

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31861
Docket No. MW-32682
97-3-95-3-619**

The Third Division consisted of the regular members and in addition Referee Charles J. Chamberlain when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE:
(Burlington Northern Railroad Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The discipline (20 day overhead suspension) imposed upon Grinder J.D. Harris for alleged violation of General Rule A and Rule 30 of the Rules of the Maintenance of Way Department was unwarranted, on the basis of unproven charges and in violation of the Agreement (System File T-D-795-B/MWB 94-10-05AD).**
- (2) The discipline (20 day overhead suspension) imposed upon Welder Moen for alleged violation of General Rule A and Rule 30 of the Rules of the Maintenance of Way Department was unwarranted, on the basis of unproven charges and in violation of the Agreement (System File T-D-796-B/MWB 94-10-05AE).**
- (3) As a consequence of the violation referred to in Part (1) above, Claimant J.D. Harris' record shall be cleared of all reference to the twenty (20) day overhead suspension.**
- (4) As a consequence of the violation referred to in Part (2) above, Claimant R. K. Moen's record shall be cleared of all reference to the twenty (20) day overhead suspension."**

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.

The incident in this case involves the performance of welding work by the Claimants in Saunders Yard, a section of railroad where the movement of trains is controlled by signals and a control operator who regulates the train traffic through Saunders Yard.

On February 28, 1994, the Claimants were assigned to perform welding work on track frogs in Saunders Yard.

Claimant R. K. Moen who was in charge of the welding work stated that he went to the Saunders Tower and requested permission to work on one of the yard frogs.

Claimant Moen stated that he was informed by Control Operator D.J. Lock that he should wait for the Hib-Tac train to pass and he then could have the track until 3:30 P.M. when the next train would be due. The Claimants commenced work on the rail frog after the Hib-Tac train cleared the site where the welding work was to be performed.

At approximately 3:00 P.M., Train 831 approached Saunders Yard and the Control Operator alerted the train crew of Train 831 to the presence of the welding crew on the track at the Saunders Yard Plant. The Engineer responded, reduced his train speed and began to blow the train whistle.

Claimant Moen was acting as look out while Claimant J.D. Harris was grinding the frog. He became aware of approaching Train 831 when it was about a mile away. Claimant Moen stated that he assumed Train 831 would stop because of the permission he had received verbally from the Control Operator that they could work on the track until 3:30 P.M. Additionally, the Claimant stated that he assumed Train 831 would stop at the absolute signal governing Saunders Yard Plant.

Train 831 did not stop at the signal but proceeded at a reduced speed towards the work site.

The Control Operator being aware of the proceeding train left his tower and walked towards the Claimants to alert them that the train was proceeding.

The Control Operator arrived at the work site which was in close proximity to the Control Tower and alerted the Claimants to remove themselves and the grinder from the track which they did before the train reached the work site. No one was hurt or injured at the scene of the incident.

Following the incident on February 28, 1994, the Claimants received a notice dated March 3, 1994 to attend an Investigation on March 14, 1994 to determine responsibility, if any, in connection with your alleged near miss with Train 831 on February 28, 1994, at approximately 14.45 at Saunders Yard. The Investigation was postponed at the request of the Organization and was subsequently held on April 11, 1994, in Superior, Wisconsin.

Following the Investigation on April 11, 1994, the Claimants received individual notices assessing the discipline which is at issue in this dispute.

During the Investigation and the subsequent handling of this dispute on the property, the Organization took the position that procedures and pre-judgment by the Carrier officers was prejudicial against the Claimants.

Our thorough review of the record and transcript of the Investigation can find no support for the Organization's position in this regard.

The Investigation was lengthy and numerous witnesses were called and permitted to testify. The Organization representative and the Claimants were permitted to question all those who were in attendance. We find nothing in the record that would support the position of the Organization of procedural defects prior to or during the Investigation.

With respect to the incident that occurred, the testimony of those involved appears to be reasonably consistent with respect to the factual situation that led to the so-called near miss.

