

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41487
Docket No. MW-41453
12-3-NRAB-00003-110005

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 [thirty (30) day record suspension and a one (1) year probation] imposed upon Mr. D. Cox by letter dated December 2, 2009 for alleged violation of MOWSR S-1.2.3 Alert and Attentive while assigned to Gang TSCX0764 in performing services on a surfacing gang that allegedly caused damage to a switch machine and switch circuit controller box at/or near Mile Post 91, Main Track 3, on the Orin Subdivision, on October 22, 2009, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-8/10-10-0094 BNR).**
- (2) The discipline [thirty (30) day record suspension and a one (1) year probation] imposed upon Mr. P. Bohnenkamp by letter dated December 2, 2009 for alleged violation of MOWSR S-1.2.3 Alert and Attentive while assigned to Gang TSCX0764 in performing services on a surfacing gang that allegedly caused damage to a switch machine and switch circuit controller box at/or near Mile Post 91, Main Track 3, on the Orin Subdivision, on October 22, 2009, was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.**

- (3) As a consequence of the violation referred to in Part (1) above, Claimant D. Cox shall now receive the remedy prescribed by the parties in Rule 40(G).
- (4) As a consequence of the violation referred to in Part (2) above, Claimant P. Bohnenkamp 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.

This dispute arises from substantial damage to a switch machine on the Orin Subdivision, Main Track 3. A three-man surfacing gang was scheduled to work in this area at the time the damage occurred. It consisted of Tamper Operator D. Cox, Foreman P. Bohnenkamp and Ballast Regulator Operator M. Narramara. Its primary task on October 22, 2009, was to tamp crushed stone between, under, and around the ties which are part of the track bed. Such tamping serves several purposes - facilitates drainage of water, distributes the load from the ties, reduces vegetation that might interfere with the track structure, and assists in holding the track in place as trains roll by. Together these benefits help make the track more durable and create a better ride for freight and passengers.

A brief description of the tamping process is necessary to a full understanding of this dispute. The tamping machine has work heads that hold vibrating metal paddles. These paddles, when activated, are driven into the ballast in order to move and pack the ballast so that it will provide firm support for the track and ties. This is, of course, the work of the Tamper Operator. In doing so, however, he must be

careful not to damage Carrier equipment. That care is especially important when he is tamping on any switch location where switch rods are set between the ties. For damage to the switch rod may, depending on the nature of the damage, cause damage to the “switch machine” itself.

Narramara, one of the three members of the surfacing gang, did not report to work on October 22 and apparently did not report off either. Management, initially at least, was unaware of his absence. The other members of his gang, Bohnenkamp and Cox, were aware of his absence, but evidently believed they could perform the tamping safely without a replacement. At least, Foreman Bohnenkamp made no attempt to secure a replacement. He had a job briefing at the start of the shift during which he talked to Cox, perhaps someone else, about what they were going to do on the day shift. He did not discuss the presence of switch rods or other hazards they might encounter that day, because he and Cox had worked together on this same type of assignment many times and were familiar with their respective roles. Bohnenkamp was to be on the ground closely observing the tamping process for problems which might arise on his side of the track while Cox was to operate the tamping machine and observe the process from the other side of the track. Bohnenkamp also would be in close radio contact with Cox and would, after each segment of track was tamped, direct Cox to move to the next segment.

At some point that day, while Cox was tamping, the work heads and/or the metal paddles struck the switch rod(s). During the course of the formal Investigation held a few weeks later, Cox was asked by the Conducting Officer, “How did we damage the switch machine?” and Cox replied, “One of the crew [members] working [on the tamping machine] did not completely clear the [switch] rod.”

Following the Investigation, the Carrier found both Bohnenkamp and Cox guilty of a violation of Safety Rule S-1.2.3, which reads in part:

“S-1 Rights and Responsibilities

We have the right and responsibility to perform our work safely . . .
[and] for making safe decisions about work practices

S-1.2.3 Alert and Attentive

Assure that you are alert and attentive when performing duties.”

Bohnenkamp and Cox were each assessed a 30-day record suspension and a one-year probationary period.

The Organization promptly protested the discipline. It believes that: (1) the Carrier failed to satisfy its burden of proof, (2) the Carrier’s case is based on pure “speculation” (3) nothing in the record shows the Claimants to have been non-alert or non-attentive to their duties (4) damage sometimes occurs to equipment without anyone being at fault, and (5) the Claimants offered some possibilities, which Management was unable to disprove. It asks that the discipline be set aside.

The Carrier argues, at the outset, that “the Claimants confessed to committing the offense” with which they were charged. That simply is not so. They admitted at the formal Investigation that the damage to the switch rod(s) occurred while Cox was at the controls of the tamping machine using its equipment to tamp ballast and while Bohnenkamp was standing close by watching the tamping process and the ballast. But such admissions cannot reasonably be construed as a “confession” of wrongdoing on their part. They insisted throughout the preliminary and formal Investigations that they were “alert and attentive” to their duties throughout the tamping process and hence did not violate Safety Rule S-1.2.3.

