

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

CASE # 72 – AWARD #73 – Glenn L. Cox
(30 Day Record Suspension, 3 Year Probationary Period, Safety Rules Violation)

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

Glenn L. Cox, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on July 6, 1977. At the time of the incident, the Appellant was assigned to drive the Whitefish Bend truck in Whitefish, Montana. The Appellant is represented by the Brotherhood of Maintenance of Way Employees.

C. The Charge at Issue

On or about March 19, 2004, following an Investigation conducted on February 24, 2004 by Doug L. Schuch, Trainmaster and Conducting Officer, the Appellant was charged with a violation of Maintenance of Way Safety Rule 1.0 (Core Safety Rules), S-1.2 (Rights and Responsibilities) and S-1.2.7 (Two or More People) when on January 22, 2004 at approximately 1110 hours, the Appellant sustained an injury while moving a switch heater by hand in the Old Material Department located in Whitefish, Montana. The Carrier seeks to impose a thirty-day record suspension with a three year probationary period as a result of the Appellant's alleged failure to perform the foregoing task in a safe and efficient manner.

D. Facts Gathered from the February 24, 2004 Investigation

On February 24, 2004, a formal investigation was conducted by Mr. Doug L. Schuch, Trainmaster for the BNSF located in Kalispell, Montana, who served as the conducting officer. At all times during the investigation, the Appellant was represented by Robert D. Osler, Vice General Chairman, BMW. The record created at this formal investigation established that:

- On January 22, 2004, at approximately 1100 hours, Bryce Vandenberg, a track laborer, was operating a forklift when he was instructed by the Roadmaster to move a number of objects to a storehouse located on the property. Once Mr. Vandenberg moved a number of old pallets, he set out to move the Detroit diesel engine (generator) that was setting in the storehouse. At or about this time, the Appellant asked Mr. Vandenberg if he could assist. Mr. Vandenberg accepted his offer, and Mr. Vandenberg, with the aide of his forklift, picked up the generator located at the north end of the storehouse, and began to move the forklift and generator toward the electrician's building in an area designated by the Roadmaster. (TR 4)

- As Mr. Vandenberg began to position the generator into the spot designated for its storage, he observed that the space was tight, and that while he might be able to place the generator down in the designated spot, he would be unable to get the forklift out from underneath it. He noticed, however, that if he was able to move the two switch heaters that were located in the vicinity of where he wanted to place the generator, he would have ample room to place the generator in its designated spot and have the ability to successfully remove the forklift. (Id.)
- At or about this time, the Appellant attempted to move one of the switch heaters by himself without soliciting the assistance of Mr. Vandenberg. Mr. Vandenberg estimated the weight of the switch heater to be approximately 300 pounds.¹ (TR 4-5) As Mr. Vandenberg observed, he noticed that the switch heater was heavier than what the Appellant could handle by himself. Accordingly, he offered to assist the Appellant with this task. (TR 5)
- The team effort of the Appellant and Mr. Vandenberg achieved its goal, moving the switch heater just enough to create the needed space in which to place the generator. (TR 5, 6) Both Mr. Vandenberg and the Appellant testified that their joint effort made the task of moving the switch heater a relatively easy one. (TR 10, 12) At this point in time, the Appellant mentioned to Mr. Vandenberg that he had cut his finger. (TR 6)
- Mr. Vandenberg testified that he did not see the Appellant sustain the injury to his right small finger. (TR 7) Appellant testified that his injury, which he labeled as a "compression cut", was sustained when, in the process of attempting to move the switch heater without assistance, he caught his finger between the frame of the machine and the toe of his steel-toed boot. (TR 10) Appellant required a treatment consisting of four stitches. (Id.)

