**Form 1** **NATIONAL RAILROAD ADJUSTMENT BOARD**
**THIRD DIVISION**

**Award No. 43745**
**Docket No. MW-44937**
**19-3-NRAB-00003-180279**

**The Third Division consisted of the regular members and in addition Referee Richard K. Hanft when award was rendered.**

**PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - (IBT Rail Conference**
**(Norfolk Southern Railway Company**
**(former Norfolk and Western Railway Company)**

**STATEMENT OF CLAIM:**

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

**(1) The Carrier failed to comply with Mediation Agreement A-8853 Dated February 10, 1971, Article V: (Amended September 26, 1996) following an injury sustained by Mr. K. Barker on December 8, 2016 and continuing [Carrier's File HW-50 (Barker) NWR].**

**(2) As a consequence of the violation referred to in Part (1) above, Claimant K. Barker shall be '... provided the coverage under the plan at 80% of his basic full-time weekly compensation for the time lost, beginning after the accident and continuing.'"**

**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 concerns an employee who was, at the relevant time, December 8, 2016, assigned as a machine operator and operating a Caterpillar 420E backhoe in a grade crossing in the vicinity of DB 3.1 of the Delorme Branch. The Claimant was sent to that location to remove asphalt in the grade crossing in preparation for further work by the smoothing gang.**

**The Claimant arrived at the grade crossing, set up the machine in the gauge of the track with the front end of the machine facing North, lowered the bucket on the machine, extended the backhoe's outriggers and began using the bucket arm on the back of the machine, facing in the Southerly direction, to break away and remove asphalt from the grade crossing.**

**Simultaneously, T & S Gang 23 began to shove equipment from a siding at DB 3.6 south clear of the siding switch onto the main line in order to tram to its work area.**

**The operator of a material truck with an attached cart, a contractor, backed the cart in tow of the material truck into the Claimant's backhoe. The impact of the on-track machine collision moved the backhoe several feet and derailed the cart. The Claimant, the backhoe operator, was injured and has been off work since the incident.**

**The Organization contends that the Claimant is eligible for benefits under the Off Track Vehicle Agreement first put into effect by the Parties' February 10, 1971 National Agreement, as amended on October 30, 1978 and then again on September 26, 1996.**

**As the Agreement currently provides, in relevant part:**

> **"ARTICLE V – PAYMENTS TO EMPLOYEES INJURED UNDER CERTAIN CIRCUMSTANCES**
> **Where employees sustain personal injuries or death under the conditions set forth in paragraph (a) below, the carrier will provide and pay such employees, or their personal representative, the applicable amounts set forth in paragraph (b) below, subject to the provisions of other paragraphs in this Article.**

**(a) Covered Conditions -**

**This Article is intended to cover accidents involving employees covered by this agreement while such employees are operating, riding in, boarding or alighting from off-track vehicles authorized by the carrier and any accidents which occur while an employee is under pay…"**

**The Carrier instead argues that the above-quoted provision of the Agreement was not intended to apply to the instant situation, in that the employee was not in the act of transporting or being transported, in an off track vehicle as an employee under pay.**

**The crux of the instant dispute hinges on whether the above-cited provision of the Agreement is interpreted from a textualist or intentionalist point of view. A majority of the Board favors the intentionalist interpretation of the quoted provision.**

**"Originally, the record reveals, the 1971 National Agreement provided that:**

**This Article is intended to cover accidents involving employees covered by this Agreement while such employees are riding in, boarding or alighting from off-track vehicles authorized by the carrier and are:**

**(1) dead-heading under orders, or;**
**(2) being transported under Carrier orders."**

**According to the submissions submitted to this Board, the parties to that Agreement argued over whether the driver of an off-track vehicle qualified for coverage under the above-referenced provision and whether or not employees were covered by the provision as they were traveling from home or lodging to the job-site. The record indicates that the 1996 amendment to the 1971 Agreement was intended to clarify that employees driving from home or lodging to a job location were not covered, while the drivers, or operators of off-track vehicles were afforded the same coverage as passengers in the off-track vehicles.**

**As applied to the instant dispute, the Claimant is not eligible for benefits under the Off Track Vehicle Agreement, as amended, because the Claimant was not operating, riding in, boarding or alighting from an off-track vehicle. Instead, the pictorial evidence**

