suspension; Three (3) year probationary period)

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

John D. Harris, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on August 7, 1970. At all relevant times, the Appellant was working as a Grinder Operator in the Allouez Yard located in Superior, Wisconsin. The Appellant is represented by the Brotherhood of Maintenance of Way Employees.

C. The Charge at Issue

On or about January 29, 2003, following an Investigation conducted by Charles E. Keeler, Terminal Manager and Conducting Officer, the Appellant was charged with a failure to follow BNSF Track Welding Rules and Procedures on January 27, 2003, when grinding switches in Allouez Yard, and his failure to follow the BNSF Boutet Thermite Welding Manual on January 28, 2003 when thermite welding in 17th St. Yard, while assigned as a Grinder Operator in Superior, WI. Appellant was working under the immediate supervision of Robert Noffsinger, who functioned as Head Welder on the project at issue. The facts revealed that the Appellant had worked as a flagman at Brookson approximately two weeks prior to the incident at issue. When the flagman position was abolished, the Appellant exercised his rights to bump back into the grinder operation where he as assigned as a Grinder Operator in Superior, WI. effective January 8, 2003. All toll, the Appellant spent approximately 95% of his total work time as a grinder operator, and the remaining 5% as a flagman flagging bridge constructions. (See TR 63)

As a result of the foregoing Charges, the Appellant was issued a Level S Record Suspension of 30 days for his violation of BNSF Maintenance of Way Operating Rules 1.3.1, 1.3.3, BNSF Safety Rules 1.1, 1.2.5, and Boutet Thermite Molding rules 11.2, 11.5, 11.10., 12.16 and 13.16. Additionally, the Appellant was assigned a probationary period of three (3) years, and directed to attend and pass a thermite welding class prior to holding a welding or grinding position.

Finally, the Appellant was forewarned that any further "serious rule violation during [his] tenure of this probation period" would subject him to dismissal.

D. Facts Gathered from the February 19, 2003 Investigation

On February 19, 2003, a formal investigation was conducted by Charles Keeler, Terminal Manager at Superior, Wisconsin, who served as the investigating officer. At all times during the investigation, the Appellant was represented by Robert L. Bobby, Vice Chairman BMW. The record created at this formal investigation established that:

- Max Sanford, the Roadmaster at Superior, Wisconsin, observed the Appellant, who was working as the Grinder Operator at Allouez Yard, and Robert Noffsinger, who worked with the Appellant as the Head Welder and Appellant's supervisor on the week prior to January 27th and 28th. Mr. Sanford testified that he was concerned about the grinding procedures employed by the Appellant and Mr. Noffsinger in that "[t]here were some slight lips or overflow left on some of the stock rails, the radius of the stock rails that were left after the grinding was done on the switch, also the radius on switch points and some of the shelling on the switch points was not taken out." (TR 7)¹ Mr. Noffsinger's service as Head Welder rendered him ultimately responsible for the Appellant who functioned on the project as the Grinder Operator. (TR 10)
- As a result of the above concerns, Mr. Sanford contacted Steve Heinen, the Welding Supervisor located in Minneapolis, Minnesota, and requested that Mr. Heinen visit the Allouez Yard in order to view the work performed by the Appellant and Mr. Noffsinger. The purpose of Mr. Heinen's observation was to insure that such work was being performed in accordance with BNSF Procedures, and to render an assessment in this regard. (TR 7) It was undisputed that Mr. Heinen is the Division quality control officer, and an expert on procedures. (TR 21)

¹ References to the Official Record are noted as "TR" followed by the applicable page number.

