

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

SAN FRANCISCO BAY AREA
RAPID TRANSIT DISTRICT
300 Lakeshore Drive, 18th Floor
Oakland, CA 94612

Employer

Dockets. 11-R2D2-3137 through 3139

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code, and having taken the petitions for reconsideration filed by each of the San Francisco Bay Area Rapid Transit District (BART or Employer) and by the Division of Occupational Safety and Health (the Division) under submission by order dated January 14, 2015, renders the following decision after reconsideration.

JURISDICTION

Commencing on July 17, 2011 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On December 2, 2011, the Division issued three citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a two-day contested evidentiary hearing on April 4 and 5, 2013. At the hearing the parties resolved their dispute of two of the citations, leaving only Citation 2 at issue. Citation 2 alleged a serious violation of section 2944, subdivision (c), pertaining to work near energized electrical equipment.

¹ References are to California Code of Regulations, title 8 unless specified otherwise.

On November 3, 2014, the ALJ issued a Decision (Decision) which sustained the violations alleged in Citation 2 and imposed a civil penalty.

Both Employer and the Division timely filed petitions for reconsideration, and answered the other's petition.

ISSUE

Did BART violate section 2944, subdivision (c)?

DISCUSSION

Background

BART operates an intercity heavy commuter rail system in the San Francisco Bay Area. Its trains are powered by electricity supplied through a "third rail" which parallels the two "running rails" on which trains ride. The voltage of the electric current in the third rail is 1,000 volts, and flows to any given location through electrical substations which receive power from the local utility at a higher voltage and employ equipment to reduce the voltage to the levels delivered to the third rail. Before flowing to the third rail, the electric current also passes through circuit breakers at the substations. The circuit breakers can be opened or closed by commands sent from BART's central operations center in Oakland (Central).² They can also physically be opened or closed ("racked out" and "racked in," respectively) at the substations.³

At approximately 8:30 a.m. on Saturday, June 4, 2011 a tree branch or branches fell into the BART right-of-way in Pleasant Hill, California and onto a passing train. The train halted and its operator performed a "walk around" to assess the situation. At 8:46 a.m. Central turned the power off to one third rail, and turned off power to the other at 8:56 a.m.⁴ Train service was halted and BART Central dispatched workers to the scene to evaluate the situation and clear the obstruction to the right-of-way. From the record it appears that first to arrive on scene were two electricians who were "qualified electrical workers" as the term is used section 2944, subdivision (c) and defined in section 2700. Thereafter, other BART personnel also arrived.

² The circuit breakers can be used to open the circuit to interrupt power flow and are functionally equivalent to those used in residential service, except they are physically much larger and handle higher voltages and currents.

³ In electrical terms, when a circuit is "closed" electricity flows through it; and when a circuit is "open" the flow is interrupted. When, for example, one uses a wall switch to turn a light on, one closes the circuit and opens it when turning the light off.

⁴ BART has two tracks at the incident location which usually carry trains in opposite directions, one track toward Concord and Pittsburg, and the other points generally to the west such as Walnut Creek and Oakland.

The electricians tested the two third rails at the location to verify that power to them had been successfully turned off, and they determined power was indeed off. Workers, including the electricians, then proceeded to clear the fallen tree branch or branches from the tracks without incident, and train service was resumed by about 10:40 a.m.

The Division subsequently began an investigation into the response to the incident, and in December 2011 issued the citation at issue. The citation alleged that BART's procedure whereby power to the third rails was turned off by Central and then verified to be off by testing ("probing") them at the incident location was a violation of section 2944(c). The procedure BART used is called "field verified power off" (FVPO). The Division contends BART should have used a different procedure, called "safe clearance," instead. Safe clearance requires electricians to attach a temporary ground to the third rails and rack out (open) the circuit breaker or breakers supplying power to the third rail or rails in question.

After the hearing the ALJ issued a Decision finding BART was in violation of section 2944, subdivision (c). We now reverse.

Discussion.

The Decision erred on an issue of fact and an issue of law. We first address the factual error.

One of the key premises upon which the ALJ found BART to have been in violation was the incorrect finding that a BART worker named Brian Pingle was the first to arrive at the scene and did so at 7:30 a.m. the morning of the incident. (Decision, pp. 5 and 9.) In fact, Pingle testified that he traveled to the scene with his foreworker, and that when they arrived the two electricians were there waiting. Thus he was not the first to arrive. Further, as noted earlier, the tree branch did not fall until 8:30 that morning, and BART did not dispatch personnel to deal with the problem until about 8:45 a.m. Thus, neither Pingle or anyone else was working to remove the fallen branches at 7:30, for the simple reasons the branches had not yet fallen and no one had been sent to deal with them.⁵

Also, there is abundant evidence in the record that the work to remove the fallen branches did not begin until the electricians verified that the power to the third rails had been turned off by Central. Therefore, we find that the

⁵ The Decision seems to have made its finding concerning the start of work based on a statement Pingle made during his testimony. When asked what time he and his foreworker arrived at the scene, he stated: "You know, I'm not too sure. I'd say around - golly, I really - 7:30ish? I'm not too sure. Give or take." (Hearing transcript, 83:13-15; question mark in original.) The hearing was transcribed by a certified shorthand reporter who was present at the hearing.

record shows no work was done to remove the branches until power was turned off by Central and verified to be off by the electricians on scene.

We turn now to the legal error.

Section 2944, subdivision (c) provides:

Work Near Energized Equipment and Facilities.

