

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

CASE #64 – Vincent L. Roberts (Level S – Thirty (30) Day Record Suspension)
AWARD NO. 65

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

Vincent L. Roberts, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company on May 22, 1974. At all relevant times, the Appellant was assigned as a Section Foreman working at or near Burlington, Iowa.

C. The Charge at Issue

On or about June 24, 2003, following a formal investigation conducted on May 28, 2003, The Appellant was served with following charge:

This letter will confirm that as a result of investigation on May 28, 2003 concerning your negligence causing personal injury to a fellow employee, you are issued a Level S Record Suspension of thirty (30) days for violation of Maintenance of Way Safety Rules S-17.2.2, Lifting, and S-17.6, Crane and Hoisting Signals. Also, you will be on a three (3) year probation period.

In accessing discipline consideration was given to your personal record.

D. The Rules at Issue

Maintenance of Way Rule 17.2.2 (Lifting) effective January 31, 1999, provides in relevant part:

When lifting: . . . Ensure that a designated employee will direct movement and give signals. This employee must determine that all personnel are in safe positions before the hoisting begins.

Maintenance of Way Rule S-17.6 (Crane and Hoisting Signals) effective January 31, 1999, provides in relevant part:

Only a designated employee (groundman) will give signals to the hoisting machine operator. Before work begins, the ground must communicate with the operator to develop an understanding of all signals.

The crane operator must stop the move if a signal is not understood or visual contact is lost with the groundman. The groundman must continue to give signals until the move is complete.

When two or more hoisting machines are lifting the same load, only one designated employee will direct the movements.

Accept signals for operating hoisting equipment only from the designated groundman, except in an emergency. An emergency stop signal must be accepted from anyone.

E. Facts Gathered from the May 28, 2003 Investigation

On May 28, 2003, a formal investigation was conducted by J.P. Johnson, Roadmaster and Conducting Officer. At such investigation, the Appellant was represented by T. H. Archibald, BMW Assistant General Chairman. The facts gathered at the investigation, which are not in dispute, established that on April 17, 2003, the date of the incident:

- A safety briefing was held to discuss the particulars associated with a replacement rail. At such briefing were the Appellant, who was Section Foreman, Randy Morrow, who was working as a Laborer, and Steve Feehen, working as the truck driver. These three individuals comprised the crew at issue. The Appellant described the task that was to be performed, particularly untying rail #129 and unloading it before picking up the #136 rail, the rail that would be used for the task. Appellant was to operate the boom, Mr. Morrow was responsible for untying the rail, and Mr. Feehen would be responsible to turn the radio on outside of the truck so that the Appellant and Mr. Morrow could hear the radio if someone were to attempt contacting the crew.
- Appellant, Mr. Morrow and Mr. Feehen were on board a truck which held a Knuckle boom located in the back end of the truck. This knuckle boom was kept stable by its location in a boom rack. The boom, which rests approximately seven feet above the truck bed has two knuckles, one on either side of the boom. Two tongs, each weighing approximately 45 pounds, are suspended, one on each side of the boom. The boom is operated by a set of 5 controls located at the back of the truck. Each control is marked, and located approximately one-half inch from the next control.
- Following the briefing, each member of the crew took his respective position. Mr. Morrow took his position in the back of the truck, and was ready to untie the

#129 rail. Mr. Morrow was facing the rail in the racks on the west side of the truck with his back toward the Appellant, and the truck was facing south. At this time, the Appellant noticed that the rail tongs were located at about head height, and he was concerned that if Mr. Morrow was to turn around, given his height of approximately 6 foot 2 inches, it was very possible that he would walk into the tongs when he finished untying rail #129, and quite possibly sustain a serious injury. (TR 27) Appellant indicated that he attempted to get Mr. Morrow's attention, but was unsuccessful, primarily due to the excessive noise. (TR 13) In an effort to relocate the boom, the Appellant used the "swing lever", causing the boom to swing to the west. At that point, the boom was located behind Mr. Morrow, with tongs suspended. As the boom began to swing, the momentum of the move caused the tongs to swing, hitting the back and side of Mr. Morrow's hard hat, causing him to fall into the truck. (TR 28).

- The blow Mr. Morrow experienced caused him to vomit, experience light headedness, and a headache. As a precautionary measure, he was taken to his physician for an examination. Mr. Morrow reported to work the next day.
- The Appellant admitted using the incorrect lever (TR 33, 36), a mistake he attributed to having a new pair of glasses, with bifocals. Accordingly, while the Appellant believed that he was reaching for the lever that controlled the boom's up and down movement, he inadvertently used the swing lever. (Id.)

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. Compliance with Rule 40

While the Appellant and his Union representative reserved judgment as to whether the investigation was conducted in a fair and impartial manner, there is nothing in the record evidence to indicate a challenge to the contrary. Accordingly, the provisions of Rule 40 have been met in this proceeding.

C. Substantial Evidence Exists to Support the Charges

In a nut-shell, the Carrier alleges that the Appellant's actions on April 17, 2003 were negligent, thereby causing injury to Mr. Morrow, a fellow employee. 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 Safety Rules, and that he was clearly trained and capable of performing the tasks associated with the operation and movement of a boom in a safe and efficient manner. Accordingly, the first and fourth factors have been met.
2. Next, it was established that Mr. Morrow had his back to the Appellant, the area was extremely noisy, and accordingly, the Appellant's was unable to communicate with Mr. Morrow so as to inform him of his intentions to move the boom. Accordingly, the Carrier has established a violation of Rule S-17.2.2. In addition, pursuant to Rule S-17.6, it was the Appellant's responsibility to cease all boom activity where, as here, he was unable to communicate with Mr. Morrow. Accordingly, the Carrier has established a violation of this Rule. Appellant's actions were, therefore, unreasonable under the specific facts and circumstances associated with the instant matter. Accordingly, the third factor has been met.
3. It is undisputed that there was a clear and present danger to Mr. Morrow. The testimony of the Appellant established that. Indeed, it is undisputed that the Appellant's actions were designed to prevent potential injury to Mr. Morrow. Accordingly, the second factor has been met.

While there is no doubt that the Appellant was acting in a manner he believed would in the best interest of Mr. Morrow, in his attempt to prevent potential harm to him, his manner of doing so was negligent, thereby causing injury to the individual the Appellant sought to protect. In retrospect, the injury sustained by Mr. Morrow could have been prevented with strict adherence to the BNSF Rules.

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

D. 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.

CONCLUSION AND AWARD

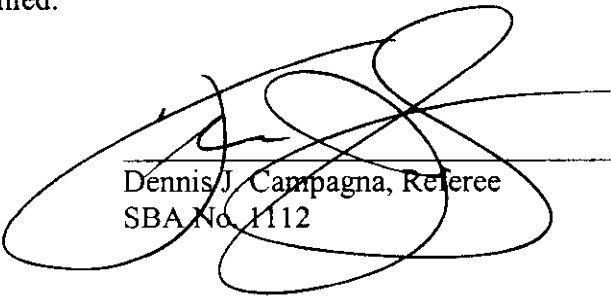
For the reasons noted and discussed above, it is the conclusion of this Referee that:

1. The Carrier has complied with Rule 40;
2. There is substantial evidence in the record to support the charge at issue.

Accordingly, the claim herein is denied.

11-11-03

Dated


Dennis J. Campagna, Referee
SBA No. 1112