

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

CASE # 73 – AWARD #74 – David L. Engelbrecht
(10 Day Record Suspension – 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

David L. Engelbrecht, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on April 11, 1994. At all relevant times, the Appellant was assigned as a Truck Driver headquartered in Gillette, Wyoming. The Appellant is represented by the Brotherhood of Maintenance of Way Employees.

C. The Charge at Issue

On or about March 15, 2004, following an Investigation conducted on February 23, 2004 by Jeff J. Stevens, Trainmaster and Conducting Officer, the Appellant was charged with a failure to follow BNSF MOW Safety Rule S-1.2.3 when on December 8, 2003, at approximately 3:00 p.m., BNSF Vehicle #12671 driven by the Appellant slid out of control and into a ditch causing the vehicle to roll-over onto its side at a location at/or near MP 001.0 Westbound on Edwards Road. As a result of the circumstances surrounding this incident, the Carrier seeks to impose a ten-day record suspension as a result of the Appellant's alleged failure to "[b]e Alert and Attentive".

As a result of the foregoing Charge, the Appellant was issued a formal reprimand consisting of a Ten (10) Day Record Suspension, and that notice of such formal reprimand is to be placed in his personal file.

D. Facts Gathered from the February 23, 2004 Formal Investigation

On February 23,, 2004, a formal investigation was conducted by Mr. Jeff J. Stevens, Trainmaster for the BNSF in Gillette, Wyoming, who served as the conducting officer. At all times during the investigation, the Appellant was represented by Robert I. Nickens, Vice General Chairman, BMW. The record created at this formal investigation established that:

- On December 8, 2003, at approximately 1500 hours, Michael Kline, Roadmaster in Gillette, Wyoming, received a radio call involving a "vehicle incident" that occurred near Edwards road south of Gillette, Wyoming. Upon receiving this call, Mr. Kline drove to the site where he met with Forman Brain Prickett. (TR 10) Mr. Kline testified that he observed Vehicle #12671 "[f]lipped over on its side on the north side of Edwards Road." (Id.) Mr. Kline described the vehicle as a single cab, hi-rail maintenance truck, "a very large vehicle." (Id.) The Vehicle was equipped with airbrakes, and not antilock brakes. (TR 27)

- Mr. Kline described his trip to the accident scene, a distance of approximately 10 miles, as snowy and icy. (TR 11, 14) Dirk Turner, who accompanied the Appellant in Vehicle #12671, concurred with Mr. Kline. (TR 16) Mr. Kline testified that a snow plow traveled by the scene of the accident spreading sand on the road following the accident. (TR 21) Both Mr. Turner and the Appellant were wearing their safety belts at the time of the accident. (TR 19)
- There is no dispute that at all relevant times, the Vehicle was in good working order. (TR 24)
- During his testimony, Mr. Turner indicated that it had been snowing all day, and that the road conditions had been affected by the weather that day. (TR 16) He described the events leading up to the accident as he and the Appellant were driving westbound on Edwards Road as follows: “Edwards Road is a two-turn road. We had already went through the worst part of it and we were coming up on the second part, and the vehicle slid. There’s two curves there. We were taking our time, going slow. Me and Dave had both have put down quite a few miles for this Company in personal vehicles and other trucks.” (TR 16, 17) The Appellant estimated the speed of his vehicle at the time of the incident as “[b]etween 30 and 35 coming around the curve.” (TR 27)
- The Appellant in a manner substantially identical to that offered by Mr. Turner, described the weather as snowy, icy and cold. He also indicated that given these inclement weather conditions, he was not comfortable driving. (See TR 26) The Appellant next described the events leading up to the accident as follows: “On this particular curve, when you’re going to, when you’re going westbound, at the start of the curve you’re uphill, you’re coming downhill. So, I was, I was in my lane, all the way in my lane, I was, I was coming into the curve and the truck was picking up speed cause I was descending down the grade. So, I tapped on my

brakes, you know, cause I always tap them, I don't, they say not to slam on your brakes. So I. I tapped on the brakes. And, I did it a couple of times. And I don't know, I don't know exactly what did it, cause I couldn't see what was going on. But I believe the wheels locked. I don't know if it was a malfunction. I believe it was, because I couldn't regain control of the truck. And I went into a skid and I couldn't stop it from sliding, so I, I tapped on the brakes a couple of times to see if it would, I could get the wheels rolling again, and I, couldn't. So, yes, I did cross the yellow lines after that so I could kind of straighten it out a little bit, cause I was, you know, still gaining speed beings how I was sliding. I, I crossed, I looked ahead to make sure there was no oncoming traffic, and I, I proceeded to use the other lane to see if I could straighten out the truck and keep it on the road rather than going into the ditch." (TR 27)

