

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39147
Docket No. MW-39405
08-3-NRAB-00003-06-3-55
(06-3-55)

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (

(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (formal reprimand and disqualified on the leased ballast regulator) imposed under date of July 30, 2004 upon Mr. N. Garcia for alleged violation of MOWR 6.51, Maintaining a Safe Braking Distance, Engineering Instruction 1.1.8, Spacing of On-Track Equipment, (A) Work Zones around Machines and (B) Safe working distance between machines, while operating the leased ballast regulator on July 13, 2004, was arbitrary, capricious, unwarranted and in violation of the Agreement [System File C-04-D040-1/10-04-0292(MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, Mr. N. Garcia shall now be “***returned to his position on TP-10 and be made whole for all lost earnings and benefits as of this wrongful discipline. All reference to this case should be removed from his personal record and file.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On July 13, 2004, the Claimant, while operating a leased ballast regulator on Tie Production Gang TP-10 that was replacing ties along the railway, bumped into a Spiker SD-2 machine that was driving spikes into newly laid ties. The ballast regulator was following immediately behind the spiker, which was traveling on the track at a slow speed of about two to four miles per hour. The spiker had been refueled by a fuel truck as it passed through a road crossing immediately before the ballast regulator made contact with it. A Laborer was performing work between the spiker and the ballast regulator, but had stepped out from between the machines shortly before they touched.

The Claimant was sent a notice of Investigation dated July 14 and the Investigation was held on July 21, 2004. By letter dated July 30, 2004, the Claimant was notified that he was being "issued a Formal Reprimand" and that he was "disqualified on the leased ballast regulator." The letter stated, "Evidence adduced at the investigation showed you violated MOWR 6.51, Maintaining a Safe Braking Distance, and Engineering Instruction 1.1.8, Spacing of On-Track Equipment, (A) Work Zones around Machines, and (D) Safe working distance between machines."

Maintenance of Way Operating Rule 6.51 states, in part, "On-track equipment operators are responsible for maintaining a safe braking distance

between their on-track equipment and other on-track equipment, trains and engines.” Also pertinent is the following portion of MOWR 6.51:

“Maintain at least 50 feet between on-track equipment while in working mode unless job briefing establishes a shorter distance due to existing working conditions. While in working mode, it is the responsibility of all machine operators to maintain a safe distance between their machine and other men and on-track equipment.”

Engineering Instructions 1.1.8 provides in pertinent part:

“When on-track equipment is being used, workers and machine operators must follow the guidelines below for maintaining safe distances to prevent machines from contacting other machines and workers.

* * *

A. Work Zones Around Machines

Roadway workers must not enter a machine’s work zone without first communicating with the operator to establish safe work procedures.

Note: Unless a different understanding is established through a job briefing, this work zone extends from a point 15 feet in front of the machine to a point 15 feet behind the machine. The work zone limits on each side of the machine will be designated in the job briefing.

If a machine is approaching workers who are foul of the track, the operator must communicate with the workers before getting closer than 15 feet to them.

B. Safe Working Distance Between Machines

The minimum distance between machines while working is 50 feet, unless a job briefing establishes a different distance.”

The Organization’s main argument is that supervisors on Gang TP-10 were aware that employees on the gang were working their machine closer than 15 feet to another machine and encouraged them to do so. It asserts, “The carrier can not tell the operators to work within 15 feet of each other and then when something goes wrong attempt to blame the operator for the incident and say he should have been working 15 to 50 feet apart.” The Organization contends that “the supervision on this gang continually pushed Mr. Garcia to work faster and to stay closer and closer to the spiker, and this included working closer than 15 feet as a common, daily practice.”

The difficulty with the Organization’s case is the absence of any testimony or other evidence that the Carrier ever requested the Claimant or any other operator to bring his machine closer than 15 feet to another machine. The Organization relies on the testimony of the Construction Roadmaster in Q/A 19 that it is common to have a job briefing with the operators “and they will work within 15 feet of each other, practically daily.” Immediately previously the Roadmaster had testified that the proper spacing of work equipment in the work mode was “50 feet, and with a job briefing 15.”

Apparently the Organization interprets “within 15 feet” to mean within a range of 15 feet and therefore also to include a distance of less than 15 feet. The Board does not share that interpretation of the Roadmaster’s testimony. The Board believes that from the totality of the Roadmaster’s testimony it is clear that what he stated was that Machine Operators in the work mode were required to maintain spacing of 50 feet, which could be reduced to 15 feet with a job briefing. He then stated that the Claimant got closer than 15 feet, which meant that he was in violation of the Rule that permitted Operators to get as close as 15 feet, but no closer, with a job briefing. The Roadmaster was asked in Q. 19, “Did he have a job briefing with the employee?” He answered, “I didn’t ask, but that’s our common

practice that those operator's [sic operators] job brief and they will work within 15 feet of each other, practically daily."

Since the Roadmaster had just testified that with a job briefing an Operator may space his machine 15 feet from another machine, it is clear that in A. 19 the Roadmaster was stating that it is common to have a job briefing and for employees to work at a distance of 15 feet from one another. To read the Roadmaster's answer as an assertion that with a job briefing operators worked less than 15 feet from each other on a daily basis would mean that he was contradicting testimony that he had given only seconds earlier that with a job briefing Operators could space their machines 15 feet apart.

The Board finds that the Claimant violated MOWR 6.51, as charged, by failing to maintain a safe braking distance between the ballast regulator he was operating and the spiking machine that he was following. He also violated Engineering Instructions 1.1.8 by permitting his machine to come closer to the spiker than the 15 foot limit established in the job briefing. As a result of these violations, the Claimant placed in jeopardy the safety of a Laborer who was performing work behind the spiker and improperly caused the ballast regulator to come in contact with the spiker. The Claimant's operation of the ballast regulator indicated that he lacked the skill and ability to operate it properly without additional training, and it was not an abuse of discretion for the Carrier to disqualify the Claimant on that machine.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 7th day of July 2008.