- (1) No person other than a qualified electrical worker shall perform work or take any conducting object with the area where there is a hazard of contact with energized conductors unless directly under the observation of a qualified person.
- (2) When working around energized equipment, precautions shall be taken to prevent any material or tools from accidentally contacting energized conductors or equipment.
- (3) Temporary barriers. Suitable temporary barriers in or adjacent to the work area shall be used to prevent accidental contact by workers with energized high voltage parts.
- (4) Tape Barricades. Suitable barricade tape shall be used to mark off and bar approach to dangerous areas. An employee shall not be permitted to cross over or under the tape while it is barricading an area, except in an emergency or when work in progress requires the employee to enter the dangerous area. While in the area, the employee shall be continuously watched by a qualified person for the purpose of preventing an accident.

The plain language of the foregoing uses the term “energized” throughout. The evidence in this matter shows that BART Central turned off power to the third rails at the incident scene by sending a computer-generated command to open the circuit breakers controlling power to them. After the breakers opened, power was off – i.e. the third rails were no longer “energized.” That condition was then verified by the electricians on scene when they tested the third rails. The record indicates they did so at least twice.

We have previously addressed the issue of whether BART’s FVPO procedure violates section 2944, subdivision (c), and have held that it does not. (*Bay Area Rapid Transit District*, Cal/OSHA App. 10-3056, Decision After Reconsideration (Jan. 31, 2014); writ denied Alameda County Superior Court (Jul. 2015).) We apply our analysis of the safety order in that matter here.

The Division and Union contend that the third rail was not shown by BART to be “de-energized” and as a result BART was in violation. To the contrary, section 2944 applies to high-voltage electrical equipment which is *energized*, and the evidence did not support finding it was. The term “de-energized” is not used in section 2944, subdivision (c), and we may not read it

into the safety order. The third rails at issue had been powered off by remote command from Central before work to remove the tree branches began, and was verified in the field to be powered off. The third rails were not energized when the work at issue was done. Also, the work was conducted *near* but not *on* the third rail. Section 2944, subdivision (c) does not apply in such circumstances.

The Division argues Employer did not prove it took the appropriate steps to de-energize the third rail, i.e. to ensure there was no electrical power running through the third rail. We find two flaws in that argument. First, under the terms of the safety order the Division had the burden to prove the third rail *was* energized while the work was done, rather than Employer having the burden to prove it was de-energized. Second, the term “de-energized” does not appear in the cited safety order, and we may not read language into or alter its terms. (*State Roofing Systems Inc.*, Cal/OSHA App. 08-276, Denial of Petition for Reconsideration (Apr. 28, 2010.)) To the contrary, the question we must answer is whether the evidence preponderates in favor of a finding that the third rail was in fact energized at the time. (See *Chamberlain v. Ventura County Civil Service Commission* (1977) 69 Cal.App.3d 362, 369, citing *People v. Miller* 171 Cal. 649, 652-653.)

It is well-established that the Division has the burden of proving each element of its case, including the applicability of each cited Safety Order, by a preponderance of the evidence. (See, e.g., *Travenol Laboratories, Hyland Division*, CAL/OSHA App. 76-1073, Decision After Reconsideration (Oct. 16, 1980); *Howard J. White, Inc., Howard White Construction, Inc.*, CAL/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983); and *Cambro Manufacturing Co.*, CAL/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986).) The Division's burden includes proving that employees were exposed to the hazard addressed by the cited Safety Orders. (See, e.g., *Rudolph & Sletten, Inc.*, Cal/OSHA App. 80-602, Decision After Reconsideration (Mar. 5, 1981); and *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).)

The Division did not prove that the third rails were energized, and given the facts could not. Compelling evidence in the record established that the power was off, and therefore the third rails were not energized. Here the facts are even more compelling than in our earlier FVPO decision that no violation occurred. (*Bay Area Rapid Transit District*, Cal/OSHA App. 10-3056, *supra*.) Not only was the power turned off, so the third rails were not energized, but there were BART electricians on scene who *were* “qualified electrical workers” and they had probed – tested – the third rails to verify they were not energized, and they remained on the scene throughout the branch clearing process. Their testimony was that the FVPO procedure was safe, that going through the “safe clearance” procedure was not necessary, and they would have used that

procedure if it had been needed. In the earlier BART (*Bay Area Rapid Transit District*, Cal/OSHA App. 10-3056, *supra*), the third rail was probed by welders, not electricians, who were assigned to work on the near running rail.

Accordingly, we hold that the safety order was not violated because the third rails were not energized.

BART's appeal of Citation 2 is granted and the citation and associated penalty are vacated.

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: SEP 21, 2015

SUMMARY TABLE DECISION AFTER RECONSIDERATION

In the Matter of the Appeal of:

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT
Docket No(s). 2011-R2D2-3137 through 3139

Abbreviation Key:	Reg=Regulatory
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

IMIS No. 314327933

Site: BART properties in Alameda/Contra Costa Counties, California

Date of Inspection: 07-21-2011 ~ 12/02/2011

Date of Citation: 12/02/2011

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY ASSESSED BY ALJ	FINAL PENALTY ASSESSED BY BOARD
11-R2D2-3137	1	1	3395(f)(3)	G	Failure to provide written Heat Illness Prevention Procedures to DOSH upon request.	x		\$560	\$560	\$560
11-R2D2-3138	2	1	2944(c)	S	Performing tree removal and cleanup on trackway in close proximity to third rail that was not de-energized. Board vacated citation and penalty.		x	\$3,375	\$3,375	\$0
11-R2D2-3139	3	1	2995(f)	S	Failure to provide Heat Illness Prevention Training to electricians and grounds workers. DOSH reclassified from Serious to General and recalculated penalty.	x		\$5,060	\$560	\$560
Sub-Total								\$8,995	\$4,495	\$1,120

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$1,120

NOTE: Payment of final penalty amount should be made to:

Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.
Please call (415) 703-4291 if you have any questions.

POS: 9/21/2015