The issue to be decided is whether the Claimants' actions violated General Rule A and Rule 30 of the Rules of the Maintenance of Way Agreement.

The record and the transcript of the Investigation reveals clearly that there is consistency with respect to work practices that prevail at the Saunders Yard location. It is clear that it is a common occurrence for employees to obtain verbal permission to use track facilities at the Saunders plant where a Control Operator is located and in charge of train movements through the controlled area.

In this particular case, it is evident that the Control Operator may have, for whatever reason, overlooked the time that had been allotted to the Claimants for welding work; however, he was aware of their presence on the track as he alerted the Engineer of Train 831 and left the control tower to alert the Claimants of the approaching train. The Claimants were aware of the approaching train, but assumed that it would stop at the absolute signal at the approach to Saunders Yard which was under control of the Control Operator.

While this incident was described as a near miss and fortunately no one was injured, the responsibility for the incident or near miss cannot be placed on laxity, improper or careless action by the Claimants.

The Investigation transcript clearly reveals testimony by other employees with many years of experience on the railroad that practices followed by the Claimants at Saunders Yard have been consistent through the years.

In this incident, the record clearly reveals an oversight on the part of the Control Operator who is responsible for the movement of trains through Saunders Yard Plant and was responsible for the protection of the Claimants performing the work on the Saunders Yard Plant. The transcript reveals that subsequent to the incident, the Carrier officials revised rule procedures and the Control Operator changed his method of operation to protect against further instances of what transpired in this dispute.

Accordingly, while we recognize the serious nature of the incident, we cannot find any basis for holding the Claimants responsible for the events that led to the near miss and accordingly no basis for the charge of violation of General Rule A and Rule 30 of the Rules of the Maintenance of Way Department.

Accordingly, we must rule that the claim be sustained as presented by the Organization.

AWARD

Claim sustained.

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 4th day of March 1997.

**CARRIER MEMBERS' DISSENT
TO AWARD 31861 (Docket MW-32682)
(Referee Chamberlain)**

In the Investigation held in this matter we find the following concerning Rule 30:

"OCCUPYING MAIN TRACK: One of the following is required to authorize on-track equipment to occupy a main track, off-track equipment to foul a main track, or to perform work on a main track which affects the movement of trains:

- (1) Train location line-up.
- (2) Track warrant.
- (3) Track bulletin Form B.
- (4) Track and time limits.
- (5) Track flags placed as required by rule.
- (6) Track Permit.

Yard limits do not authorize equipment to occupy a main track or work to be performed on a main track. Within yard limits, this may be done only when way is known to be clear.

Q. by Mr. Hovland, A. by Mr. Moen

632. Q. Mr. Moen, do you understand that rule?
A. Yes, I have an understanding of that rule.

Q. by Mr. Hovland, A. by Mr. Harris

633. Q. And, Mr. Harris, do you have an understanding of that rule?
A. Yes, I do.

Q. by Mr. Hovland, A. by Mr. Moen

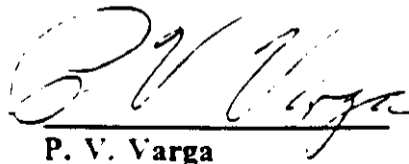
634. Q. Mr. Moen, how did you comply with that rule on February 28, 1994, while working in the vicinity of Saunders interlocking?
A. Complied to that rule to the best of my understanding.
635. Q. Did you have a train location line-up?
A. No.
636. Q. Did you have a track warrant?
A. No.
637. Q. Did you have a track bulletin Form B?
A. No.

638. Q. Did you have a track and time limits?
A. No.
639. Q. Did you have a track flags placed as required by rule?
A. No, I did not.
640. Q. And did you have a Track Permit?
A. No."


Claimant Harris also answered the same questions in the negative.

Whatever our opinion of who had more responsibility or the amount of discipline assessed, it is clearly not supported by the record, as quoted above, that Claimants had no responsibility. Practice at the location may mitigate the failure to follow the rules; it does not exonerate that failure.

We Dissent.



P. V. Varga



M. W. Fingerhut



M. C. Lesnik