

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Burlington Northern Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on March 30, 2001 when it issued the Claimant, Mr. T. R. Ruiz a 30-day Record Book Suspension for allegedly leaving workers unprotected on the track in violation of Rule 6.3.1, of the Maintenance of Way Operating Rules.
2. As a result of the violation referred to in part (1), the Carrier shall remove the discipline mark from the Claimant's personnel record and make him whole for any time lost." [Carrier's File 14-01-0072. Organization's File 120-13N1-014.CLM.]

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction over the dispute herein.

The Claimant, Mr. T. R. Ruiz, was hired by the Carrier on March 9, 1981, as a Switchman. He transferred to the Maintenance of Way Department on May 12, 1991. On February 16, 2001, he was the assigned Foreman on Tie Gang TP13, working in and around Kiowa, Kansas.

On February 22, 2001, the Carrier addressed a letter to the Claimant, ordering him to attend an investigation on March 2, 2001, as follows:

"[F]or the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to protect men and equipment authorized inside your Form B Limits between MP 305.3 and MP 309.2, Panhandle Subdivision, Amarillo Division, at approximately 2:00 p.m. on Friday February 16, 2001, while assigned as Foreman on Tie Gang TP13."

The investigation was held at the appointed time and place. The Claimant was present and was represented by the Organization's Assistant General Chairman. Appearing as witnesses for the Carrier were Assistant Roadmaster J. D. Barnes and Support Gang Foreman J. M. Fry.

The Claimant's representative entered an initial objection to the notice of charges, arguing that it was "vague and ambiguous, indefinite and generally lacking a specific rule violations or charges." His objection was noted and the investigation proceeded. Later in the proceedings, he renewed his objection, arguing that the Parties' Agreement required specific charges.

The Board notes that this Agreement, unlike many rules which require "precise charges," reads as follows:

"Prior to the investigation, the employee alleged to be at fault shall be apprised, in writing, of the circumstance or matter to be investigated . . ."

(A letter of understanding dated April 13, 1980, requires a "specific charge" when an employee has been suspended, but such does not seem to be the case here).

The Board finds that the notice of charge is sufficiently specific to permit the Claimant to prepare a defense. It names a date and time on which the alleged offense occurred, as well as a description of the offense. The transcript contains testimony that the matter was discussed with the Claimant on that same date and approximate time. He was well prepared to defend himself, and a competent defense was mounted by his representative. The Board is not persuaded that the charge lacked sufficient specificity. Nor was the issue of the charge pursued in the Organization's appeals.

When Maintenance of Way Operating Rule (MWOR) 6.3.1 was read into the record, the Claimant's representative objected because this rule was not stated in the notice of charge. This issue has been addressed in Awards of Public Law Board No. 6102, involving the same Carrier and Organization, although a different agreement with different language is there at issue. In Award No. 9 of that Public Law Board, the Board held, "Employees are deemed to have knowledge of the Rules which govern their employment. If unrelated Rules are raised for the first time during the course of the investigation, there might be merit to the objection, but not in this case." Further, the Board in the instant case notes that the Claimant acknowledged that he knew and understood the applicable rules. (Q. and A. No. 200 in the transcript).

The investigation transcript discloses the following events. On February 16, 2001, the Claimant was the Foreman in charge of Tie Gang TP13. He was working under a form of authority identified in MWOR Rules 6.3.1 and 15 as "Track Bulletin Form B." Under this form of authority, which is applicable in Centralized Traffic Control territory, a train order is issued by the Train Dispatcher which delineates the limits of the authority by mile post location. Further visual protection is afforded by the placement of red flags or lights at the beginning of the limits, and yellow flags or lights two miles in advance of the red flags or lights. Under this arrangement, maintenance crews may work on tracks within the limits of the authority, and trains may not enter the limits of the authority except by verbal permission of the Foreman in charge, given by

telephone, radio, or in person. Form B authority must have specified starting and ending times. In the case of the Claimant's authority on February 16, 2001, it began at 8:30 a.m. and ended at 5:00 p.m., and extended between Mile Posts 305.3 and 309.2. According to the record in this case, the fractional mile post locations are not marked as such, and the record does not indicate precisely how these locations were identified in the field, i.e., whether measured from the nearest mile post, estimated from known switch or crossing locations, by counting communication poles from a known location, or any other method.

