

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41484
Docket No. MW-41382
12-3-NRAB-00003-100271

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal 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 [Level S thirty (30) day record suspension and a three (3) year probation period] imposed upon Mr. C. Lee by letter dated September 17, 2009, for alleged violation of MOWOR 6.51 Maintaining a Safe Braking Distance while assigned as a machine operator on July 16, 2009, in connection with a collision between two (2) surfacing gang machines on the Aurora Sub at Mile Post 199.8, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-09-D040-8/10-10-0002 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Lee shall now receive the remedy prescribed by the parties in Rule 40(G).”**

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 16, 2009, between 8:00 A.M. and 9:00 A.M. seven machines engaged in a reverse move on Main Track 1. They were traveling in a westerly direction toward a crossover point where they were to be switched to Main Track 2 on which surfacing work was scheduled to be performed. This dispute involves three of the seven machines traveling in a convoy toward the crossover point. The first of the three, referred to as the "ballast regulator," was operated by M. Dunbey; behind it was a "back-up tamper" operated by C. Lee; and behind it was a "lead tamper" operated by S. David. They were in a "traveling mode" within the meaning of that term in Work Rule 6.51, Maintaining a Safe Braking Distance, which reads 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.

For purposes of this rule: . . . traveling mode will apply to on-track equipment moving to and from a work location. . . .

On-track equipment operators must:

Insure that on-track equipment remains at least 300 feet behind a train or engine while in . . . traveling mode, except when it has been determined by a job briefing that the train or engine is stopped and will not move.

Insure that on-track equipment remains at least 300 feet behind other on-track equipment while in traveling mode. Exception: On-track equipment may be 'bunched' to make movements over short segments of track such as crossings at grade . . . and control points. A job briefing must establish the procedure with all involved

employees. Machines must be at least 50 feet apart during such movements. . . . If machines will be ‘bunched’ when stopped, all employees must remain clear of the track until the entire movement has stopped. . . . After stopping the lead machine operator must do the following:

Dismount the machine.

- Assume a position that is visible to a following machine operator . . .
- Spot the following machine using hand signals.
- Each successive operator must follow this procedure to spot the next approaching machine:
- Use radio or hand signals to notify the operator of the following machine when slowing or stopping on-track equipment during traveling mode. . . .
- Maintain at least 50 feet between on-track equipment while in working mode. . . . (Emphasis added)”

The three employees, mentioned above, have somewhat different accounts of what happened. Dunbey said he received a radio message from the “district tamper” in front of him that he intended “to stop at the crossover to let a man dismount. . . .” Because Dunbey was then more than 600 feet from the crossover, he did not see any need to stop. He nevertheless “slowed down.” And he saw that the machine behind him, operated by Lee, did “slow and stop.” Lee, on the other hand, believed Dunbey came to “a complete stop” and then, after a brief pause, started up again toward the crossover. Lee contends his moves mirrored Dunbey’s, slowing down and then, after a short pause, starting up.¹ Just moments later, Lee’s machine was struck by David who operated the last machine. As for David, he admitted his machine was in “high gear” when he first noticed that Lee’s machine had stopped. He immediately put on his brakes and put “travel in a neutral position.” But these efforts came too late and he could not prevent a collision with Lee’s machine. Lee

¹ During the Investigation, Lee flatly denied that he had stopped.

was injured by the collision and the Carrier's machines suffered some \$10,000 in damages. Lee insists that he did not have sufficient time to warn David through a radio message that he had slowed down or stopped.

After the Investigation, the Carrier concluded that Lee and David were guilty of the following offense: ". . . failure to operate machines to avoid incident with regard to maintaining a safe braking distance, when on July 16, 2009 . . . you were involved in a collision between 2 surfacing gang machines which resulted in a personal injury and machine damages. . . ." It assessed both employees a Level S 30-day record suspension and placed them on probation for three years commencing September 17, 2009. It cited both men for a violation of Work Rule 6.51. The Organization protested Lee's discipline; David evidently accepted his discipline.

