

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 when on August 26, 2002, Mr. E. W. Whittie was dismissed from service for allegedly violating Rules 1.6.4, 1.7.2, 1.7.5, 36.1, and 36.2 of the Track Welding Rules and Procedures in conjunction with causing damage to Carrier welding equipment.
- "2. As a consequence of the Carrier's violation referred to in part (1) above, Mr. Whittie shall be reinstated with seniority, vacation, all rights unimpaired and paid for all wages lost in accordance with the Agreement.
- "3. The Carrier violated the Agreement when on August 26, 2002, Mr. C. E. Barlow was issued a (10) ten day record suspension for allegedly violating Rules 1.6.4, 1.7.2, 1.7.5, 36.1, and 36.2 of the Track Welding Rules and Procedures in conjunction with causing damage to Carrier welding equipment.
- "4. As a consequence of the Carrier's violation referred to in part (1) above, Mr. Barlow shall be reinstated with seniority, vacation, all rights unimpaired and paid for all wages lost in accordance with the Agreement."  
[Carrier File No. 14-02-0176. Organization File No. 110-13N1-0212.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 first Claimant, Mr. Eric W. Whittie, hired by the Carrier in 1993, was employed as a Lead Welder, headquartered at Casey Yard in Houston, Texas. The second Claimant, Welder Cedric E. Barlow, a co-worker with Mr. Whittie, was employed by the Carrier in 1979. On June 28, 2002, Welding Supervisor Don Hiatt and Mr. Rick Bell, whose job title is not known to this

Board, conducted an audit of the Claimants' assigned truck and the area where their welding equipment and materials are stored. This audit disclosed numerous exceptions to the prescribed storage and care of such equipment and materials. Claimant Whittie was not at work on the date of this audit, having marked off with permission for personal reasons. The record does not indicate whether Claimant Barlow was present or working that day. The following exceptions were noted on the audit report:

“Storage trailer containing welding material:  
Roof leaking on thermite material  
Out dated grinding stones dated 1997 (5 years out of date)  
Illegal preheating torches (2 minute)  
Profile grinder lying outside, not used and rusty  
2 extra weld shears not being utilized  
General housekeeping condition was poor. A general clean up is recommended  
Gas cylinders lying on ground unsecured – no cage

“Truck 13917  
Crane cable not secure flopping around on bed  
Preheating tip in bottom of tool basket with tools thrown on top of it  
Regulators had pressure on them  
Gas cylinders were not unhooked regulators or high-pressure lines attached  
Doors were missing from welding machine  
Fire extinguisher discharged  
Bed of truck was covered with oil and very slick  
Grinding wheels and saw blades covered with oil  
Straight stone grinding attachment had bent handles  
Crucibles were covered with oil and had been wet  
Tools on bed were not secured”

As the result of this audit, both Claimants were issued a notice of charges and investigation, reading in part as follows:

“[F]or the purpose of ascertaining the facts and determining your responsibility, if any, with the alleged violation of Track Welding Rules and Procedures 1.6.4 – Equipment Care, 1.7.2 – Arc Welding Units, 1.7.5 – Grinding Wheels and Abrasive Cut Off Wheels, and from Thermite Welding Rules and Procedures, Rule 36.1 – Thermite Molds, Charges and Crucibles, 36.2 – Pre-Heating Torches. The alleged violations occurred on June 28, 2002, on the Houston Sub at Casey Yard. These violations were identified during a vehicle and facility audit conducted by Don Hiatt and Rick Bell.”

The investigation was set for July 15, 2002, but postponed to and held on August 6, 2002, at the request of the Organization's General Chairman.

Mr. Hiatt was the Carrier's sole witness at the investigation. He submitted into evidence the audit report quoted above. It was accompanied by 13 photographs illustrating some of the exceptions taken. Each item listed in the report was discussed to some degree. In several instances, Mr. Hiatt explained how a hazard could arise from the condition or finding.

