

OPINION IN REVIEW OF DANIEL CARCILLO SUSPENSION

The National Hockey League Players' Association ("NHLPA"), on behalf of Daniel Carcillo, has sought review of an automatic ten (10) game suspension issued pursuant to Rule 40.3 ("Automatic Suspension – Category II") of the League's Playing Rules as a result of an incident that occurred on May 22, 2014 during Game 3 of the Eastern Conference Final between the Montreal Canadiens and the New York Rangers. In accordance with my authority and responsibility under Playing Rule 40.5 and Article 18.17 of the CBA, I hereby determine that:

1. Mr. Carcillo's conduct constituted a Category III violation pursuant to the terms of Playing Rule 40.4 ("Automatic Suspension – Category III").
2. Mr. Carcillo shall be suspended for a total of six (6) games, inclusive of the three (3) games already missed as of the date of this decision.

THE RULE AT ISSUE

Rule 40 (Physical Abuse of Officials) provides in relevant part as follows:

40.1 Game Misconduct – Any player who deliberately applies physical force in any manner against an official, in any manner attempts to injure an official, physically demeans, or deliberately applies physical force to an official solely for the purpose of getting free of such an official during or immediately following an altercation shall receive a game misconduct penalty. In addition, the following (40.2, 40.3, 40.4) disciplinary penalties shall apply.

* * *

40.3 Automatic Suspension – Category II - Any player who deliberately applies physical force to an official in any manner (excluding actions as set out in Category I), which physical force is applied without intent to injure, or who spits on an official, shall be automatically suspended for not less than ten (10) games.

40.4 Automatic Suspension – Category III - Any player who, by his actions, physically demeans an official or physically threatens an official by (but not limited to) throwing a stick or any other piece of equipment or object at or in the general direction of an official, shooting the puck at or in the general direction of an official, spitting at or in the general direction of an official, or who deliberately applies physical force to an official solely for the purpose of getting free of such an official during or immediately following an altercation shall be suspended for not less than three (3) games.

40.5 Automatic Suspension – Process - Immediately after the game in which such game misconduct penalty is imposed, the Referees shall, in consultation with the Linesmen, decide the category of the offense. They shall make a verbal report to the League's Director of Hockey Operations and advise of the category and of the offense. In addition, they shall file a written report to the Director of Hockey Operations in which they may request a review as to the adequacy of the suspension. The NHLPA, the player and the Club involved shall be notified of the decision of the Referees on the morning following the game. The League will then hold a conference call with the NHLPA to review the Referees application of this rule, and will refrain from issuing public comment affirming the Referees application of Rule 40 until that call is complete.

The player or the officials may request the Commissioner to review, subject to the provisions of this rule, the penalty imposed by the Referees. Such request must be filed with the Commissioner in writing not later than seventy-two (72) hours following notification of the penalty.

If a review of the incident is requested by either the player, goalkeeper or by the officials, a hearing will be conducted by the Commissioner on an expedited basis, and best efforts will be used to provide a hearing before the second game missed by the player due to the automatic suspension imposed under this rule. The player's suspension shall continue pending the outcome of the hearing by the Commissioner.

For Category III offenses only, the Commissioner may conduct the hearing by telephone. For Category I and II offenses, the hearing shall be conducted in person.

After any review as called for hereby, the Commissioner shall issue an order that:

- (i) sustaining the minimum suspension, or*
- (ii) increasing the number of games within the category, or*
- (iii) changing to a lower category, or*
- (iv) changing to a lower category and increasing the number of games within this category, or*

(v) in the case of a Category III suspension only, reducing the number of games of the suspension.

The penalties imposed under this rule shall not be deemed to limit the right of the Commissioner with respect to any action that he might otherwise take pursuant to Article 18 of the CBA.

Article 18.17 of the CBA provides in relevant part as follows:

18.17 Appeal of Automatic Suspension Arising from Violation of Playing Rules. In any case in which a Player is subject to automatic suspension pursuant to the Playing Rules, the Player shall be entitled to appeal the discipline imposed. The appeal shall be heard by the Commissioner or his designee. The Commissioner or his designee may decide the appeal without holding a hearing, at his option...

SUMMARY OF RELEVANT FACTS

At approximately 14:09 of the first period of Game 3 of the Eastern Conference Final between the Montreal Canadiens and New York Rangers (on May 22, 2014), Mr. Carcillo (a forward with New York) was assessed a delayed penalty for charging. After the whistle was blown, Montreal forward Brandon Prust and New York forward Derek Dorsett engaged in fisticuffs. Mr. Carcillo positioned himself a few feet away from the fight with several Montreal Players in the immediate vicinity. Mr. Carcillo “[k]ind of made [his] way towards the fight” (Tr. 23) but did not attempt to intervene in it or engage any other Player in a fight. He also did not proceed immediately to the penalty box.

