

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 November 26, 2002, Mr. D. M. Stokes was issued a Level S actual suspension of 30 days for allegedly violating Rule 1.1, 1.1.1, 1.1.2, and 6.3.4 of the Maintenance of Way Operating Rules, Rule 1.1.3 of the BNSF Engineering Instructions and Rule S-1.1 of the Maintenance of Way Safety Rules in conjunction with failure to position another employee and himself in a predetermined place of safety at least 15 seconds prior to the arrival of a train.
- “2. As a consequence of the Carrier’s violation referred to in part (1) above, Mr. Stokes shall be reinstated with seniority, vacation, all rights unimpaired and paid for all wages lost in accordance with the Agreement” [Carrier File No. 14-02-0287. Organization File No. 130-13S1-026.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. Danny M. Stokes, was hired by the Carrier on August 20, 1996. He was employed as a Welder in its Maintenance of Way Department on September 9, 2002, when he and a Welder Trainee, Mr. Jeff S. Robinson, were working on a damaged or worn frog at the west end of the siding in Canadian, Texas. At approximately 12:50 p.m., the Claimant was acting as a lookout for approaching trains, and Mr. Robinson was engaged in laying out their welding leads on the track structure, preparatory to resuming their work of building up the worn frog after the passage of trains, at which time they could obtain track and time limits to permit exclusive occupancy of the track at that location.

Maintenance of Way Operating Rule (MWOR) 6.3.4 details the requirements when employees are working under the protection of Lookouts:

“Lookouts must adhere to the following:

- Be trained and rules qualified.
- Identify a place of safety where they and employees they are protecting can go when a train approaches.
- Communicate the place of safety to the other employees prior to the track being fouled.
- Devote their full attention to detecting the approach of trains and warning employees.
- Warn employees and have them positioned in a predetermined place of safety at least 15 seconds prior to the arrival of the train moving at maximum authorized timetable speed as indicated in the Statement of On-Track Safety.
- Use a method to warn employees of the approach of a train or on-track equipment that:
 - Is distinctive, clear and unquestionable.
 - Does not require employees to be looking in any particular direction.
 - Can be detected by employees regardless of noise or work distractions.
 - Is identified in the job safety briefing.

Employees who depend upon a lookout for protection must always remain in a position that allows them to receive warnings communicated by the lookout.”

This Rule is worded to closely adhere to the requirements of the Federal Railroad Administration’s regulation for the protection of employees, 49 CFR 214.329.

An eastbound freight train passed Canadian at about 12:50 p.m. on September 9, 2002. The Claimant saw and heard the approaching train, tapped Mr. Robinson on the shoulder, and they both walked away from the track structure a distance of 15 to 20 feet, behind their parked truck, clear of the train’s passage.

Subsequently, after they had resumed work, an Inspector for the Federal Railroad Administration (FRA), Mr. David Roberts, came back to the location where the Claimant was working, and told him that they had not cleared the track by the prescribed 15 seconds. He took, the Claimant’s name and Social Security number. Mr. Roberts said he was riding one of the trains that passed that location. The Claimant called Roadmaster Jens Skovbo, his immediate supervisor, and told him of this event. In following up on the matter, Mr. Skovbo talked with Mr. Roberts, who provided more details, and presented the Carrier with an FRA Inspection Report form, citing an alleged violation of 49 CFR 214.329, described as, “Failure of Watchman/Lookout to give full attention to detecting approach of train.”

As a consequence of the above events, the Carrier's Roadmaster, Mr. Duane F. Befort, on September 13, 2002, addressed a notice of investigation and charges to the Claimant, reading in part as follows:

"Attend investigation . . . on Thursday, September 19, 2002, at 9:00 a.m., for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your possible violation of Rules 1.1, 1.1.1, 1.1.2, and 6.3.4, of the Maintenance of Way Operating Rules, . . . and BNSF Engineering Instructions 1.1.3, and Rule S-1.1 of the Maintenance of Way Safety Rules, . . . concerning your alleged failure to position JS Robinson and yourself in a predetermined place of safety at least 15 seconds prior to arrival of train S-LHANYC-07A at the West Switch Canadian, Texas at approximately 1250 hours on Monday, September 9, 2002, while working as a lookout and assigned as a welder, . . ."

The investigation was twice postponed at the Organization's request, and was finally held on October 31, 2002. The Claimant was withheld from service pending the investigation, but the first 30 days he was still under pay.

On the notice of the investigation, Mr. Roberts was listed as a witness for the Carrier. He did not appear, however, and e-mail correspondence was submitted by Roadmaster Skovbo to attest that the FRA would not permit Mr. Roberts to appear, nor to submit any statement, other than his Inspection Report, alluded to above.

