

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
and
Burlington Northern and 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 December 10, 2001, when it issued the Claimant, Mr. M. S. Grant, a 30-day Record Suspension for allegedly failing to be alert and attentive in violation of Rule 1.1.2, **Alert and Attentive**, of the Maintenance of Way Operating Rules, when your backhoe came in contact with an employee's hard hat resulting in his injury.
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 File No. 14-01-0272. Organization File No. 10-1313-0121.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 of the dispute herein.

The Claimant, Mr. M. S. Grant, a Machine Operator with more than twenty years' service with the Carrier, was operating a backhoe on October 19, 2001, when the shovel on his backhoe struck another employee, causing injury, while they were engaged in work at a road crossing near Streator, Illinois. As the consequence, the Claimant and the other employee were both charged with failure to be alert and attentive, and an investigation was set for November 2, 2001.

By agreement of the Parties, the investigation was postponed until November 27, 2001, and then rescheduled for November 16, 2001. It was held on the latter date and a transcript of evidence and testimony is a part of the record in this case.

The Claimant and the injured employee, Foreman J. L. Olvera, testified at the investigation. Testimony was also presented by their immediate supervisor, Roadmaster R. E. Huss, who did a preliminary inquiry and caused a reenactment of the events to be held.

Their combined testimony presents the following account of the incident which resulted in the Foreman's injury: At approximately 7:30 p.m. on Friday, October 19, 2001, the work crew had been on duty since 6:00 a.m. Darkness had already fallen at that hour, but the crew was working in the light of several machines and vehicles. The Claimant was unloading rock from a truck, and transporting it in the shovel of his backhoe to a road crossing. As he described this operation, the Claimant said the truck was "quite a ways" from the crossing; he would load the shovel, back away from the truck and turn around, and proceed to the crossing, where he would dump the rock on the crossing to be spread by workers at that location. The accident occurred when he transported the third load to the crossing. The Claimant states that he did not know that he struck anyone until questioned by the Roadmaster three days later, after an intervening weekend.

Foreman Olvera testified that when the second load of rock was dumped on the crossing by the Claimant, he noted some debris and weeds among the rock. He did not confer with the Claimant about his intentions, but bent over to remove the foreign material from the rock, and while doing so, heard someone in his gang call a warning that the backhoe was backing up. As he started to move away from the area, he was struck in the head by the backhoe's shovel. Fortunately, and in accordance with the Carrier's rules, he was wearing a hard hat, and he described the event this way in his accident report: "Hard hat suspension bottomed out on top of head before knocking me backwards." He said he did not fall down, and considered the injury to be minor. In fact, he did not report the injury until two days later, when he began feeling some discomfort in his neck.

Following the investigation, both the Claimant and Foreman Olvera were notified by Division Engineer B. P. Chatten that they were each assessed a 30-day record suspension, for violation of Maintenance of Way Operating Rule 1.1.2, which reads:

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

The Organization has appealed the Division Engineer's disciplinary decision to the Carrier's highest designated officer, and upon being denied at that level, progressed the appeal to this Board.

First, the Organization argues, the Carrier failed to provide a fair and impartial hearing because the Conducting Officer, Assistant Director Maintenance Production M. F. Heille, acted as both witness and prosecutor, in that he participated in the entire factual background of the matter under investigation, and therefore drew upon his own knowledge in asking leading questions. The Carrier answers that the record contains no evidence of impropriety by Mr. Heille, and without such evidence, the mere assertion that he was prejudiced does not make it

factual. The Board notices that Roadmaster Huss testified that Mr. Heille participated in the reenactment of the accident. To that degree, at least, he had some foreknowledge of the witnesses' movements and their positions with respect to the events surrounding the accident. He may even have formed some idea of the degree of responsibility of each of the parties, but the record does not bear out the Organization's position that he did not conduct a fair and impartial investigation. Indeed, no objection was raised to his role, even after Mr. Huss testified that Mr. Heille was present at the reenactment. Further, the disciplinary decision was rendered by the Division Engineer, who had the opportunity to review the recommendations of Mr. Heille. Absent a clear showing of prejudice, the Board does not concur in the Organization's position in this respect.