**shows, he was operating an on-track piece of machinery, within the gauge of the track, and was injured as a result of an on-track machinery collision.**

**While the Organization offers Public Law Board 2366, Award Number 26 as evidence that prior Boards have held that a backhoe similar to that being operated by the Claimant in this dispute is considered to be an off-track vehicle, that Award is distinguishable from the case at hand because the Claimant in that matter was operating the backhoe on a public highway in transport from one job location to another when he was struck and killed by a tractor trailer. Here, the backhoe being operated by Claimant was immobilized with bucket and outriggers down and being used on-track as an excavator.**

**Additionally, Public Law Board No. 2668, Award No. 40 was submitted as precedent that a forklift was considered to be an off-track vehicle and thus, covered by the agreement. In that case, the vehicle involved was in a warehouse and transporting an employee from pick-up point to delivery point and overturned, killing the employee. There, the forklift was not being used as an on track vehicle as it was being used in a warehouse and transporting the employee from pick up point to delivery point. Here, the backhoe was being used on track to excavate a grade crossing. The Board finds no similarity in the facts of Award 40 and the case at hand.**

**The above-cited Awards however, do show that the facts that are decisive in determining whether an employee's accident is covered by the Off Track Vehicle Agreement is not what type of vehicle or machine is involved in an accident, but rather whether the vehicle or machine is being used for off track transportation purposes at the time of the accident. Here, the accident occurred when an on track machine was shoved into another machine that was at that moment being used as an on track machine.**

**After thorough review of all of the evidence on the record, the Board finds that Claimant is not covered by the provisions of Mediation Agreement A-8853 as asserted by the Organization in its claim.**

## AWARD

**Claim denied.**

## 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 16th day of July 2019.**

LABOR MEMBER'S DISSENT
TO
AWARD 43745, DOCKET MW-44937,
(Referee Richard K. Hanft)

The Majority erred in its findings in this case. Under the Off-Track Vehicle Agreement, an employe is covered if he or she is (1) operating, riding in, boarding or alighting from off-track vehicles; (2) authorized by the Carrier; and (3) under pay at the time of the accident. Admittedly, there are exceptions to qualification listed in the Agreement, the Carrier did not assert any in this case. In this specific case, it was undisputed that the Claimant was authorized to be working as he was, was under pay and was operating a backhoe. Accordingly, the only analysis for the Board was to determine if the backhoe was an off-track vehicle as contemplated by the Agreement. This issue has already been answered by Award 26 of Public Law Board No. 2236, wherein that board held that a backhoe was an off-track vehicle under the Agreement.

Rather than simply applying precedent and finding that a backhoe is an off-track vehicle, the Board substituted its own judgment into what it believed the intent of the agreement was. Specifically, the Board held the deciding factor in this case was: "… not what type of vehicle or machine is involved in an accident, but rather whether the vehicle or machine is being used for off track transportation purposes at the time of the accident. ***" The issue with this holding is that it is adding a condition precedent to qualifying for coverage under the Agreement for which the parties did not bargain.

To further its misjustice, the Majority relied on facts and evidence that were not part of the developed record and were only submitted by the Carrier within its submission to decide the case. On Page 4 of the award, the Majority references pictorial evidence showing where the backhoe was located. The Board also referenced the backhoe in question being immobilized with its bucket and outriggers down at the time of the accident. Once again, that was never asserted or established in the record. Rather, the Carrier's sole position during the on-property handling was that the backhoe was a piece of equipment incapable of being operated over the highway, so the Claimant was not covered under the Agreement. In fact, the Carrier's entire appeal denial made reference to a bulldozer, which has no application to this case whatsoever. Apparently, knowing it needed more evidence than was in the record, the Carrier improperly attempted to add evidence to the record. Unfortunately, the Majority improperly rewarded the Carrier's sleight of hand. The Organization was unable to verify or challenge the evidence as it was not exchanged during the on-property handling and should have never been considered by the Board as its only jurisdiction is appellate. Accordingly, this award should be given no precedential value.

Respectfully submitted,

*Zachary C. Voegel*

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Labor Member