Mr. Skovbo was a witness for the Carrier. He stated that, in accordance with the Carrier's Rules, employees working on the track under a lookout form of protection must be in a predetermined place of safety at least 15 seconds before a train arrives. Since the maximum authorized speed at the west switch at Canadian is 70 miles per hour, employees are required to be in their place of safety when a train is not less than 1,540 feet away. This data is readily available on the Carrier's "Statement of On-Track Safety" form, which provides a table of speeds and distances, and a copy of this form was filled out by the Claimant on September 9, 2002.

Mr. Roberts told Mr. Skovbo that he was riding in the locomotive of the eastbound train, and they had to sound the whistle to get the attention of the Claimant, who then hurried to get himself and his companion off the track. Mr. Roberts also told Mr. Skovbo that he had measured the distance from the west switch at Canadian to the point where he was when he saw the Welders leave the track structure, and it measured 565 feet.

Because of track curvature and a clump of trees inside the curve which limits sight distance, the maximum distance from the switch at Canadian to the first point at which an approaching eastward train could be seen, was 1,904 feet, according to Mr. Skovbo's measurement.

Welder Trainee Robinson testified that their place of safety, by their truck, was 20 to 25 feet from the frog, and it would require 15 to 20 seconds to walk that distance. (The Board believes, by experimentation, that it would require no more than about five seconds to walk 25 feet, at a normal pace). He testified that they were behind their truck for about 15 seconds before the train passed them, and he did not feel any sense of danger or threat at the time.

Engineer Jeff Cates was operating the locomotive of the train on which Mr. Roberts was riding. He estimated that the workers at Canadian started clearing the track when his locomotive was about 1/8 mile (660 feet) from them. He estimated his train's speed at 65 m.p.h.

Conductor Ben Baca was also riding in the locomotive. He had little or nothing to add to the testimony of Engineer Cates. He first saw the switch at Canadian when they were at a point less than 1,904 feet away, but more than the 565 feet estimated by Mr. Roberts. At that time the workmen had not yet cleared the track structure.

The Claimant testified that he actually saw the approaching train when it was 200 to 300 feet beyond the road crossing that Mr. Skovbo had measured at 1,904 feet, as the farthest sight distance from the switch at Canadian. He further testified that he and Mr. Robinson were completely clear of the track structure and behind their truck when the train passed over that crossing. He also had heard the train blowing for the crossing before it came into the range of his vision.

On November 26, 2002, Roadmaster Befort wrote the Claimant, advising that he was being assessed a 30-day actual suspension, November 1-30, inclusive, and placed under three years' probation, having been found guilty of the charges against him. After his return to service, he was also required to attend additional rules classes. MWOR 6.3.4 is quoted on page 2, above. The other charged rules read as follows:

MWOR 1.1

"Safety

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.

"Empowerment

All employees are empowered and required to refuse to violate any rule within these rules. They must inform the employee in charge if they believe that a rule will be violated. This must be done before the work begins.

"Job Safety Briefing

Conduct a job safety briefing with individuals involved:

- Before beginning work

- Before performing new tasks
- When working conditions change

The job safety briefing must include the type of authority or protection in effect.”

MWOR 1.1.1

“In case of doubt or uncertainty, take the safe course.”

MWOR 1.1.2

“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.”

Engineering Instruction 1.1.3 and Maintenance of Way Safety Rule S-1.1 reiterate the necessity for job briefings and the details to be covered therein.

The Carrier’s disciplinary decision was promptly appealed by the Organization’s General Chairman to the Carrier’s Assistant Director - Labor Relations.

The Organization challenged the fairness of the investigation. It points out that the same officer, Roadmaster Befort, issued the notice of charges, conducted the investigation, permitted hearsay evidence to be offered, i.e., Roadmaster Skovbo’s testimony about what he was told by Mr. Roberts, asked leading questions, and finally assessed the discipline.

The Organization also argues that the record shows that the Claimant observed the train’s approach when it was more than 1,904 feet away, and he and Mr. Robinson were in their place of safety 15 seconds or more before the train passed. They did not feel endangered, nor did the train’s Engineer and Conductor consider them endangered. No penalty was imposed upon either the Claimant or the Carrier by the FRA for any alleged infraction of their regulations. The Organization further argues that the Carrier has failed to carry its burden of proof in this case.

