

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 197
AWARD NO. 197

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1527165

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File

R-0948U-306

STATEMENT OF CLAIM

1. The five (5) day suspension imposed upon Machine Operator D. R. Oelke for violation of Rules 70.3, 42.9 and 1.13 of the Union Pacific Safety Rules effective July 30, 2007 in connection with his failure to hold an adequate job briefing and failure to protect his machine while being fueled on September 6, 2009 is based on unproven charges, unjust, unwarranted and in violation of the Agreement.
2. As a consequence of the violation referred to in Part 1 above, we request that the charges leveled against Claimant Oelke be withdrawn and removed from his record and that he be made whole for the lost work opportunity at the applicable rate of pay and paid for the applicable mileage.

STATEMENT OF BACKGROUND

Claimant has established and holds seniority as a machine operator and has accumulated thirty-five (35) years of service in the railroad industry. During his 35 years of service, Claimant has never once received any disciplinary action.

On September 6, 2009, the date of the incident that gave rise to the subject claim now before the Board for its consideration and determination, Claimant was working under the supervision of Manager Track Programs (MTP) Rail Northwest, A. J. Williams as an

Anchor Applicator Operator on Section Gang No. 9013. Section Gang 9013 had a regular complement of thirty-one (31) persons but on the morning of September 6, 2009 it operated short with a total of twenty-four (24) persons due to employees taking vacation. As a result, Assistant Foreman, Bradley C. Olson assumed the duties of the fuel truck operator. While on the bus and traveling to the work site, Olson conducted an "enhanced job briefing" with all the members of the section gang as to how he was going to fuel the machines once the gang commenced working.

At approximately 8:15 a.m., Olson pulled along Track No. 5 of the Western Avenue Yard where the machines were located and prior to commencing fueling the machines, he placed two (2) thirty-six (36) inch cones at prescribed distances inside the track and turned on the fueling truck's strobe light as a means of establishing his work area. After fueling three (3) spiker machines the next machine to be fueled was Claimant's anchor machine. Olson explained that while the spiker machines are fueled from the side, the anchor machines are fueled either in the front or the back of the machine but in order to fuel them, it is necessary to stand in the middle of the track. As Claimant approached and reached Olson, Claimant stopped and dismounted his machine and then signaled Anchor Operator, Dave Elam who was behind him to stop his machine by waving his hard hat. Operator Elam acknowledged Claimant's signal and stopped his machine. According to Olson, at the time Operator Elam stopped his machine he was about 200 feet behind Claimant's machine. In testimony however, Claimant put the distance at about 90 feet. In preparation to fuel Claimant's machine, Olson's fuel hose got caught on a tie. Claimant then assisted Olson to free the fuel hose from the tie and to remove the cap from his machine's fuel tank. When all preliminary duties had been performed, that is the placement of the safety cones, the strobe lights of the fuel truck on, and assurance that Elam's anchor machine had stopped, Olson then entered onto the middle of the track and began to fuel Claimant's machine from the front of the machine. Almost immediately after he began to fuel Claimant's machine, Olson heard a loud crashing sound and responded by jumping and turning 360 degrees over the north rail to avoid being run over by Claimant's anchor machine resulting in his landing on his back outside the track. By reacting in this manner, Olson avoided incurring a serious injury but he did not avoid being struck by Claimant's machine as the crashing sound he heard was employee Elam's anchor machine striking the back end of Claimant's anchor machine. According to a written account of the incident, Olson reported that the bumper of Claimant's anchor machine struck his right knee. In his written report, Olson also noted that later that morning, at 11:50 a.m. his neck was a little stiff and his back was a little sore at the base of his spine. Further, according to Olson, in an attempt to determine what caused the crash, he asked employee Elam what had happened to which Elam responded he had screwed up, that he was working on his machine while looking down and did not realize his machine was in motion and moving forward thereby slamming into Claimant's anchor machine.

Although MTP Williams was notified of the incident at 10:00 a.m., it was not until the next day, September 7, 2009 that he proceeded to the location of the incident to perform his own investigation of the circumstances which consisted of his interviewing some of the Section Gang employees including Claimant and observing the distance between the work area where the machines were being fueled and the area where the equipment was stopped for loading material. Williams did not engage in performing a re-enactment of the incident on this date.

Subsequent to Williams' visit to the incident location and his gathering of information pertaining to the incident, on September 25, 2009, Carrier issued Claimant Notice of Investigation which reads in pertinent part as follows:

Please report . . . on Tuesday, October 6, 2009, at 0900 hours, for investigation and hearing on charges to develop the facts and place responsibility, if any, in connection with the charge that:

On September 6, 2009, you may have failed to comply with rules and instructions when you allegedly did not hold an adequate job briefing before commencing on track fueling operations. Furthermore, you may have failed to protect your machine while being fueled by giving the required signal to stop approaching equipment. This may have contributed to your machine being struck by other track equipment.

. . . Your alleged actions indicate possible violation of Rule 70.3, Rule 42.9 and Rule 1.3 of the Union Pacific Safety Rules effective July 30, 2007, the Maintenance of Way Rules, effective November 17, 2008, and the General Code of Operating Rules, effective April 3, 2005, respectively.

Most relevant to the instant claim are the cited Rules, Rule 42.9 and Rule 1.3 which read in full as follows:

RULES FOR ON-TRACK OPERATION OF TRACK CARS, ROADWAY MACHINES AND WORK EQUIPMENT

42.9: Signal to Stop

When two or more track cars are traveling together on the same track, the operators of all cars must agree upon and use a predetermined signal to stop that is easily seen and understood.

The operator of a track car that follows must watch for signals and must acknowledge a signal with the same signal.