- It is undisputed that the Police did not issue any citations to the Appellant as a result of his accident. (TR 30) Moreover, the record indicates that the Appellant had a clean driver's license. (TR 31)
- Mr. Kline testified that he had an opportunity to speak with the Police Officer who responded to the scene of the accident. It was Mr. Kline's recollection that the Police Officer stated "[t]hat what it looked like to him was that the vehicle had come around the curve, lost control, and ended up in the ditch." (TR 22)

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. Substantial Evidence Exists to Support the Instant Charge

As an initial note, the record does not reflect any challenges by the Organization alleging a breach of Rule 40 as it applies to the instant proceeding. Accordingly, it is apparent and I conclude that there was compliance with Rule 40 in this case.

Next, in addressing issues of credibility, it is undisputed 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.

Turning now to the merits of the Charge, the Carrier maintains that the Appellant failed to be alert and attentive while driving his truck, and that as a direct of this failure, an incident occurred at approximately 3:00 p.m. on December 8, 2003. Accordingly, the Appellant was charged with a breach of BNSF MOW Safety Rule S-1.2.3.

S-1.2.3 Provides: Alert and Attentive

Assure that you are alert and attentive when performing your duties.

Simply stated, the question posed in this appeal is whether the incident at issue was a preventable one. A well-accepted definition of defensive driving is driving in a manner to avoid accident involvement despite adverse weather conditions created by roads,

weather, traffic, or the errors of other drivers or pedestrians. With this definition in mind, it is generally true that when a driver makes errors or fails to react reasonably under the circumstances then present, the accident is considered to be preventable.

In the instant matter, it is undisputed that the weather conditions were inclement, and that as a direct result, the road conditions were slippery and icy. This point notwithstanding, it is generally accepted that adverse weather conditions are not a valid excuse for being involved in an accident. Rain, snow, sleet or icy pavement has never caused an accident. While it is true that these conditions increase the hazards of driving, the failure to adjust driving to the prevailing weather conditions is accepted cause for deeming an accident as preventable. It should be noted that the morning briefing attended by the Appellant provided a reminder for all employees to heed the safety rules.

In the instant matter, the Carrier determined, in essence, that the accident at issue was a preventable one, and attributed the Appellant's failure to be alert and attentive while performing his driving duties as the root cause. The record evidence, noted above, reveals that as the Appellant approached the second curve, he knew that he would be traveling downhill, and also knew that the road ahead was full of snow, slippery and icy. Knowing this, he approached the curve traveling at a speed of approximately 30 to 30 MPH, obviously too fast for the conditions ahead. Accordingly, it is clear, and the record evidence supports that conclusion that while the road conditions increased the chances of having an accident, they did not cause the accident. Rather, the Appellant's failure to heed these conditions provided the root cause for his mishap.

Finally, while it is true that the Appellant was not issued any citation by the Police as a result of his accident, the lack of any such citation, while demonstrating that the Appellant's actions did not rise to the level of a violation of the Vehicle and Traffic Laws, does not remove the fact that as alleged by the Carrier, he failed to be alert and attentive at the relevant time periods.

Given the foregoing conclusions, I find that substantial evidence exists to support the charge maintaining his failure to be "Alert and attentive" while performing his duties, thereby breaching Safety Rule 1.2.3.

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 (10) day record suspension. Under the specific circumstances of this case, with particular emphasis on the need to promote safety at all times, I find that the penalty imposed by the Carrier to be a reasonable one.

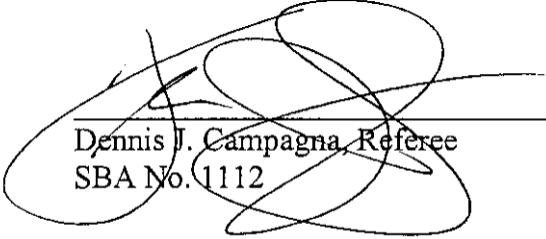
CONCLUSION AND AWARD

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. The penalty imposed by the Carrier, consisting of a Ten (10) Day Record Suspension is, under the circumstances of this case, just and reasonable.

06-10-04

Dated


Dennis J. Campagna, Referee
SBA No. 1112