- Notwithstanding Mr. Sanford's concerns regarding the Appellant's and Mr. Noffsinger's work, it is undisputed that Mr. Sanford chose not to say anything to either prior to the week(s) preceding January 27th. (TR 16) Mr. Sanford testified that he chose not to discuss his concerns with either the Appellant or Mr. Noffsinger, electing instead to delegate that task to Mr. Heinen, who was better equipped for this task. (TR 75)

- Pursuant to Mr. Sanford's request, Mr. Heinen visited the worksite in order to observe both the Appellant and Mr. Noffsinger. Mr. Heinen observed the following:

"Went out with Mr. Sanford to check the quality of their work per the BNSF Track Welding Manual on the 27th, the stock rails and switch points that I did look a, there was some overflow left on some of them, visual overflow. The radiusing, which is outlined in the welding manual, was not accomplished per BNSF standards, where they left sharp edges and not the proper radius. Not achieving proper radius can lead to abnormal checking or aggravated checking and spalling. Not removing the overflow can leave a switch point held open or can cause also checking and shelling when the overflow will break off." (TR 18)

- Mr. Heinen discussed his findings with the Appellant and Mr. Noffsinger at the time of his observation on January 27th, and observed that they did have a copy of the chapter for grinding with the MC3 in their truck. (Id.)
- On January 28th, Mr. Heinen again observed the Appellant and Mr. Noffsinger:

"And then on the 28th, Mr. Sanford had one of his Section crews and the other welding crew that is assigned to Superior set up a stock rail and a piece of rail on ties and then I went over with Harris and Mr. Noffsinger and watched them start to proceed doing that weld. They did not hold any kind of briefing at the beginning to show where they were going to set any of their hot materials and that they did not clean any snow away from the area for proper placement of hot materials. They did not check the alignment of the rail as per the instructions. They did not check to see the vertical crown by sitting down underneath the ball. When they went into their crowning procedures, they went up with the alignment plates and then back down. They then started the alignment process again. And then after they'd gotten the crown up in the air again, that's when they decided to sit down underneath the ball, which is not the proper procedure. I then took the crown out and looked at the gap they had, during this time period they had made no effort to maintain their one-inch gap. At the time, the second time the alignment plates were put down, the gap was an inch and a 1/4, which does not meet any type of BN specifications. I then called Mr. Sanford and asked him to

come over and we talked to Mr. Noffsinger and Mr. Harris over at the office, advising them that there would be a formal hearing being held on these issues, for not following BNSF Rules and Procedures.” (TR 18, 34)

It was undisputed that throughout the entire process, the gap and the alignment process should be monitored. (TR 35) The Appellant testified that

- In his testimony in this regard, Mr. Sanford, who served as the Appellant’s and Mr. Noffsinger’s immediate supervisor, noted that “Steve [Heinen] stopped the procedures for several reasons, safety reasons, and the procedures in the welding manual were not followed to align the weld both vertically and horizontally, and the gap to make that weld, and, and had other safety concerns that this was not going to be able to take place.” (TR 8) He also testified that he observed that the Appellant was performing the grinding tasks associated with the project. (TR 9)
- Mr. Heinen testified that there was no indication that the Appellant and Mr. Noffsinger were going to pour a weld with the gap unchecked. (See TR 33) Moreover, Mr. Noffsinger testified that he would not have poured the weld if the rails had not been properly aligned. (TR 57)
- The foregoing observation by Mr. Heinen caused him to stop the thermite welding process from a safety concern. Mr. Heinen explained: “Because the gap I saw was wide, it was up there, and once final crown is achieved, you cannot move the rail back together, ‘cause that will then affect your crown. The crown has to be monitored through the whole process.” (TR 36) Neither the Appellant nor Mr. Noffsinger were taken out of service. (TR 38) Mr. Heinen commented to the Appellant about the grind he and Mr. Noffsinger had performed. (TR 60)
- The Appellant recalled Mr. Heinen commenting that “You can’t line a rail like this with these rail ends up in the air. . . Look at this gap . . It’s an inch and a quarter.” (TR 67)
- Prior to Mr. Heinen’s observations on January 27, there was no meeting called so that either principal, Mr. Sanford or Mr. Heinen could discuss expectations. (TR 29) However, once at the work site, Mr. Heinen advised the Appellant and Mr. Noffsinger “I’m just here to look at your work practices, watch you gentlemen

make a thermite weld.” (TR 29) There was, however, a “conference call” in the morning preceding Mr. Heinen’s observations where the Appellant and Mr. Noffsinger as well as others, were advised that Mr. Heinen would be observing their work performance. (TR 53)