The Organization further argues that the reenactment did not factually reproduce the circumstances of the actual incident which resulted in the Foreman's injury. The Carrier made no answer to this argument. The Board observes that the reenactment was performed in the daylight hours, while the actual event occurred in darkness, although lighting was provided by artificial means, i.e., vehicles and track machines. The Board does not believe this failure to replicate the precise conditions lessens the Claimant's culpability. In fact, if no reenactment had been held, the testimony of the two principals, the Claimant and the Foreman, provided sufficient evidence on which to base a conclusion as to their respective actions and responsibility for the accident.

The Organization asks why, if the accident was severe enough to cause injury, the Claimant was not notified at the time. The Carrier does not answer that question, nor can the Board, but the record indicates that the injured employee, himself, did not think it worth reporting until two days later, when he began to suffer some discomfort.

The Organization also asks whether other employees were present who might have witnessed the accident. The Carrier made no response to that question. If other employees were present whose testimony would have exonerated the Claimant from any responsibility for the accident, their presence could have been requested at the investigation. Nothing in the record indicates that any such effort was made.

The Organization objects that the Carrier listed no rules in its notice of charges, and Maintenance of Way Operating Rule 1.1.2 was not read into the record until near the end of the investigation after all the evidence had been presented. The Carrier rebuts that the notice named the date, the time, and a description of the incident to be the subject of investigation, and states there is no Agreement provision requiring that rules be listed. The notice of charges was stated to be "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to be alert and attentive while performing crossing work . . ." [Underscoring added]. These underscored words reflect the title of Maintenance of Way Operating Rule 1.1.2, and should have alerted the Claimant to the implications of this Rule. In

any event, as this Board pointed out in its Award No. 262, "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." The Board does not believe that the Organization's position in this regard is well-founded.

Finally, the Organization argues that the Carrier failed to provide substantial evidence to support its conclusion that the Claimant violated Rule 1.1.2, and the discipline is therefore unjust, extreme, and unwarranted. The Carrier responds that the Claimant's own admissions in the record prove that he was not alert and attentive. It points to his answer to Question No. 90:

"... I didn't, you know, was not expecting anybody to be behind me, especially after I've made three trips back and forth, I, you know. [sic]. I was, I was looking, near that backhoe lights shine, it's kind of a glare, but, you know, I didn't expect anybody to be bent, you know, bent over behind me."

The Carrier added this comment to its quotation of the above testimony:

"Clearly the Claimant was not looking for anybody because he did not expect anybody to be there. If he were alert and attentive to were [sic - where?] he was driving his backhoe he would not have hit the other employee."

The Board reaches the same conclusion the Carrier expressed above. There were mitigating circumstances, it is true. The gang had been on duty more than 13 hours. It was Friday night and they had worked long hours all week. They were anxious to finish the work for the day and were working in some degree of haste, according to the record. The Foreman did an unexpected act, by putting himself in the path of the backhoe in order to extract debris from the previously dumped shovel-load. They were working in darkness, albeit by the light of several vehicles and machines, working among noisy, moving equipment. The Foreman said he did not hear the backhoe's backup alarm signal. He described the lighting as having a "stereo effect." The Foreman did not apprise the Claimant that he would be working in the exact location where the next load of rock would be dumped.

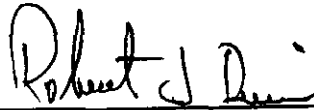
But these adverse circumstances suggest that extra care should be exercised by all concerned. The Foreman was careless of his own safety, but that does not exonerate the Claimant from the necessity to be alert and attentive. Track work is dangerous, and the circumstances here illustrate why.

The notice of discipline indicates that consideration was given to the Claimant's personal record. The nature of the violation here could dictate a more severe disciplinary penalty but for the Claimant's long record of good service, with only one prior incident of discipline, and that

more than ten years before the present case. A record suspension of 30 days is not unreasonable.

AWARD

Claim denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

November 5, 2002
Date