Linesman Scott Driscoll immediately engaged Mr. Carcillo in an attempt to “usher” him to the penalty box. (Tr. 38) Mr. Carcillo resisted, attempting to free himself from the Linesman’s grasp, resulting in his right elbow striking Mr. Driscoll on the left side of the latter’s face. Linesman Driscoll continued to escort Mr. Carcillo to the penalty box. Mr. Carcillo was assessed a Game Misconduct under Rule 40.

PROCEDURAL HISTORY

After the game, the on-ice Officials consulted and assessed Mr. Carcillo a Game Misconduct for Physical Abuse of Officials, Category II, pursuant to Rule 40.3. The Officials' report (Exh. 4) contained the following synopsis:

The whistle had blown for a delayed penalty to NYR # 13 Carcillo. MTL #8 Prust and NYR #15 Dorsett engaged in fisticuffs. I went to Carcillo to escort him to the penalty box for his minor penalty. While I was escorting him to the penalty box he attempted to get away from me and then applied physical force to me by hitting me with an elbow to my chin. I continued to escort him to the penalty box and upon completion of the play and with consultation with the Referees the above penalties were assessed.

By memorandum dated May 23, 2014 (Exh. 1), the League informed the Club and Player as follows:

In the above referenced game, at 14:09 of the first period, New York player Daniel Carcillo was assessed a Game Misconduct under Rule 40.3 – Physical Abuse of Officials – Category II for physically applying force to Linesman Scott Driscoll while being escorted to the penalty box by Mr. Driscoll.

Rule 40.3 – Automatic Suspension – Category II...reads as follows: Any player who deliberately applies physical force to an official in any manner (excluding actions as set out in Category I), which physical force is applied without intent to injure, or who spits on an official, shall be automatically suspended for not less than ten (10) games.

Be advised Mr. Carcillo has been automatically suspended for ten (10) games, commencing with the New York Rangers conference Final game vs Montreal Canadiens this Sunday, May 25th, 2014.

By letter to me dated May 24, 2014, the NHLPA, on behalf of Mr. Carcillo, requested a review of the suspension pursuant to Playing Rule 40.5. By letter dated May 29, 2014, the NHLPA, on behalf of Mr. Carcillo, confirmed that the hearing “will be both in respect of the review by the Commissioner contemplated in Rule 40 and the appeal to the Commissioner contemplated under CBA Article 18.17.”

THE MAY 30 HEARING

A hearing was held on May 30, 2014 at the League office. In attendance at the hearing were Mr. Carcillo and his agent, Jarrett Bousquet; Roman Stoykewych, David Sinclair, Maria Dennis and Steve Webb of the NHLPA; Glen Sather and Jim Schoenfeld of the New York Rangers; Linesman Scott Driscoll; and Dan O'Halloran of the NHLOA. Joining me at the hearing were members of the League office staff, including Colin Campbell, Stephen Walkom, David Zimmerman and Julie Grand. Also in attendance was Joseph Baumgarten from Proskauer Rose. All parties were given a full opportunity to be heard and no challenges were raised to the fairness of the hearing.

At the hearing, several video feeds of the incident were shown, followed by Mr. Carcillo's testimony. Mr. Carcillo apologized for his actions, stating that he was aware when the whistle blew that he had been called for a penalty, but that he nevertheless did not proceed to the penalty box. Mr. Carcillo testified that the incident came at an emotional point in the game, and that he "skated around the net to try and get back into play, [and] saw Derek [Dorsett] and Brandon [Prust] start to fight." (Tr. 22-23) Mr. Carcillo then "[k]ind of made [his] way towards the fight" and "then backed off" but "was still relatively pretty close." (Tr. 23) He then testified that "Scott [Driscoll] came in and grabbed [him] for the penalty and to remove [him] from the area", and as they were "jostling," Mr. Carcillo "pushed back" and they went "back and forth verbally." (*Id.*) He then told Mr. Driscoll to "fuck off" but did not remember what else he had said, and he jostled to get away from Mr. Driscoll when his "elbow came up." (Tr. 24) Mr. Carcillo testified that he had not intended to hit Mr. Driscoll in the head; and that he did not have

any negative interactions with Mr. Driscoll prior to this incident. (Tr. 25) Mr. Carcillo testified that he immediately apologized to Mr. Driscoll before leaving the ice. (*Id.*)