- Mr. Heinen testified, without contradiction, that both the Appellant and Mr. Noffsinger had been trained several times regarding the BNSF Welding Manual and the Thermite Manual “[i]n the field and down at Overland Park or Kansas City and the Technical Training Center.” (Id.) Mr. Heinen testified that once qualified in BN Standards, “[y]ou’re supposed to know the complete process from beginning to end.” Both the Appellant and Mr. Noffsinger were qualified in BN Standards, and the Appellant had been examined on the Maintenance of Way Operating Rules. (See TR 63-64) During his testimony, the Appellant acknowledged that he had received formal welding training in Overland park, and received on-the-job training as a grinder operator. (TR 65)
- Mr. Heinen testified that the work deficiencies he observed regarding the work performed by the Appellant and Mr. Noffsinger, particularly their failure to perform the proper radius grinding at the switches or switch points, could very well subject them to wear, spalling and gapping, potentially resulting in a derailment. (TR 20)
- Mr. Heinen testified that in order to insure that proper tolerances are met, workers should use the visual method as well as a radius gage. Mr. Heinen used both methods, and concluded that the work performed by both the Appellant and Mr. Noffsinger did not meet specifications. Neither had a gage in their possession at the time Mr. Heinen observed them. However, Mr. Heinen secured a gage from the Track Inspector and gave it to them on January 27th. (TR 22) Mr. Sanford testified that had he been informed of the Appellant’s need for a gage, he would have secured it. (TR 76) Mr. Skoglund, who testified on the Appellant’s and Mr. Noffsinger’s behalf agreed with Mr. Sanford testimony in this regard. (TR 77)
- The Appellant acknowledged that he did not have a radius gage. In this regard, he testified that he and Mr. Noffsinger had discussed this deficiency “often”, but

elected not to report the matter to anyone, choosing instead to leave it up to Mr. Noffsinger to secure. (TR 65) Neither Mr. Heinen nor Mr. Sanford recalled receiving any type of notice from either the Appellant or Mr. Noffsinger as to the need for a radius gage. (See TR 26, 49, 74)

- Appellant acknowledged his need to have a gage in order to properly perform his job, a fact that was brought to his attention by Mr. Noffsinger. (TR 69. See also TR 76) A visual inspection as well as use of the radius gage would have alerted the Appellant that there was not the proper contour. (See TR 24) Neither was properly utilized by the Appellant.
- Once in possession of a gage, which he secured from Mr. Heinen, the Appellant was able to perform his task as required. (TR 70-71)
- When questioned about the use of “protective equipment” required for use with the oxy-acetylene torch use to heat the rail, the Appellant acknowledged that he did not use the required gloves to perform the job, noting that he used “[t]he best leather gloves I had. That’s what I did.” (TR 73)
- Bruce Skoglund, a Grinder Operator since 1977, testified that on January 28th, he and Tom Jonasen, his partner, were asked by Mr. Heinen about a rail gap that the Appellant and Mr. Noffsinger were aligning. Mr. Heinen informed them that the gap was greater than one inch at the time of his observation. Mr. Skoglund responded by informing Mr. Heinen that they had started off with a one-inch gap, but when adjusting the rail, it is possible for the gap to either get larger or smaller. (TR 40-41)
- Bruce Hendrickson, the Section Foreman at Allouez, testified that prior to the time Mr. Heinen checked the Appellant’s and Mr. Noffsinger’s work, the Appellant and Mr. Noffsinger were in the process of adjusting the MC3 Grinder in order to get it to work in an optimal fashion. (TR 44) (There was some belt slippage at prior to the adjustment. TR 46) Neither the Appellant nor Mr. Noffsinger brought any such “problem” to Mr. Heinen’s attention. (TR 59) Thereafter, Mr. Hendrickson recalled Mr. Heinen raising a serious concern he had