The Carrier rejoins that the Organization has failed to point out even one thing that would invalidate the proceedings in this investigation. As for the multiple roles performed by Roadmaster Befort, an independent review and determination of what took place in the hearing was done by the Labor Relations Department. It was found that the hearing was fairly held and the Organization has failed to show otherwise.

The Carrier states that both the Engineer and the Conductor on the train testified that the Welders were not clear of the track at least 15 seconds before the train passed their location. The Carrier states that if one uses only the testimony of Mr. Robinson, according to him, the train

would have been at least 2,850 feet away when the Claimant tapped him on the shoulder. But the totality of all their evidence does not add up to any such figure.

The Carrier states that the 15-second interval in the Rule is a minimum time intended to be a buffer to protect the workers. The Claimant cut it too close on this occasion. Just because the train did not have to go into emergency, and just because no one was injured, does not exonerate the Claimant from his responsibility to safeguard himself and his fellow worker. The Carrier believes the discipline is fully warranted.

The Board has addressed the issue of the same officer occupying multiple roles in its Award No. 265, wherein it was held:

“When the same officer issues the notice of charges, conducts the investigation, and then assesses the outcome and determines the Claimant’s responsibility, fairness and impartiality are inescapably called into question, even where the officer acts with the best of intentions. Finally, as the assessor of discipline, he inevitably becomes the arbiter of his own purposes.”

The Board has critically studied the transcript of the investigation in this case. Although the Carrier should avoid putting one single officer in charge of all the facets of a disciplinary proceeding, it is not so clear that there are serious breaches of the Claimant’s due process rights in this particular case. Except for the admission of Mr. Roberts’s hearsay testimony, via Mr. Skovbo, the investigation was fairly conducted.

Hearsay testimony is generally of little value except as it corroborates direct testimony, in which case it lends some degree of credibility to the direct testimony. The Board finds that only the Inspection Report submitted by Mr. Roberts is of any evidentiary value, and even that serves only to corroborate the statements of the Engineer and Conductor.

The Board is persuaded that the Claimant did not have himself and Mr. Robinson in their predetermined place of safety no less than 15 seconds before the train passed their site. We believe that the Carrier’s assessment of Mr. Robinson’s testimony inevitably leads to the conclusion that they could not have been in the clear while the train was more than ½ mile away, as the Organization suggests. Mr. Robinson’s testimony and his estimates are suspect. The Board questions whether even a nonagenarian with a geriatric walking device would have required “15 to 20 seconds” to walk to their place of safety.

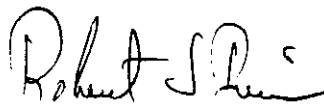
The Board cannot determine whether the testimony of the Claimant should be accepted at face value. He, after all, had a vital interest in the outcome of the investigation. Only the testimony of the Engineer and the Conductor can be considered as unbiased and devoid of self-interest. Engineer Cates said initially that the workers were 1/8 mile or 600 to 700 feet from the switch when they started moving off the track. But later in his testimony he said they were

"[D]efinitely on the move to be in the clear at 1,500 feet." Conductor Baca said the train was between the bridge and the road crossing when the workers were still on the track. No measurement was given to that somewhat indefinite location, but from a drawing which was placed in evidence, the Board reasons that it was far short of the 2000+ feet estimated by the Claimant when they vacated the track structure. The Conducting Officer, who heard the words and observed the demeanor of those who testified in the investigation, found the testimony of the train crew more credible than that of the Claimant and Mr. Robinson. He is best equipped to assess the credibility of those who appeared before him, and the Board will not substitute its judgment for his.


The Board is persuaded from all the evidence and testimony that the Claimant and Mr. Robinson did not relocate themselves to their designated place of safety no less than 15 seconds before the passage of the train in question. There is no evidence in the record, however, that the Claimant and Mr. Robinson did not have an adequate job briefing. There was no ambiguity about the location of their place of safety. Those several Rules in the charges which address job briefings were not violated, according to the evidence and testimony. Finding that the record does not sustain all the violations with which the Claimant was charged, the Board is constrained to modify the disciplinary penalty. The 30-day actual suspension shall be reduced to a 15-day actual suspension.

AWARD

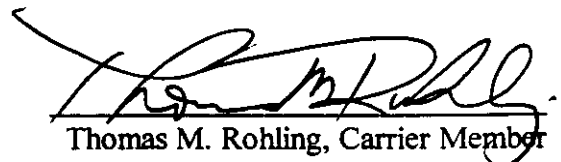
The claim is sustained in accordance with the Opinion. The Carrier shall compensate the Claimant for time lost in excess of fifteen (15) days within sixty (60) days from the date of this Award.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

June 17, 2003

Date