Foreman Fry's Support Gang was working on the same project with the Claimant's Tie Gang, and therefore occupying the track and right-of-way in the same geographical area. In accordance with MWOR Rule 6.3.1, he obtained "work group authority" under the Claimant's Form B authority on February 16. This is an arrangement under which more than one gang working in the same track limits may be listed by the Foreman in charge, using his authority under the Form B train order, thus making it unnecessary to create multiple Form B authorities for the same limits. Under this arrangement, however, the Foreman in charge is responsible for all the gangs listed as multiple work groups, and before authorizing a train to enter the Form B limits, he must know that all such gangs are clear of the track and/or aware that the train has been cleared to enter the limits. Assistant Roadmaster Barnes described a typical work group authority procedure in his testimony:

- "31. Q. Normally when somebody has a Form B or a foreman has a Form B how do other people other foremen's or workers protect themselves with another person's Form B. What are, can you go through what the procedures are to protect?
- A. If another foreman wishes to work in someone else's Form B he has to notify the person that's in charge of the Form B and be put on a multiple worker list.
32. Q. Okay. When they do that do they have a job briefing or how do they converse can they do it on the radio or how can they do that?
- A. They can do it on the radio or face to face just has to be an understanding as to where the limits of the Form B and where the other person is going to be.
33. Q. And when they put them on this multiple work group form do they put any specifics down to how, where and what?
- A. Should be the foreman's name and the time that he was put on the multiple work.
34. Q. Name and time.
- A. Yep.

35. Q. And then how does the foreman in charge know when the other person is no longer needing protection?
A. It's the other foreman's responsibility to notify the foreman charge that he no longer needs it.
36. Q. Okay. And then what does the foreman in charge do at that time?
A. He says then you're off my Form B at such and such a time.
37. Q. Okay. So getting on and getting off they give time and name?
A. Yes."

Although the Claimant's Form B record does not show a starting and ending time for Mr. Fry's work group authority, Mr. Fry's record shows it began at 8:59 a.m. and ended at 4:06 p.m. The Claimant did not deny that Mr. Fry's gang was under his Form B authority that day, despite the absence of specific times for such authority. His record does show Mr. Fry's name.

According to Mr. Fry's testimony, he spent the morning of February 16 working in the vicinity of the Claimant's Tie Gang, midway between Mile Posts 306 and 307. After lunch, Mr. Fry took his gang to a road crossing at Mile 305.28. If that location is precise, it was actually 0.02 mile east of and outside the Form B authority limits held by the Claimant, and in which Mr. Fry had work group authority. This is confirmed by the undisputed testimony in the record that when Mr. Fry's gang began working at the road crossing, he observed the red flag marking the beginning of the Claimant's Form B limits just west of the road crossing, i.e., at a location corresponding to Mile 305.3. The Assistant Foreman who put the red flag at its designated location that day submitted a written statement that it was placed on the west side of the road crossing.

Mr. Fry testified that when his gang was working at this location, replacing planks in the road crossing, his backhoe had knocked the flag down, and he had it moved to a location east of the road crossing, out of the way of his equipment. Although he stated that this relocation of the flag resulted in his working within the limits marked by the flags, he was still outside the limits specified in the Form B authority.

