

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 32429  
Docket No. MW-32698  
98-3-95-3-629**

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

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

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline (30 day suspension) imposed upon Surfacing Gang Foreman D. D. Brooks for alleged violation of Burlington Northern Maintenance of Way Operating Rules 1.1.2 and 20.1 on May 11, 1994 was without just and sufficient cause, on the basis of unproven charges and in violation of the Agreement (System File S-P-528-O/MWB 94-09-16AI).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant’s record shall be cleared of the charges leveled against him and he shall be compensated for all wage and benefit loss suffered.”**

**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.

Following a formal Investigation that was held on May 18, 1994, the Claimant was found to be in violation of the Carrier's Operating Rules for failing to perform his duties in a manner which would have prevented the collision between Engine 6820 and Ballast Regulator BNX 06013, and the injury to Ballast Regulator C. Vasquez, on May 11, 1994. The Carrier suspended the Claimant from service for 30 days.

On May 11, 1994 the Claimant was assigned to supervise a Maintenance of Way Surfacing Gang in the area of Balton, Montana. At the time of the events giving rise to the instant claim, both the Maintenance of Way Gang and the Train Crew were operating under a "Track and Time" permit. This permit gives both the Gang and the Train Crew, which operated under the instructions of Conductor R. F. Harwood, authority to occupy specified limits of the main and adjoining track. In order to avoid accidents which place employees at risk of injury and damage to property, coordination between the work of the Maintenance of Way Gang and the Train Crew is essential under a "Track and Time" permit. Thus, the resolution of the dispute depends upon the information communicated between Harwood and the Claimant.

Initially, the Claimant and Harwood had an understanding with respect to the work to be performed by the Train Crew. Subsequently Harwood changed the Train Crew's assignment and told the Claimant that the Train Crew would be performing a switching operation.

Before talking to the Claimant about the switching operation, Harwood talked to Vasquez about the change in his plans. According to Vasquez, Harwood told him to "hold back . . . when I finish my work I'll let you know and your guys can come in." Harwood said he then talked to the Claimant about the change in the work to be performed by the Train Crew, involving the switch of two cars.

According to Vasquez he then stopped his machine where the Claimant was standing. The Claimant confirmed Harwood's change of work assignment for the Train

Crew and said to Vasquez, "Go ahead and go into the siding." Vasquez reminded the Claimant that Harwood was "going to do some switching at the west end of the industry track." The Claimant was aware of the switching operation and instructed Vasquez to "just go in there part ways where you can see them. They're only going to pull out ten cars."

Vasquez went to the siding and parked. Some time thereafter Vasquez observed a train coming which he thought would stop. When he realized that it would not stop, he started to move west. However, it was too late and the train collided with his machine.

It is of great weight that the Claimant may not have heard everything that was said by Harwood with respect to the work to be performed by the Train Crew. He testified: "I thought we were pretty clear, but you know, maybe—I'm not speaking out of line with any of us, I just think . . . you know, either we didn't hear everything or could've been my fault on the hearing."

If the Claimant did not understand Harwood's statement with respect to the switching operation, he should have sought clarification from Harwood rather than instruct Vasquez to go into the siding. If the Claimant failed to hear Harwood's plans for his Train Crew, he should not have instructed Vasquez to operate his machine so as to place him at risk of injury and subject the Carrier's property to the risk of damage. Indeed, as if to indicate that there might be a problem with respect to the Claimant's instructions, Vasquez reminded the Claimant of the switching operation to be performed by Harwood's Train Crew.

The record, however, does not absolve Harwood from responsibility for the collision. Harwood said that he told the Claimant: "When I get everything out of there, you can come in there and tie up and I'll let you know when to come in." Furthermore, he told the Claimant "to stay back."

However, early in his testimony, Harwood said that he told the Claimant "to stay at the switch." He then changed his testimony, by stating that he did not believe he told him "to stay at the switch."

Harwood attempted to clarify what he meant when he told the Claimant "to stay back." As he stated "as far as I'm concerned he could probably come down into the holding block, and if he's getting real short on time, which he felt he was on his Track and Time . . . he could come down with just clearing his outfits west of the holding block, or the signal off the siding that'd be 150 feet. I have no objection with any of these places, when I say 'stay back'." Harwood acknowledged that he failed to specify any of these places to the Claimant.

The record establishes that Harwood did not clearly inform the Claimant what he meant by telling him to "stay back." Harwood's failure to clearly communicate instructions to the Claimant establishes that the Claimant is not solely responsible for the events which led to the collision. Nevertheless, in light of the Claimant's admission that he was at "fault" for not hearing everything that was said by Harwood, he violated Rules 1.12 and 20.1 of the Maintenance of Way Rules. These Rules provide as follows:

**Rules 1.1.2:**

**"Employees must be careful to prevent injury themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury."**

**Rule 20.1:**

**"Foremen must not perform or authorize any work that will interfere with the safe movement of trains without providing the proper protection."**

The record warrants the conclusion that the Claimant violated Rules 1.1.2 and 20.1. However, Harwood's ambiguous and vague communication to the Claimant constitutes a weighty mitigating factor in reducing his suspension to ten days.

**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 21st day of January 1998.**