If necessary to dismount the equipment, the operator must stand on the field side of the track and not foul the track until one of the following has been complied with:

- **The operator has signaled the following machine and the machine has stopped.**
- **Another employee is providing lookout protection.**
* * *
- **The operator has conducted a job briefing with the following operator to discuss the location of the first machine and specify where the following operator will stop.**

Once stopped, the operator of the following machine must, in turn, flag the next machine to a stop unless he/she is operating the last machine.

GENERAL RESPONSIBILITIES

1.13: Reporting and Complying with Instructions

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

By written notice dated October 22, 2009, Manager of Work Equipment, Roger Riojas, the Carrier officer who conducted the formal investigation informed Claimant that after he carefully reviewed and considered all the testimony contained in the hearing transcript, he found more than a substantial degree of evidence to warrant sustaining all charges brought against him. Riojas further informed Claimant that under Carrier's UPGRADE Discipline Policy the violations he committed required the assessment of a Level 3 Discipline resulting in the imposition of a five (5) day suspension.

Thereafter, by letter dated November 9, 2009, the Organization filed the subject claim which is now before the Board for its consideration as Carrier and the Organization were unable to resolve the matter in dispute on the property.

CARRIER'S POSITION

Carrier asserts that it was not within Claimant's duties to assist Olson in the fueling of his machine and the fact that he engaged in so doing resulted in his failing to be in proper position so that he could signal any trailing equipment to stop and/or issue a warning to other employees of any dangerous conditions. Carrier maintains that the record evidence clearly demonstrates that Claimant violated the cited rules when he failed to hold an adequate job briefing with Olson before commencing on-track fueling operations, as well as failing to provide proper track protection by not giving the required signal to stop approaching equipment or warning fellow employees; failures that directly contributed to Claimant's anchor machine being struck by another anchor machine. As to the assessed discipline of a five (5) day suspension, Carrier asserts it was justified given its fundamental right to correct employees as to their unsafe actions and too, such disciplinary suspensions have been issued in other cases similarly situated. Furthermore, Carrier submits, the suspension assessed was neither harsh, excessive, nor draconian in light of the seriousness of the safety violations Claimant committed. As a final argument, Carrier submits there were no extant procedural errors or affirmative defenses proffered that would warrant voiding the assessed discipline.

Accordingly, Carrier respectfully requests the Board to rule it is not required to vacate the properly assessed progressive discipline notation issued to Claimant.

ORGANIZATION'S POSITION

The Organization asserts Carrier failed in its burden to show by any substantial evidence that Claimant was guilty of violating any one of the three (3) cited rules it charged Claimant committed. The Organization argues that Claimant fully complied with every aspect of the cited rules and that it is ludicrous for Carrier to hold Claimant accountable for the careless actions of another employee, specifically, Dave Elam, who was the one here who failed to follow said rules and, as a result, was the person who caused the collision of his and Claimant's anchor machine which, in turn, caused Olson to incur an injury. The Organization notes that employee Elam took full responsibility for the collision and that Olson and Foreman Jansen who was an eyewitness to the events both concur that Claimant signaled Elam to stop and that he did stop and acknowledged receiving Claimant's signal to stop.

Accordingly, based on the foregoing argument asserted, the Organization respectfully requests the Board to sustain the subject claim in its entirety.

FINDINGS

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

The Board concurs in the argument advanced by the Organization that Carrier failed to bear its burden of proof to support its position by substantial evidence that Claimant was guilty of committing the rules violations he was charged with committing. The record evidence clearly shows that after Claimant dismounted from his anchor machine but before he assisted Olson in fueling his machine, he signaled to Operator Elam who was trailing behind him in his anchor machine to stop and Elam acknowledged Claimant's signal, the waving of a hard hat and stopped. Carrier failed to prove that Claimant violated any rule by dismounting from his anchor machine to assist Olson in fueling his machine. In fact, Carrier did not refute the Organization's assertion that Claimant on other occasions routinely would assist in the fueling of his machine.

Of course, the key evidence to counter any assertion by Carrier that Claimant was the person responsible for having caused the collision is the confession by Operator Elam that he lost focus while trying to make an adjustment to his anchor machine and therefore was unaware he was moving forward on the track and heading toward Claimant's anchor machine eventually resulting in the collision. The Board finds interesting that in the gathering of information prior to citing Claimant for formal investigation that Carrier did not obtain a written statement from Operator Elam about the incident nor was Elam called as a witness to proffer testimony at the investigation. Further proof that Claimant signaled Elam to stop and that he did stop is the fact that had he not stopped the 90 feet behind Claimant's anchor machine, the collision would have occurred sometime during the time Claimant was assisting Olson in freeing the fueling hose from the tie and Claimant removing the gas cap from his machine.

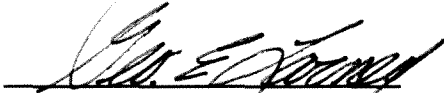
Accordingly, we rule to sustain the claim in its entirety and to award in full the remedy requested by the Organization. This Award is to become effective within sixty (60) days from the date signed by the Parties.

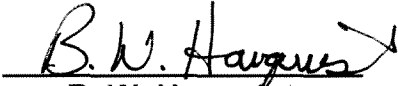
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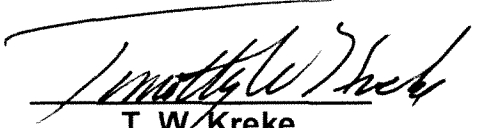
Award No. 197

A W A R D

CLAIM SUSTAINED


George Edward Larney
Neutral Member & Chairman


B. W. Hanquist


T. W. Kreke

Chicago, Illinois

Date: September 13, 2011