

SPECIAL BOARD OF ADJUSTMENT NO. 1112

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 Head Welder and Grinder Operator in Superior, WI.

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 one (1) year, 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. Relevant Rules at Issue

The relevant portion of the **BNSF Maintenance of Way Operating Rules** read as follows:

1.3.1 Safety Rules

Employees must have a copy of, be familiar with and comply with all safety rules issued in a separate book or in another form.

1.3.2 Circulars, Instructions and Notices

Circulars, instructions, notices and other information are issued and cancelled by the designated manager. Before beginning each day's work or trip, trainmen, enginemen, and any others whose duties require must review those that apply to the territory they will work on.

Rule 1.1: Safety

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.

All employees are empowered and required to refuse to violate any rule within these rules. They must inform the employee in charge if they believe that a rule will be violated. This must be done before work begins.

Conduct a job safety briefing with individuals involved before work begins, before performing new tasks, when working conditions change. The job safety briefing must include the type of authority and protection in effect.

Rule 1.2.7 Furnishing Information

Employees must not withhold information or fail to give all the facts to those authorized to receive information regarding unusual events, accidents, personal injuries or rules violations.

Rule 1.6 Conduct

Employees must not be:

1. Careless of the safety of themselves or others.
2. Negligent

BNSF Maintenance of Way Safety Rules, Effective January 31, 1999:

Rule S-1.1 Job Safety Briefing

Employees must participate in job safety briefing before beginning work and when work or job conditions change. The briefing includes a discussion of the general work plan, existing or potential hazards, and ways to eliminate or protect against hazards. Outside parties or contractors involved in the work or who are in the work area must also be included in the job safety briefing.

Rule S-1.2.5 Safety Rules, Training Practices, Policies

Comply with all safety rules, training practices and policies and engineering instructions.

BNSF Welding Rules and Procedures:

Rule 5.3.6: In order to produce the rounded surface with a piece of equipment that will only produce straight cuts, the operator must make a series of linked “lighter” or smaller cuts, rather than one heavy cut.

Rule 5.5.4: Switch Points and Stock Rails require preventive grinding as follows:

- a. Removal of the overflow lip and the reestablishment of the proper radius on the gage side of the stock rail from four inches in front of the tip of the switch point, to a location approximately three feet past the end of the side head planning on the field side of the switch point.

BNSF Thermite Welding Manual, Boutet Process, Rules and Procedures:

Rule 11.2: Track at a thermite weld site must be in proper surface and line prior to beginning a thermite weld installation.

Rule 11.5: The welder in charge shall check the surface of the joint to be welded. If the joint is low, it shall be raised and ties tamped prior to removal of the joint bar.

Rule 11.10: Areas shall be prepared for the on-molding operation. These areas are located where:

- a. The hot crucible will be placed after removal from the weld. This location shall be level and dry.
- b. Slag basin will be placed to complete cooling after removal from mold clamp. This location shall be level and dry, free of any water, snow or ice. The pathway to this location must be determined such that an employee has sound footing and cannot slip while carrying the slag pan.

Rule 12.16: The weld gap must be checked to insure it meets established tolerances. The welding gap shall be checked at three locations, top center of the rail head, gage edge of the base, and field edge of the base.

Rule 13.1(b): Visual alignment must be checked from a distance of approximately 39 feet from the weld in both vertical and horizontal plane. Vertical alignment is checked by sighting under the ball of the rail to insure proper crown exists. In order to achieve vertical alignment, if flat plateau or concave surface exists, it may be necessary to set a jack approximately 15 feet from the joint on the low rail, raise rail up so that it is level with the higher rail, then check alignment at the joint.

E. 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 Head Welder at Allouez Yard, and John Harris, who worked with the Appellant as his Grinder 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. Harris 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 The Appellant’s service as Head Welder rendered him ultimately responsible for Mr. Harris as the Grinder Operator, serving as Mr. Harris’s foreman. (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. Harris. 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)
- Notwithstanding Mr. Sanford’s concerns regarding the Appellant’s and Mr. Harris’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. Harris, 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. Harris. 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)

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

- Mr. Heinen discussed his findings with the Appellant and Mr. Harris 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. Harris:

“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. Hoffsinger 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 ¼, which does not meet any type of BN specifications. I then called Mr. Sanford and asked him to come over and we talked to [the Appellant] 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 he did not continue to monitor and measure the gap during the lining process until it was brought to his attention. (TR 61)

- Mr. Heinen testified that there was no indication that the Appellant and Mr. Harris were going to pour a weld with the gap unchecked. (See TR 33) Moreover, the Appellant 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. Harris were taken out of service. (TR 38) Mr. Heinen commented to the Appellant about the grind he and Mr. Harris had performed, and the Appellant testified that he understood Mr. Heinen’s concerns. (TR 60)

- In his testimony, the Appellant acknowledged that he “should have” conducted a safety briefing once Mr. Heinen came on the work site. (TR 61)
- The Appellant acknowledged the existence of a one and one-quarter inch gap. He also acknowledged that he had the BNSF Welding and the Thermite Welding Manuals in his truck. (TR 51, 52)
- 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. Harris “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. Harris, as well as others, were advised that Mr. Heinen would be observing their work performance. (TR 53)
- It was stipulated that the Appellant had several years of experience as a thermite welder, and had performed several hundred welds to his credit without incident or exception. (TR 58) It is undisputed that in the numerous years performing Welding and Grinding operations, prior to the instant matter, the Carrier had never taken issue or exception with his work. (See TR 21)

