

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

CASE # 82 – AWARD #83 – Michael G. Fox
[Level S 30 Day Record Suspension]

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

Michael G. Fox, the Appellant at issue, was employed by the Burlington Northern Santa Fe Railway Company (Carrier) on September 7, 1979 as a Trackman. He was dismissed from his employment on March 18, 1994, and subsequently reinstated on May 13, 1994. At the time of the incident that occurred on October 1, 2004, the Appellant worked as a

truck driver/Section Foreman in Wenatchee, Washington. The Appellant is represented by the Brotherhood of Maintenance of Way Employees.

C. The Charge at Issue

On or about December 8, 2004, following an Investigation conducted on November 11, 2004 by Don Karls, Trainmaster and Conducting Officer, the Appellant was charged with a violation of Maintenance of Way Safety Rule S-1.2.3 (Alert and Attentive) when on October 1, 2004, the Appellant struck a vehicle that was stopped in front of him at a street light at the intersection of Maiden Lane and Wenatchee Avenue. The Carrier seeks to impose a 30-day Level S Suspension as a result of the Appellant's alleged failure to comply with the foregoing Rule.

D. Facts Gathered from the November 11, 2004 Investigation

On November 11, 2004, a formal investigation was conducted by Mr. Don Karls, BNSF Trainmaster from Spokane, Washington, who served as the conducting officer. At all times during the investigation, the Appellant was represented by Robert (Bob) Osler, Vice General Chairman, BMWE. The record created at this formal investigation established that:

- On October 1, 2004¹, Charles ("Chuck") Christ, Roadmaster and the Appellant's immediate supervisor, received a phone call from Roger Dunn who informed him of the accident involving the Appellant. The Appellant told Mr. Christ that when he tried to stop at the intersection, he noticed that there were "[n]o brakes and he couldn't stop, struck the vehicle." (TR 11) Mr. Christ described the intersection as consisting of two lanes, and a third lane dedicated to a left turn. Appellant was in the center lane at the time of his accident. (Id.)

¹ All dates noted herein occurred in calendar year 2004 unless otherwise noted.

- On the week following the accident, Mr. Christ inspected the truck driven by the Appellant, described as a 1995 Ford Crew Cab, Four Wheel Drive Hyrail (meaning that the truck is capable of traveling on the roads as well as on the railroad track rails). (TR 11-12) Mr. Christ testified that the Truck was parked at Lloyd's Truck Center. He spoke with an individual named Bob, who indicated that following their inspection of the Truck's master cylinders, brakes, brake shoes and pads, hoses "and so forth", Lloyd's "[d]idn't find anything wrong with the brakes." (TR 12) Moreover, Mr. Christ noted, this Truck has a "double master cylinder", meaning that if one of the master cylinders fail, the other master cylinder would engage. Lloyd's could find nothing wrong with the double master cylinder system. (TR 19) Mr. Christ testified that during his inquiry of the Appellant, the Appellant told him that the brake pedal went to the floor. (TR 34) During his testimony, Jamie Sandoval, a truck driver in his own right, and passenger in the Appellant's Truck at the time of the accident, agreed. (TR 36, 39) However, when Mr. Christ took the Truck for a test drive, the brake pedal did not go to the floor, but went down far enough to stop the vehicle normally. (TR 34, 36)
- The inspection report from Lloyd's Auto & Truck noted: "Inspect brakes - [driver] involved in [motor vehicle accident] and stated that brake pedal went to floor - found no leaks - brake at 20% remaining on [front] and 50% on rear-master full and no leaks - booster working correctly." (Exhibit D, page 2)
- Mr. Christ testified that he drove the truck, taking some back roads "[a]nd drove it quite a bit you know thinking maybe I'd find something wrong but I didn't take any exceptions to the stopping it seemed to stop fine." (TR 12)
- Notwithstanding the lack of any findings by Mr. Christ or Lloyd's, a repair consisting of the replacement of the Master Cylinder was performed on the truck. Mr. Christ explained the reason for this repair: "After I drove the truck and I went back to the shop and I didn't take any exception to anything. And I talked to Mike Fox and later that day . . . Mike thought that we should have something done to the truck. 'Cause he felt that he told me that something will happen again

to the you know maybe not today, tomorrow but something will happen. And I felt that hey Mike wants us to do something to the truck, I didn't take any exception with the truck when I drove it but . . . Mike's empowered and for to show him good faith yeah I went back to the shop and I talked to them. I said hey is there anything we can do to this vehicle you know and they thought about it well we could start with the actual I believe the name was actuator and I said let's go ahead and replace that cause the guys Mike's refusing to drive it so they replaced that and they're driving it now." (TR 13, see also TR 16)²