This does not mean, however, that the Claimants’ words and actions, along with the surrounding circumstances, are not relevant in determining guilt or innocence. Of course they are. The Carrier’s argument is that such words, actions, and circumstances taken together, will support an inference of guilt in this case. The Organization seeks to dismiss this argument as mere “speculation,” emphasizing that no one other than the Claimants were present when the damage occurred. That simply is not so. There is a familiar legal doctrine “res ipsa loquitor”¹ used by judges and arbitrators for generations in resolving difficult questions of fact. That doctrine was explained in a Third Division Award 32758 as follows:

¹ These words, roughly translated, mean “the facts speak for themselves.”

“... that where conduct causes an accident of a type that does not happen in the ordinary course of events if due care is exercised, and the instrument of harm is shown to have been under control of one party, a case of negligence is made out in the absence of any explanation tending to show that it was not due to his want of care.”

This doctrine, when applied to Cox, plainly warrants an inference that he was not sufficiently “alert and attentive” in performing his tamping work. First, the kind of damage that occurred here has not happened in the “ordinary course of events” when Tamper Operators are exercising “due care.” At least there is no persuasive evidence to the contrary. Second, Cox admitted during the formal Investigation that on the day of the accident, his tamping equipment struck a switch rod which resulted in the damaged switch machine. His tamper was then “under [his] control.” True, he was receiving instructions from Bohnenkamp who was stationed on the ground watching for, among other things, possible safety hazards. But Bohnenkamp was not the only one responsible for this kind of safety observation. Cox was as well. Each man, once the tamping process began, had a separate and distinct view of the rail and ballast. It appears, however, that Cox alone had a clear view of that side of the rail where the accident occurred, where the work heads struck the switch rod.

Cox’s testimony at the formal Investigation regarding this matter was revealing:

“Q: What precautions were you taking to prevent from damaging those pieces [switch rods]?”

A: We were being observant as to where the rods were ... we were communicating back and forth the locations of rods.

Q: ... when you’re ready to cycle your machine or tamp ... you hit the button and the tamping tools just go down, or can you kind of feel your way into it?

A: For the rod location, I always feel first.

Q: So you do have a little bit of control when you’re tamping?

A: Checking to see if they're [where you think they are].

Q: Yeah.

A: Make sure you're going to clear.

* * *

Q: . . . if we had talked about, and discussed the hazards and [how to] protect against it, how did we damage the switch machine?

A: . . . One of the work heads [on the tamping machine] did not completely . . . clear the [switch] rod." (Emphasis added)

It seems clear from the damage done to the switch rod, and hence to the switch machine, that Cox should have "felt" his tamping tools hit the rod and taken corrective action. But he insists he did not "feel" anything. That failure, along with the evidence already discussed persuades the Board that Cox was not sufficiently "alert and attentive." He was guilty of a Safety Rule violation. There is no sound reason to reduce the penalty imposed by the Carrier.

* * *

The same doctrine, when applied to Bohnenkamp, does not establish a violation of Safety Rule S-1.2.3.

The principal reason is that the tamping machine, the cause of the switch damage, was not within his "control." It was Cox, not Bohnenkamp, who was operating the tamper when its work heads hit the switch rod. Both men knew there were switch rods laying in the ballast and both had a rough idea where the rods were located. But Bohnenkamp had no opportunity to feel his way through the ballast to find the precise location. Supervision had not ordered or suggested that the crew performing the tamping do so by hand. We suspect that any such decision would have to be made by management. And inasmuch as the crew had already tamped its way through one switch, there was no reason why Bohnenkamp could not reasonably believe it could successfully tamp this second switch. At no point prior to the accident did anything happen that should have required Bohnenkamp to stop the tamping and seek some kind of assistance. And if there was such a

happening, it was not called to Bohnenkamp's attention. He certainly cannot be held responsible for Cox's failings, particularly because they were not made apparent until after the damage occurred.

Of course, Bohnenkamp could have suggested or insisted on the presence of another ground employee to improve the gang's observance of avoiding some hidden hazard. But given the circumstances of this case, there is little reason to believe that an extra ground observer would have prevented the damage. It is true that, as the Organization asserted, had the rods been removed from this area before the tamping process, there would have been no damage. However, the Carrier believed that an additional ground observer was not needed. Such a belief, given the facts of this case, is well within management's permissible discretion.

Bohnenkamp was not proven guilty of a violation of the Safety Rule in question. He is entitled to the appropriate relief – removal of both the 30-day record suspension and the one-year probation from his personnel record.

AWARD

Claim sustained in accordance with the Findings.

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.