At about 2:00 p.m., Mr. Fry overheard the Claimant's radio communication with a westbound train, releasing it to proceed through the Form B limits. Mr. Fry had already seen the headlight of this train and had adequate time to clear the track of his backhoe. The way was made safe for its passage. Since, according to Mr. Fry, the Claimant had released the train without contacting him to ensure he was clear of the track, he called the Claimant by radio and said, "I'd like to be advised before you release a train." This radio comment was overheard by Mr. Barnes, which caused him to interview both the Claimant and Mr. Fry about the incident.

According to Mr. Barnes, the Claimant said he had forgotten to notify Mr. Fry:

- "72. Q. Did Mr. Ruiz explain or say anything about releasing the train through the limits without calling Mr. Fry. Did he make any statements toward that or?
A. When I first asked him he did.
73. Q. And what was his response?
A. Said that he forgot.
74. Q. He said he forgot?
A. Yeah."

The Claimant gave a differing explanation in his testimony:

- "187. Q. Why did you not call him?
A. 'Cause I didn't consider him under my Form B limits.
188. Q. And why is that?
A. Because we had established that the red board was west of the road crossing."

The Claimant stated that since Mr. Fry's gang was outside the Form B limits, he understood Mr. Fry would obtain his own authority to work at the crossing location.

Following the close of the investigation, by letter dated March 30, 2001, the Carrier's Division Superintendent wrote the Claimant, in part:

"This letter will confirm that as a result of investigation on March 2, 2001, in connection with your failure to protect men and equipment authorized inside your Form B Limits between MP 305.3 and MP 309.2, Panhandle Subdivision, Amarillo Division, at approximately 2:00 p.m. on Friday February 16, 2001, while assigned as Foreman on Tie Gang TP13, you are issued a Level - S, 30 Day Record Suspension, for violation of Rule 6.3.1 of the Maintenance of Way Operating Rules, in effect 12:01 a.m., Central time, January 31, 1999, including revisions up to April 2, 2000 as amended or supplemented. Additionally, you have been assigned a review period of 3 years. If you commit another serious rule violation during the tenure of this review period, you will be subject to dismissal."

The Organization appealed that decision to the highest officer of the Carrier designated to handle such appeals. The thrust of the Organization's appeal is founded on the evidence that

when the westbound train was released to enter the Form B limits, Mr. Fry's gang was working outside those limits at Mile 305.28.

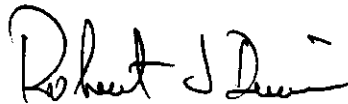
The Board is not persuaded by this defense. Although the evidence does support the probability that Mr. Fry's gang was working outside the Form B limits at the time the westbound train was released, Mr. Fry was still listed as a multiple work group within the Form B limits. Not having been removed from such protection, he could have reentered those limits at any time. This is demonstrated by his backhoe knocking down the flag which marked the beginning of the Claimant's Form B limits. The flag was moved eastward to keep it out of the way of Mr. Fry's machines. Arguably, the backhoe, other equipment, or workers could have been moving into and out of those limits while pursuing their work at the crossing.

In any event, since Mr. Fry had not reported clear of the Form B limits at any time between 8:59 a.m. and 4:06 p.m., he was continuously subject to the protection of those limits under his work group authority between those hours. It was the Claimant's responsibility to ascertain whether he was clear of the track in every instance of releasing a train movement through the Form B limits.

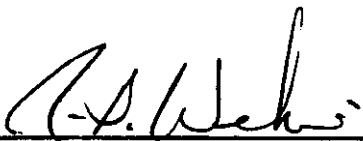
The severity of discipline is not unreasonable, given the proven violation of MWOR Rule 6.3.1. The claim is denied.

AWARD

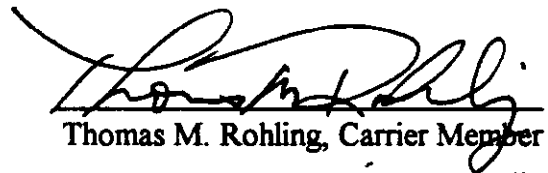
Claim denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

8-20-02

Date