- During his examination, the Appellant testified that he didn't see the vehicle in front of him brake due to the lack of any visible brake lights. He watched the vehicle in order to determine if it was going to stop at the light, and in the process, "slowly started applying the brakes more and more and more the entire time the vehicle was never slowing down. And I kept slowly applying more and more pressure and finally the car did stop at the light and I applied the brakes until they stopped and they did absolutely nothing. *The brake pedal didn't go to the floor the pedal only went about as far as it should of but the brakes didn't work.* Immediately I hollered out Jamie no brakes." (Emphasis added) The Appellant testified that he looked to the right and left but was unable to move to either lane due to the fact that both lanes were occupied with traffic. He also testified that he did not use the emergency brake, or attempt to shift to a lower gear. (TR 21) The Appellant estimated his speed at the time of the incident as approximately 30 MPH. (TR 22)
- Jamie Sandoval, Appellant's passenger at the time of the accident, testified that he recalled the incident and the Appellant yelling to him that he had no brakes. (TR 37) Mr. Sandoval testified that while he and the Appellant anticipated that the vehicle directly in front of them would not stop for the signal ahead, electing instead "[t]o run a yellow light", he testified that "[a]ll of a sudden [she] stopped by then that's when." (Id.) Finally, Mr. Sandoval testified that while he was the

² Exhibit D shows that the Master Cylinder on the Truck was replaced.

only eyewitness to the accident, no BNSF agent questioned him about the incident as part of the investigation. (TR 40)

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 Organization's Issue Regarding Compliance With Rule 40

During the formal investigation, Mr. Osler maintained that in his opinion the Investigation was not conducted in a fair and impartial manner, but stated no specific reasons to support this opinion.

Following a careful review of the record in this case, it cannot be said that the Carrier deprived either the Appellant or the Organization the opportunity to call and examine witnesses, or the right to introduce relevant evidence of its own choosing. Indeed, the Appellant himself acknowledged that he had an opportunity to review all exhibits and question all witnesses. (See TR 46) Accordingly, it is the determination of this Referee that the Carrier has complied with Rule 40 in this matter.

C. 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. In the instant matter, it is apparent that the Carrier made its credibility determination against the Appellant, and I find that its decision to do so was supported by the record.

Turning now to the merits of the Charge, the Carrier maintains that the Appellant, by his actions on October 1, 2004, failed to adhere to the foregoing Maintenance of Way Safety Rule 1.1.2, "Alert and Attentive". I find, on the basis of this record, that substantial evidence exists to support these charges. In this regard, the record evidence supports a fair conclusion that it is more conceivable than not that the Appellant proceeded in anticipation that the vehicle in front of him would not stop for the signal that was yellow at the time, but once he became aware of the fact that the vehicle would in fact stop, it was too late for him to do so.

The Appropriate Penalty

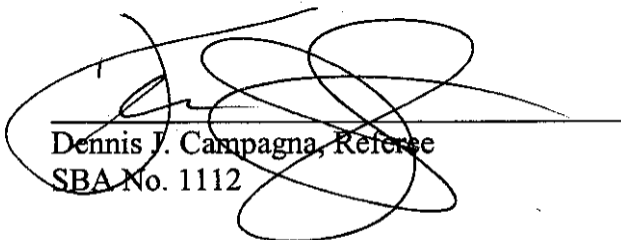
Having found and concluded that there is substantial evidence in the record to support the charges at issue, there remains a question as to the appropriate penalty. In this regard, the Carrier seeks to impose a Level S 30 Day Record Suspension. As an initial matter, it should be noted that where, as here, substantial evidence exists to support the charges at issue, it is well accepted that the proposed penalty as suggested by the Carrier will not be disturbed unless it is arbitrary or capricious, or simply too harsh to fit the offense. I cannot find on the basis of this record that the penalty sought to be imposed by the Carrier was arbitrary, capricious or too harsh.

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 Level S 30-Day Record Suspension to be, under the circumstances of this case, just and reasonable.

7 March 2005
Dated


Dennis J. Campagna, Referee
SBA No. 1112