The leaking roof, for example, could not be blamed on the charged employees, but it was asserted that they had not reported this condition so it could be repaired. Tools lying unsecured on the truck bed could fall off. The slick truck bed is conducive to a fall.

The charged employees responded that the truck was sometimes used by other employees. No cage had been constructed in which to store the gas cylinders upright. The truck had recently been pressure cleaned by a contracting equipment dealer, and that resulted in the dispersal of hydraulic oil on the truck bed. Some of the equipment was no longer in use, such as the outdated grinding stones and the preheating tip in the tool basket, and were considered scrap.

Through cross examination of Mr. Hiatt, it was suggested that other employees than the charged Principals may have used the truck and left it in the condition it was found. On re-direct examination, however, following a recess, Mr. Hiatt stated that he was told by Roadmaster Jack Campbell that no one else used the truck between June 18 and June 28.

Claimant Whittie testified that when he and Mr. Barlow used the truck on June 27, the day before the audit, they were being rushed to finish their work and were not given the time nor opportunity to put everything back in its place. At the close of the work day, they had to meet with a Roadmaster, who told them to tie up for the day, without giving them time to do the necessary housekeeping tasks. He also attributed some issues, such as pressure still being on the regulators, and regulators being left attached to the cylinders, to his co-worker, Mr. Barlow. Claimant Whittie indicated that he took care of housekeeping and work practices on the left side of the truck and Mr. Barlow on the right side.

Claimant Whittie stated that the doors were missing on the welding machine when he went on the job and he did not know this condition was not in compliance with the welding standards. He said he was not aware the fire extinguisher was discharged, but it is his practice to inspect it.

Claimant Barlow admitted that he forgot to disconnect the regulators from the gas cylinders, and leaving them under pressure, in the rush at the end of the day on the 27th when they were called to meet with the Roadmaster. He said he also forgot to hook up the crane cable to secure it against flopping around.

On August 26, 2002, Claimant Whittie was advised that he was dismissed from the Carrier's service, and Claimant Barlow was advised that he was assessed a ten-day record suspension, for violation of the same rules they were charged with in the notice of investigation. These rules read as follows:

Track Welding Rules and Procedures 1.6.4 (in part)

"a. Welding crews shall take good care of all equipment assigned to them. Keep equipment in good working condition and clean with approved solvents.

...

c. Proper guards must be used and maintained for safe operation.

...

e. Do not leave equipment, tools, and material that can be easily moved, unattended along the right-of-way. After each day's work store equipment, tools, and material securely in a truck, tool car, or tool house.

f. Lock and secure equipment and supplies properly to prevent damage during transport, shipment, storage, and use."

Track Welding Rules and Procedures 1.7.2 (in part)

"b. Close the side doors on the arc welder when the arc welder is operating so that the welder draws air from the rear through the generator to cool the engine and generator."

Track Welding Rules and Procedures 1.7.5

This Rule is not quoted nor reproduced in the record.

Thermite Welding Rules and Procedures 36.1

"a. Thermite welding material, molds, welding charges, crucibles, and packing sand shall be stored in a dry location.

b. Thermite welding material shall be stored in an orderly manner, off the floor of the storage location."

Thermite Welding Rules and Procedures 36.2

“c. Preheating torches shall be placed carefully in the tool box after each day’s use.”

The Organization’s General Chairman promptly appealed the Carrier’s disciplinary decision to its Assistant Director - Labor Relations. The Organization argues that the Claimants were not present when the audit was made. They therefore had no control over the conditions that were found, but while acknowledging that the exceptions existed as they were found in the audit, these are common practices. A portion of the responsibility lies with the Welding Supervisor, who accepted at least some of the responsibility for the condition of the storage trailer’s disrepair, the Organization asserts.

The Organization also argues that it cannot be affirmed who else may have operated the truck and left it in its condition during the work week when the audit was made. It could not be conclusively ruled out that items found in the storage area could have been left by other employees who also had access. Mr. Hiatt admitted that he only assumed that damage to a welding torch occurred when other tools were placed on top of it.