Jim Schoenfeld (New York's Assistant General Manager) testified that he believed the incident involved an accident resulting at least in part from the fact that Mr. Driscoll is a "big, strong guy" (Tr. 31), and that "if you're trying to get loose of a big, strong guy, there are a lot of moving parts. It's not easy to break a grasp....I'm pulling here, I'm pushing there. And I think that's what happened. I think that's when the elbow came up." (*Id.*) Mr. Schoenfeld observed that immediately after Mr. Carcillo struck the Linesman with his elbow the former "just kind of melted" and proceeded to the penalty box without further resistance. (*Id.*) Mr. Schoenfeld observed that Mr. Driscoll "did everything properly" and had "acted exactly the way he should as an Official." (Tr. 32, 35)

Scott Driscoll testified that he is in his twenty-second season as an NHL Official. At the time of the incident, he was the on-ice Official closest to Mr. Carcillo and "wanted to get there and escort him to the penalty box as quickly as possible because I saw a fight break out....And I wanted to make sure that I could get Dan to the penalty box as quickly as possible to come back and assist my colleague in breaking up the fight...I grabbed him...as I wanted to prevent him from going towards the fight. But at the same time, I wanted to usher him towards the penalty box. And I applied the force that I felt I needed to do and to try to urge him to go towards the penalty box and away from the fight." (Tr. 37-38) He told Mr. Carcillo he needed to go to the penalty box and the latter responded, "fuck off," followed by "get your fucking hands off me." (*Id.*) As Mr. Carcillo tried to break free, he hit Mr. Driscoll with an elbow to the jaw, prompting

the latter to say “Dan, you just hit me. You just hit me.” (Tr. 38) At that point, Mr. Carcillo stopped resisting, allowed himself to be escorted to the penalty box and apologized.

In general terms, Mr. Driscoll described Mr. Carcillo as a “high energy” Player but one with whom he has historically had a “professional relationship.” (Tr. 39)

ANALYSIS

I am required to determine whether the Category of offense assessed, and the length of the suspension imposed, were appropriate under the standards prescribed by Rule 40. I have generally approached such matters in the past by affording substantial deference to the Officials’ judgment and I will not lightly overrule the Officials’ decision unless I am satisfied there is clear and convincing evidence that they were wrong or, alternatively, that although their ruling may have properly applied existing standards, there is nonetheless some overriding policy consideration that requires me to assess and revise those standards. In re Appeal of Rob Ray Suspension (January 11, 2001).¹

Here, there is no material dispute regarding the events that resulted in the suspension. Rather, the essence of the NHLPA’s position is that the conduct should be deemed a Category III

¹ As I have explained previously:

The standard is akin to the test applied by an appellate court when reviewing the decision of a trial court. It is – and it is intended to be – a demanding standard that will be met only in unusual cases. But I believe it to be consistent with the traditions of our game and with the clear need to vest on-ice Officials with the authority to do their jobs. In re Appeal of Andrei Nazarov Suspension (April 2, 1997); In re Appeal of J.J. Daigneault Suspension (March 5, 1997); In re Appeal of Craig Berube Suspension (Dec. 30, 1995).

offense rather than a Category II offense. In this regard, all concerned are bound by the relevant language of Rules 40.3 and 40.4, which bears repeating.

“40.3 Automatic Suspension – Category II - Any player who deliberately applies physical force to an official in any manner (excluding actions as set out in Category I), which physical force is applied without intent to injure...shall be automatically suspended for not less than ten (10) games.

40.4 Automatic Suspension – Category III - Any player...who deliberately applies physical force to an official solely for the purpose of getting free of such an official during or immediately following an altercation shall be suspended for not less than three (3) games.”
(emphasis added)

As the language makes clear, Rule 40.3 provides generally that the application of physical force to an Official without intent to injure is a Category II offense (resulting in a minimum ten (10) game suspension). Rule 40.4 sets forth a limited exception from that broad Rule when such force is “solely for the purpose of getting free of such an official during or immediately following an altercation.” In such circumstances, the conduct is deemed a Category III offense (resulting in a minimum three (3) game suspension).

Here, Messrs. Carcillo and Driscoll, as well as the NHLPA, agree that the Player’s application of physical force was solely for the purpose of getting free of Linesman Driscoll. (Tr. 5, 8, 28-29, 45, 48-49) That conclusion is supported by my review of the video footage and by the fact that there was no history of bad blood that would suggest that the Player bore any personal animus against the Linesman that might have motivated his actions. (Tr. 25, 39) I thus conclude that the application of physical force was “solely for the purpose of getting free” of the Official.