with the “profile” of the grinding performed by the Appellant and Mr. Noffsinger. (TR 45) Finally, while Mr. Hendrickson did not assist the Appellant or Mr. Noffsinger in their grinding process, he testified that he assisted them in making adjustments to the switch in order that the switch points would fit to the rails. (Id.) Mr. Hendrickson did not take exception to any of the switches he assisted in adjusting. (TR 47)

- Mr. Noffsinger, as the Head Welder and Appellant’s foreman, maintained that he followed all applicable Rules and Procedures in carrying out his responsibilities. (TR 81-85) He acknowledged, however, that he did not conduct a safety briefing with anyone other than the Appellant, thereby failing to conduct one with Mr. Heinen present. (See TR 82)
- Mr. Sanford, who served as the Appellant’s immediate supervisor since 1984, testified that prior to the January 28th incident, the Appellant did have experience as an MC3 grinder. (TR 15)

THE ORGANIZATION’S POSITION

As an initial matter, the Organization maintains that since this case is about a work method issue, it should have been handled with a coach and counsel, a process used by the Carrier in most occasions as a means of improving performance.

With respect to the observation conducted by Mr. Heinen at Mr. Sanford’s request, the Organization maintains that there was no conversation prior to such observation in order to permit a sharing of expectations. In addition, the Organization notes that it was clear that the Appellant and Mr. Noffsinger performed their responsibilities without proper gages, having brought such deficiency to Mr. Sanford’s attention prior to Mr. Heinen’s worksite visit.

With respect to Mr. Heinen’s observations regarding the existence of a one and one-quarter inch gap, together with the existence of snow in the immediate area of the weld, the Organization maintains that the adverse use of such observation to question the

Appellant's ability was premature. In this regard, the Organization maintains that the Appellant and Mr. Noffsinger were merely in the process of lining up the rail, thereby accounting for the gap. In any event, a coach and counsel would have been the most effective method of assisting the Appellant with any perceived problem.

Finally, the Organization requests that this Board take into consideration the fact that the Appellant had been employed by the Carrier for approximately 24 years, 14 of which have been as a grinder and welder, and prior to the instant matter, the Appellant's record was free from any deficiencies.

THE CARRIER'S POSITION

The Carrier's position is set forth in its March 20, 2003 letter to the Appellant, setting forth its findings and conclusions resulting from the formal investigation conducted on February 19, 2003.

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 40²;
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.

² Aside from an objection from the Organization's representative that the Conducting Officer failed to accept an exhibit, the Organization and the Appellant acknowledge that the Investigation was conducted in a fair and impartial manner. Accordingly, I find compliance with Rule 40 in this case.

B. 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, boiled down to its basic elements, the Carrier maintains that the Appellant was negligent in performing the tasks associated with his Grinding responsibilities, negligent in his failure to conduct a safety briefing with Mr. Heinen present, and negligent in his failure to use the proper safety equipment (gloves) required with the welding task at issue. In such cases, Referees will sustain reasonable 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:

1. It is undisputed, and for his part, the Appellant agrees that he has an obligation as well as a duty to perform his job responsibilities in conformance with applicable

BNSF Track Welding Rules and procedures, the BNSF Thermite Welding Manual, the BNSF Maintenance of Way Operating Rules, BNSF Safety Rules and the Boutet Thermite Welding Rules.