The Carrier contends that Lee's discipline was justified because of his failure to comply with Work Rule 6.51 in two respects. First, it asserts that he "failed to maintain a safe distance behind the . . . machine in front of him . . .," namely, Dunbey's machine. Second, it contends that he "failed to radio or use hand signals to notify the Operator [namely, David] of the . . . machine following him [Lee] when he slowed." The Organization disagrees, asserting in effect that Lee was not guilty of the former "failure" and that the alleged latter "failure" involves a misconstruction of Rule 6.51. It urges that the discipline be set aside.²

As to the first charge, it is true that while in "traveling mode," Lee was required by Rule 6.51 to insure that his "on-track equipment remaine[d] at least 300 feet behind other on-track equipment. . . ." The record fails to show any attempt to measure the distance between Lee's and Dunbey's machines at the time of the collision. The only evidence offered on this point was Lee's answers to M. Heille's questions, Heille being the Investigation Conducting Officer appointed by the Carrier. The Investigation transcript contains the following exchange between Heille and Lee:

"Q: . . . How far away were you from the next machine . . . from Dunbey...when you stopped?

² In view of the ruling made later in this Award, there is no need to address the Organization's procedural objections to the discipline assessed in this case.

A: I'd say over 100 . . .

Q: 100 feet?

A: Yeah, over 100 feet."

Neither the Carrier nor the Organization asked Lee whether he was aware of the 300-foot requirement in Rule 6.51 or whether his judgment of the distance between the two machines may have been impaired by the collision and his resultant injury. He was dazed by the impact. In short, he may not have understood the significance the Carrier placed upon this particular question and answer. He simply said it was "over 100 feet." Such uncertainty may well have prompted the Organization's request that the Carrier invoke its Safety Incident Analysis Process (SIAP). And a SIAP may have produced an indisputable footage figure. The Carrier had no contractual obligation to conduct a SIAP and denied the Organization's request. That was not improper. But, by doing so, the Carrier precluded the possibility of a precise picture of what happened.

Moreover, Lee's answer could have been attributed at least in part to the language of Rule 6.51 itself. The Rule has at least one "Exception," the 300-foot spacing requirement is reduced to "at least 50 feet" where on-track equipment is "bunched" to make movements over short segments of track such as crossings . . . and control points." These words do not appear to fit the situation faced by Dunbey, Lee, and David before the collision. However, it should be emphasized that the Carrier itself relied on this "Exception" language in contending that Lee was also guilty of a failure to make radio contact with David to inform him that he had come to a stop on the track in front of David. That alleged failure is discussed later in this Award. But if the Carrier can use it in an attempt to establish Lee's culpability, surely the Organization could use it as well to help establish Lee's innocence. In other words, Lee's answers at the Investigation could possibly have been attributable to the language of the "Exception."

One other observation is appropriate. The Carrier seems to say that Lee's failure to honor the spacing requirement contributed to the collision. That simply is not so. Even had he maintained a 300-foot distance from Dunbey's machine, the collision would have occurred. Indeed, it would have occurred even sooner. For David admitted that he was traveling in "high gear" when he first noticed Lee's machine, that he promptly "put on my brakes," that he "put travel in neutral," but

he could not avoid the collision. It was his excessive speed and his carelessness, not Lee's, that was responsible for what happened.

As to the second charge, it is true that Lee failed to make a radio call to David that he had slowed down or stopped. He offered several explanations for this failure, largely that it was the result of the slow-down and apparent stop by Dunbey who was ahead of him. Lee insists that he did not have enough time to make a radio call given his situation on the track.

Far more important, however, is the fact that the "notice of discipline" issued on September 17, 2009, was based entirely on "a failure to operate machines to avoid the incident. . . ." (Emphasis added). The "incident" was of course the collision itself; the "machines" were the on-track equipment, not the radio. Even the Carrier's written Submission recognizes these realities:

". . . Claimant was disciplined for failing to maintain a safe distance between himself and the Operator [Dunbey] ahead of him, not for failing to signal . . . David, who was following the Claimant. . . ."
(Emphasis added)

This statement plainly shows that Lee's failure to provide a radio message to David was not a basis for the discipline issued to Lee. It appears to have been an afterthought. It would be unfair to allow the Carrier, after the Investigation and after the issuance of the notice of discipline, to add a further basis for the discipline. Even if it were considered proper, the Carrier should have given Lee adequate notice by amending the notice of discipline so that the Claimant would have a full opportunity to raise a defense against the new charge. It follows that this phase of the Carrier's argument should not be considered at this stage of the proceeding.

For all of the foregoing reasons, the discipline was clearly unjustified. Accordingly, the claim must be sustained.

AWARD

Claim sustained.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of December 2012.