¹ Appellant maintained that the switch heater weighed "much less" than 300 pounds. (TR 10)

- During his testimony, the Appellant was asked the following questions to which he gave the following responses:
 - Q. So, on that particular day you sustained a cut to your finger that required four stitches on I believe the date was January 22. You were moving a switch heater by yourself that caused you to sustain this injury?
 - A. Correct
 - Q. And then later after you walked away and came back you and Mr. Vandenberg safely moved the switch heater out of the way and didn't have much difficulty doing it, is that correct?
 - A. Correct, there were two stitch heaters.
 - Q. [T]here was the opportunity to use the forklift to move the switch heater if necessary?
 - A. I guess you could say that.
 - Q. Then as mentioned earlier when, when the two of you moved the switch heater you didn't have any trouble moving it, right?
 - A. Correct
 - Q. And neither one of you were hurt moving it together?
 - A. Correct
 - Q. And only when you tried to move it by yourself did the injury occur?
 - A. Correct
- Appellant acknowledged his understanding of Maintenance of Way Safety Rules 1.0, S-1.2 and S-1.2.7. (TR 11)

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 Issue Regarding Compliance With Rule 40

During the formal investigation, Mr. Osler maintained that the Carrier failed to conduct the investigation in an impartial manner. (TR 17) However, he, as well as the Appellant, acknowledged that they had been afforded full opportunity to ask questions of witnesses and principals at the investigation. (TR 17) In addition, both Mr. Osler and the Appellant could not advise the Conducting Officer of anything that was not covered during the investigation, despite being given the opportunity to do so. (Id.)

Given the Appellant's and the Organization's responses noted above, I find and conclude that the investigation at issue complied with Rule 40 in all respects, and therefore respectfully reject any allegation by the Organization to the contrary.

C. Substantial Evidence Exists to Support the Instant Charge²

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 failed to work in a "safe and efficient manner when [he] moved a switch heater by hand in the Old Material Department building at Whitefish, Montana on January 22, 2004 at approximately 1110 hours." Specifically, the Carrier maintains that the Appellant's failure in this regard was in contravention of the following Maintenance of Way Safety Rules:

- 1.0 These rules provide a core of safe work practices for BNSF people. The rules apply everyday and in every job we do. They will guide and direct us in maintaining a safe work environment.
- S-1.2 We have the right and responsibility to perform our work safely. Our training skills, work experience and personal judgment provide the foundation for making safe decisions about work practices.
- S.1.2.7 Do not perform a task alone that can only safely be performed by two or more people.

In concluding that substantial evidence exists to support the charge at issue, I note the Appellant's acknowledgement with respect to the ease with which he AND Mr. Vandenberg moved the switch heater, that use of the forklift would have been a better

² As an initial note, the Organization has not alleged that the Carrier's violated Rule 40 in the manner and/or method used in conducting this investigation. Accordingly, I find that there was compliance with Rule 40 in this matter.

and safer option for moving this device, and that by attempting to move the switch heater by himself, he sustained an injury. (See TR 14). In addition to these conclusions, I also note that the Appellant has sustained numerous job-related injuries in the past including a "foreign object in eye", "fracture" "sprain/strain" on five separate occasions, a "bruise/contusion" and a "laceration". (See Appellant Employment History) Given this history, a reasonable person in the shoes of the Appellant would have heeded these injuries as a reminder of the importance of adhering to the foregoing Safety Rules.

The Appropriate Penalty

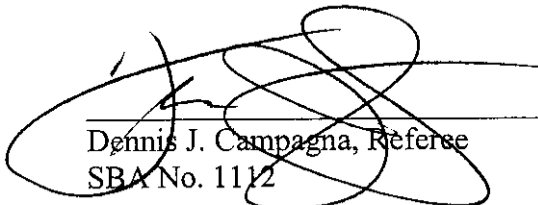
Having found and concluded that there is substantial evidence in the record to support the charges at issue, there remains a question as to the appropriate penalty. In this regard, the Carrier seeks to impose a ten (30) day record suspension with a three year probationary period. Under the specific circumstances of this case, with particular emphasis on the Appellant's prior history, noted above, together with the need to promote a safe work environment, I find that the penalty imposed by the Carrier to be a reasonable one.

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 the penalty imposed by the Carrier, consisting of a Thirty (30) Day Record Suspension with a three (3) year probationary period, to be, under the circumstances of this case, just and reasonable.

24 May 2004
Dated


Dennis J. Campagna, Referee
SBA No. 1112