- Mr. Heinen testified that in his opinion, there was nothing wrong with the way in which the MC3 Grinder was set up. (TR 24)
- Mr. Heinen testified, without contradiction, that both the Appellant and Mr. Harris 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. Harris were qualified in BN Standards. (TR 20, 49 – Appellant’s concurrence)
- Mr. Heinen testified that the work deficiencies he observed regarding the work performed by the Appellant and Mr. Harris, 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. Harris 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. Harris’s behalf agreed with Mr. Sanford testimony in this regard. (TR 77)
- It was the Appellant’s ultimate responsibility to advise his supervisor when necessary equipment was required. Appellant acknowledges this responsibility, as well as his need to have a gage in order to properly perform his job. (TR 59)

A visual inspection as well as use of the radius gage would have alerted the Appellant that there was not the proper contour. (TR 24) Neither was properly utilized by the Appellant. While the Appellant testified that he brought the lack of a gage to Mr. Sanford's attention, neither Mr. Heinen nor Mr. Sanford recalled receiving any type of notice from either the Appellant or Mr. Harris as to the need for a radius gage. (See TR 26, 49, 74)

- The Appellant acknowledged that the profile of the radius was out of tolerance, and that following his discussion with Mr. Heinen and their review of the Manual, he and Mr. Harris "[t]ried to do a better job . . . to correct the tolerances of the work [he] had previously done." (TR 50) Appellant testified that once he received a gage, he was able to "correct the problem." (TR 60)
- 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. Harris 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. Mr. Skoglund also testified that he did not know if it was necessary, according to the Rules, to remove snow in the area during the alignment process. (TR 40-41)
- Bruce Hendrickson, the Section Foreman at Allouez, testified that prior to the time Mr. Heinen checked the Appellant's and Mr. Harris' work, the Appellant and Mr. Harris 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. Harris 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. Harris. (TR 45) Finally, while Mr. Hendrickson did not assist the Appellant or Mr. Harris 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)

- Finally, the Appellant 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 Mr. Harris, thereby failing to conduct one with Mr. Heinen present. (See TR 82)

POSITION OF THE PARTIES

A. 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. Harris 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. Harris 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.

B. The Carrier's Position

In a nutshell, the Carrier asserts that it has shown that the Appellant performed his job in a negligent fashion. In this regard, the Carrier relies upon the admissions by the Appellant that he failed to perform a safety briefing when Mr. Heinen arrived on the worksite, admitted to the existence of a one and one-quarter inch gap, and admitted to performing his job without a gage. In this later regard, the Carrier takes the position that while the Appellant testified that he requested a gage from Mr. Sanford prior to Mr. Heinen's observation, a credibility determination in the Carrier's favor is appropriate in light of Mr. Sanford's testimony that he could recall no such request by the Appellant. Given the foregoing, it is the Carrier's position that it has proven the Charges at issue, and that the discipline assessed should stand.

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.

(MOA, Paragraph 8)

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, Black's Law Dictionary, Fifth Edition, defines "Substantial Evidence" as follows:

Such evidence that a reasonable mind might accept as adequate to support a conclusion. It is that quality of evidence necessary for a court to affirm a decision of an administrative board. Under the "substantial evidence rule," reviewing courts will defer to an agency determination so long as, upon an examination of the whole record, there is substantial evidence upon which the agency could reasonably base its decision.

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.

Boiled down to its basic elements, the Carrier maintains that the Appellant was negligent in performing the tasks associated with his Welding responsibilities, negligent in his failure to conduct a safety briefing with Mr. Heinen present, and negligent in his obligation to oversee the Grinding tasks associated with the project 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 under the circumstances:
 - The Appellant admitted his failure to conduct a safety briefing when Mr. Heinen entered the work site. His attempt to escape liability by turning the obligation on Mr. Heinen to request the briefing must be rejected. (See Rules 1.3.1, 1.1, S-1.1, S-1.2.5.) The Rules place the obligation upon the Appellant in this matter to have conducted the safety briefing.
 - While the Appellant admitted deficiencies in the alignment and grinding operations, his attempt to shift the blame on a lack of the proper gage must fail. In this regard, I accept the finding by the Carrier on the issue of credibility on the part of Mr. Sanford and Mr. Heinen, who, contrary to the Appellant, could not recall the Appellant ever requesting a gage in order to properly complete his job.
 - Appellant as well as Mr. Harris also acknowledged their insecurity in dealing with a last minute Thermite Weld project, and blamed their deficiency on a failure by Mr. Heinen to conduct a meeting with them prior to his observation so as to outline his expectations. However, such a claim must fail in light of the fact that the Appellant was clearly schooled on proper procedures, and admitted to having done hundreds of welding operations during his career. 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.
 - The Appellant offered no acceptable reason for having not cleared the snow away from the area for proper placement of hot materials.
4. Finally, as noted and discussed above, the Appellant was trained and clearly capable of performing the task at issue.

Given the foregoing conclusions, I find that substantial evidence exists to prove 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 one-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) Under these circumstances, the General Guidelines are clear, and the penalty imposed by the Carrier is in conformance with these guidelines.

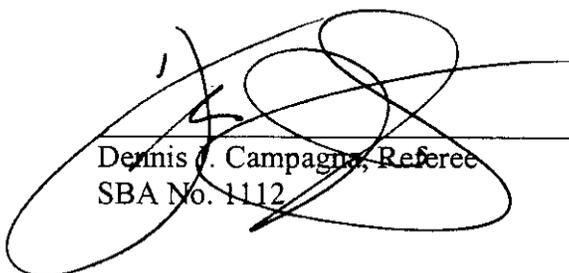
CONCLUSION AND AWARD

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 sought to be imposed by the Carrier will not be disturbed.

05-13-03

Dated


Dennis J. Campaigne, Referee
SBA No. 1112