2. It was also undisputed, and Mr. Heinen testified that the deficiencies he observed relative to the Appellant's work, particularly the failure to perform the proper radius grinding at the switches or switch points, could very well have subjected them to wear, spalling and gapping, potentially resulting in a derailment.
3. Next, the Appellant's omissions in the areas charged was unreasonable to the extent noted below:
 - While Mr. Noffsinger admitted his failure to conduct a safety briefing, the Appellant, given his level of experience and training, could have made the suggestion that one be conducted with Mr. Heinen present. In this regard, Appellant's personnel record shows that he received training on "Job Safety Briefing" on March 22, 1999 and again on April 22, 1999.
 - Appellant acknowledged his insecurity in dealing with a last minute Thermite Weld project, and blamed the resulting deficiency on a failure by Mr. Heinen to conduct a meeting with them prior to his observation so as to outline his expectations. However, Appellant's personnel record shows that he received training in Thermite Welding on August 13, 2001. He also received training in "Welding Review – Field" on January 1, 2001, and "Elements of Welding" on March 4, 2002. Moreover, as Mr. Heinen indicated, once qualified in BN Standards as the Appellant was, it was incumbent upon the Appellant to know the complete process from beginning to end.
 - Appellant acknowledged that he failed to use a gage in order to properly perform his job. He also acknowledged the importance of having a gage, indicating in his testimony that once Mr. Heinen secured one for he and Mr. Noffsinger to use, he was able to check his work properly. Appellant's attempt to shift the burden to Mr. Noffsinger to secure the gage only goes so far. In this regard, given Mr. Heinen's testimony and the Appellant's training and experience, the record evidence contains no acceptable reason for the Appellant's failure to secure the gage himself.

- The Appellant offered no acceptable reason for having not cleared the snow away from the area for proper placement of hot materials. In addition, the Appellant offered no acceptable reason for not using the proper gloves associated with his use of the oxy-acetylene torch he used to heat the rail.
- 4. Notwithstanding the foregoing conclusions, Appellant's personnel record supports his assertion that he had never received formal training on the use of the MC3 Grinder.
- 5. Appellant's personnel record shows that prior to the instant occurrence giving rise to an investigation, Appellant was served with a suspension in 1990 for "Failure to Comply with Instructions", again in 1995 for his "Failure to Comply with Instructions", and received formal reprimands for his Non-Compliance with Safety Rules in 1999. From 1999 to the instant occurrence in 2003, the Appellant has remained discipline free. Moreover, the record evidence supports the Appellant's claim that prior to the instant occurrence, he had never been censured or disciplined for his work as a grinder.

Given the foregoing conclusions, I find that substantial evidence exists to support the charges at issue.

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 Level S Record Suspension of 30 days, a three-year probationary period, and a mandate to attend and pass a thermite welding class prior to holding a welding or grinding position.

The testimony offered by Mr. Heinen established the serious nature of the Appellant's Rule and Procedural violations - noting that the work deficiencies he observed regarding

the work performed by the Appellant, with particular emphasis on his failure to perform the proper radius grinding at the switches or switch points, could very well subject them to wear, spalling and gapping, potentially resulting in a *derailment*. (TR 20, emphasis added) However, notwithstanding the serious nature of Appellant's violations, the following factors must be considered in fashioning an appropriate penalty:

First, the Appellant had never received formal training in the use of the MC3;

Second, in his thirty-one years of service as a grinder, and prior to the instant occurrence, Appellant has never had exception taken to his work;

Third, as an equity issue, the Appellant should not suffer a penalty more severe than that sought by the Carrier and ultimately imposed on Mr. Noffsinger, who, at all times, retained overall authority over the worksite, as well as serving as the Appellant's foreman.

For the foregoing reasons, while the General Guidelines are clear, the penalty imposed should be no more than that imposed on Mr. Noffsinger for identical violations.

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 charge at issue, and
3. Given the specific and serious nature of this case, the penalty imposed should consist of a 30 day record suspension, a probationary period of one year, and a mandate to attend and pass a thermite welding class prior to holding a welding or grinding position.

07-22-03

Dated


Dennis J. Campagna, Referee
SBA No. 1112