PUBLIC LAW BOARD NO. 4244

Award No. 297
Case No. 304

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employes
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 October 22, 2002, Mr. J. H. Goff was issued a Level S 10-day Record Suspension for violation of Maintenance of Way Rule 1.1.2, Alert and Attentive.

2. As a consequence of the Carrier's violation referred to above, Mr. Goff shall be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss commencing September 13, 2002, continuing forward and/or otherwise made whole. [Carrier File No. 14-03-0006. Organization File No. 50-13I3-0217.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. John H. Goff, entered the Carrier's service in 1981, working first as a Brakeman. In 1990, he transferred to the Maintenance of Way Department. On September 13, 2002, while working as Assistant Foreman on Gang RP19 at Fontana, Kansas, he suffered a personal injury. As the consequence, he was directed to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with the allegation that he failed to properly operate a switch in a safe manner, which resulted in his injury. Following an agreed-upon postponement, the investigation was held on October 2, 2002. A transcript of testimony and evidence taken in the investigation appears in the record before this Board.

In a letter dated October 22, 2002, sent by Certified Mail, the Claimant was notified that as a result of the investigation, he was issued a Level S 10-day record suspension for violation of Maintenance of Way Operating Rule (MWOR) 1.1.2, captioned "Alert and Attentive," which reads as follows:

> 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.

Other than the Claimant himself, only one witness presented testimony and evidence in the investigation, Assistant Roadmaster Michael A. Knight. There was no eye-witness to the Claimant's injury, except himself.

Mr. Knight testified that the Claimant told him he was operating a dual control switch at Fontana, Kansas, and jammed his thumb, resulting in the injury. (A dual control switch is a power-operated switch that can also be operated by hand). Mr. Knight's precise testimony on this point follows:

> He made reference that the switch, it kicked and he caught his thumb between two mechanism. He, he was unclear exactly how it had happened, but he'd made a statement that his thumb became entangled between two moving parts of the switch. [Answer No. 31].

Mr. Knight, accompanied by a Signal Supervisor, examined the switch machine three days later, and found no defects in the machine and its levers. They made several photographs of the machine, which included possible hand placements which could result in one's thumb being pinched between the hand throw lever or the selector lever and other parts of the machine. Mr. Knight acknowledged on cross examination that the photographs represented only possible accident scenarios, but he did not have first-hand knowledge precisely how the injury occurred.

(In order to operate a dual control switch by hand, an employee must throw the selector lever to the HAND position, operate the hand throw lever until the switch points are seen to move in correspondence with the hand throw lever, and then line the switch to the desired route. To restore the switch to power operation, the selector lever must be thrown to the MOTOR position and locked).

The Claimant testified that the switch was already in hand operation when he came upon it, having been lined by another employee for track machines to enter the siding. The Claimant was the last person to arrive at the site, and it was his responsibility to line the switch back to the main track and restore it to power operation. He said he threw the hand throw lever to its normal position, lining the switch points for main track movements. He was throwing the selector lever to the MOTOR position when the injury occurred. He described it this way:

> When I came down, I was putting it in, it felt like it sprung back on me, my hand did, but I think that's when the thing busted when I came down with it. [Answer No. 114].

The Claimant further testified that his hands were not in the positions illustrated in the photographs entered into the record by Mr. Knight. He described the nature of his injury:

> Mr. Knight stated that you thought that you had jammed your thumb?
> Well, that's what it felt like when, you know. I knew it wasn't jammed after Saturday afternoon. When it was all black and blue and my old lady took me to the doctor and they x-rayed it was broke in three places. [Question and Answer No. 121].

The Carrier's notice of its disciplinary decision was sent to the Claimant and the Organization on October 22, 2002, by Certified Mail. The Organization appealed the Carrier's decision on January 6, 2003. The Organization initially raised a procedural issue. It argues that the Carrier failed to render its decision within 30 days following the investigation, as required by Agreement Rule 40(d). It further points out that Rule 40(e) states that if a decision is not rendered within these time limits, the charge shall be considered dismissed. The Organization alleges that the decision was not issued until December 18, 2002.

The Organization further alleges that the discipline was issued by a Carrier officer who had not even read the transcript, and that MWOR 1.1.2 had not been brought up or addressed in the investigation. The Organization concludes that the discipline is "extreme, unwarranted and unjustified," and the Carrier did not carry its burden of proof.

The Carrier responds that the notice of discipline was rendered within the prescribed time limits, and that it complied with all aspects of the Agreement.

The Carrier argues that the record revealed that the Claimant operated the switch in such manner that it trapped his thumb between two parts of the switch, breaking the thumb in three places. He would not have been injured if he had exercised care in throwing the switch. The Carrier further states that "thousands and thousands of switches are thrown daily . . . without injury." His failure to work safely warranted the discipline imposed.

The Board has studied the record and the transcript. The record shows that the decision was sent by Certified Mail just nine days after the investigation closed. Although the Organization argues it was not issued until December, and the Carrier has offered no proof of mailing nor even a delivery receipt to prove the date it was received, the Board believes it was mailed on the date shown. Either Party could have shown more evidence of either the mailing date or the date of receipt. The Parties incur a degree of risk when they do not use a method of transmitting mail which does not require a receipt to evidence delivery. Because of the uncertainty about dispatch and receipt of the discipline letter, the Board elects to decide the dispute on other grounds.

The Board is at a loss to understand the allegation that the decision was made by an officer who never read the transcript. It cannot be determined whether that is correct or not, but even if correct, the Board notices that the decision was transmitted over the signature of the same officer who conducted the investigation.

MWOR 1.1.2 was read into the record at Transcript page 22, and the Claimant acknowledged that he planned his work so as to avoid injury, as that Rule requires.

The Board is persuaded that the Carrier did not carry its burden of proof that the Claimant was neither alert nor attentive, nor that he failed to plan his work so as to avoid injury to himself or others, as MWOR 1.1.2 requires. While the record indisputably indicates that he somehow injured his thumb while throwing the selector lever, the precise manner in which the injury occurred is conjectural. There was no witness other than the Claimant himself, and his explanation is not controverted in the record. The Board is not prepared to hypothesize that if an injury occurred, it had to be attributable to negligence on the Claimant's part. The record does not tell the reader exactly how the injury was sustained, and whether the Claimant's negligence was the proximate cause of the personal injury sustained by him. He may have been negligent, but the record does not present sufficient evidence to uphold the assessment of discipline.

AWARD

The claim is sustained.

Robert J. Irvin, Neutral Member

R. B. Wehrli, Employe Member

Thomas M. Rohling, Carrier Member

June 25, 2013
Date