The Organization further argues that the record indicates that it was a common practice to leave pressure on the regulators and hoses. Furthermore, the charged employees were confused and under duress when they were questioned about the exceptions found in the audit. The Organization believes the discipline assessed is out of proportion to the charges, even if the Carrier had carried its burden of proof.

The Carrier responds that the Claimants admitted that they violated the cited Rules, and the Carrier thus carried its burden of proof. As for the severity of the discipline assessed Claimant Whittie, the Carrier points to his personal record:

9/26/01	Level-S 30-Day Record Suspension	Not wearing required personal protective equipment.
11/15/01	10-Day Record Suspension	Failure to Comply with Instructions.
11/19/01	20-Day Record Suspension	Improper Backing -- Damaged Truck
6/28/02	Dismissed	Damaged Welder
6/28/02	Dismissed	Truck – Housekeeping Issues

Under the Carrier’s Policy for Employee Performance Accountability (PEPA), his dismissal for damage to the welder was warranted because it was his second “Serious Rule Violation,” as defined by the PEPA, within a period of 36 months. Furthermore, the instant case constituted Claimant Whittie’s fifth violation of any kind within a 12-month period, and therefore

subjects him to dismissal. The Carrier argues that an employee with five violations in less than 12 months cannot be allowed to continue in its employment, lest he injure himself or someone else.

The Carrier rejected or denied all other arguments presented on the Claimants' behalf, and continues to deny the claim presented herein.

The Board has carefully studied the record in this case and weighed the arguments of the Parties. The determinative issues in this case will be addressed below.

While the Claimants may not have been present or on duty when the audit was made, it cannot reasonably be inferred that all the exceptions noted in the audit came into being during the interval between the time they left work on the previous day and the beginning of the audit the following day. Further, they admitted that they had at least some responsibility for the conditions that were found. "I know we used the truck on the 27<sup>th</sup>." (Claimant Whittie, Transcript page 34). "I just simply forgot to do what I'm supposed to do. Plain and simple." (Claimant Barlow, Transcript page 48). Claimant Whittie either admitted the violation, or refused to comment, when the rules were discussed near the close of the investigation. Claimant Barlow readily admitted that he did not comply with the subject rules.

Clearly, other employees could have left equipment, tools, and materials scattered around the area. If that were a common occurrence, however, it would be the Claimants' responsibility to apprise the proper supervisory personnel of the practice, since they were ultimately responsible for the area assigned to this two-man crew.

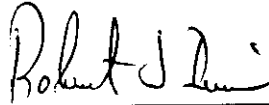
It may well be a common practice to leave pressure on hoses and regulators when they are not being used, but that does not excuse a clear violation of a rule designed to protect the equipment and prevent a fire hazard. Nor does the record indicate that the Claimants did not have ample opportunity to respond to any questions put to them, or any of the charges. They were competently represented in the investigation. While their answers were confusing at times, skillful direct examination and cross examination left few stones unturned. The Board is not persuaded that their defense was impaired by confusion or duress.

While these housekeeping and safety exceptions might not have warranted dismissal if Claimant Whittie had an exemplary personal record, the Board is disposed to concur in the Carrier's assessment of the impact of his disciplinary problems during the previous nine months of his employment, outlined on the preceding page. His personal record precludes the Board from affording him the relief sought in the appeal.

The ten-day record suspension assessed Claimant Barlow is not overly severe, in view of the admitted rule violations. His personal record is very good and it appears he was given credit for that, as does this Board.

AWARD

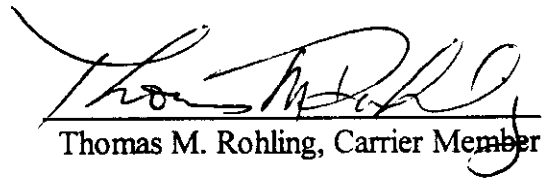
The claim is denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

June 13, 2003

Date