The next question is whether the conduct occurred “during or immediately following an altercation” within the meaning of Rule 40.4. The language of the Rule is ambiguous as to whether: (i) it is limited solely to the Players actually involved in the altercation; or (ii) its application extends to other Players on the ice. Under the former interpretation, Rule 40.4 would not be applicable to Mr. Carcillo because he was not involved in the altercation between Messrs. Prust and Dorsett. Under the latter interpretation, Mr. Carcillo might be able to avail himself of Rule 40.4.

In these circumstances, my task is to interpret and apply the applicable Rule in a common-sense fashion that takes account of the realities of the game; the reasonable expectations of Players and Officials; and the paramount need to maintain respect for our Officials and to protect their physical well-being.

Taking these considerations into account, I find that the Rule 40.4 standard for determining whether conduct should be deemed a Category III offense (*i.e.*, physical force applied “solely for the purpose of getting free of such an official during or immediately following an altercation”) extends both to Players actually involved in an altercation and to Players who are in immediate proximity to the altercation (with a reasonable expectation that they might be involved in that or another altercation) and whose physical contact with the Official was, therefore, related to the altercation. Applying the Rule in this fashion is consistent with the letter and spirit of the Rule and a matter of common sense.

Applying this standard, I find that Mr. Carcillo applied physical force solely for the purpose of getting free of an Official during an altercation – and that his conduct therefore constitutes a Category III offense. As explained above, the Player was standing within a few feet

from the Dorsett-Prust altercation, with several Montreal Players also in the vicinity. It was precisely because of the fight and the Linesman's desire to help with that one (and to limit the likelihood of another one) that the Linesman took the action he did to escort the Player away from the altercation and to the penalty box. There was a sufficient nexus between the fight and the physical force to warrant treating the conduct as encompassed by Rule 40.4.

Having decided that the conduct was a Category III offense, I must also determine the appropriate length of the suspension. As the NHLPA recognized during the hearing, I have broad discretion, subject to the minimum length (three games) prescribed by the Rule itself.² In this instance, I find that a three game suspension would be insufficient, in light of the following aggravating circumstances:

1. Mr. Carcillo's actions were not accidental. His elbow did not simply "come up" (to quote the passive phraseology used by Messrs. Carcillo and Schoenfeld); he raised it while jostling with the Linesman. The incident did not occur because he was falling or off balance.
2. The incident was not the byproduct of a fight between Mr. Carcillo and another Player. Thus, it would have been easy and simple for Mr. Carcillo to disengage and proceed to the penalty box, as he was required to do.
3. The degree of force was more than *de minimis*. An elbow to the head is generally more serious than a push or a shove. Since the plain language of Rule 40 is clear, I

² At the hearing I asked the NHLPA for its position on the appropriate length of the suspension and the Union declined to take a position, while acknowledging (correctly) that I am "tasked with making that judgment." (Tr. 58)

must reject the assertion that the degree of force moves the conduct from Category III to Category II. However, it is nevertheless appropriate to consider it in determining the length of the suspension within the appropriate Category. Mr. Driscoll testified that it was a “pretty good whack,” one that was “forceful.” (Tr. 40)

In these circumstances, I believe that a suspension of six (6) games properly calibrates the penalty to the offense. In reaching this conclusion I have taken into account that the suspension will have been served during the Eastern Conference and Stanley Cup Final. While there is no precise formula that places a “premium” on playoff games, I note that the length of the suspension here might well have been longer had it involved regular season games.

Finally, I note again that I regard Rule 40 as critical to maintaining the integrity of the game and respect for the League’s on-ice Officials. I believe that this view is shared widely not just by the Officials and the NHLA, but also by Players, coaches and front office personnel. As a result, we have been fortunate to have had infrequent occasions to invoke the Rule. Should that change, I will not hesitate to impose discipline sufficient to compel compliance. In this regard, I remind everyone that neither emotion nor frustration caused by a real or perceived missed call can ever constitute a mitigating circumstance for violation of Rule 40.

CONCLUSION

The Rule 40.3 Game Misconduct and ten (10) game suspension of Daniel Carcillo shall be revised to a Rule 40.4 Game Misconduct and a six (6) game suspension, inclusive of the three (3) games already missed. Mr. Carcillo may return to play effective with Game 4 of the Stanley Cup Final.

Gary B. Bettman
Gary B. Bettman

6/3/14
Date