

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 December 4, 2002, Mr. J. R. Browning was issued a 10-day Record Suspension with 1 Year Probation for violation of Maintenance of Way Safety Rule 1.2.3.
2. As a consequence of the Carrier's violation referred to above, Mr. Browning shall be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss commencing August 22, 2002, continuing forward and/or otherwise made whole. [Carrier File No. 14-02-0301. Organization File No. 190-13C2-0213.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 R. Browning, was hired by the Carrier on April 29, 1996. He was working as a Surfacing Gang Foreman in the Carrier's Maintenance of Way Department on August 22, 2002, when a collision occurred involving his vehicle and another driven by Assistant Roadmaster Danny Escalante, at about 12:20 a.m. Both vehicles were Carrier-owned or leased. There were no injuries to any person, and no damage to the vehicle driven by the Claimant. The other vehicle incurred damages estimated at \$1,500.

As the consequence of this accident, an investigation was scheduled, and the Claimant was charged with possible violation of Maintenance of Way Safety Rule 1.2.3. This Rule reads as follows, as found quoted in the investigation transcript: "Make sure you are alert and attentive when performing duties."

The investigation was held on November 7, 2002. Roadmaster Escalante was the Carrier's only witness. The Claimant also testified. He had no other witnesses present on his behalf. He was capably represented by the Organization's Vice General Chairman.

The Claimant testified that the vehicle driven by him was parked parallel to the railroad track at about 12:20 a.m. on August 22, 2002. His Surfacing Gang was working on the track with various on-track machines at that location. A broken rail had been found by one of the machine operators, and the Claimant was engaged in getting his machines over the defect safely without causing greater damage to the track. He initially stopped his vehicle directly across from the break site, but later drove it forward an estimated distance of 50 to 60 feet, where he consulted with one of the machine operators about his work. He then intended to back the vehicle up to the break site, where he could have the best lateral view of the break as the machines traversed that site. He testified that he looked to the back with one leg still out of the vehicle, then closed the door and looked again through the rear view mirror and the side view mirror. He began backing, continuing to look through the rear view mirror and using his peripheral vision. He said he simply allowed his vehicle to back up by taking his foot off the brake. He never observed the other vehicle. Just as he reached the point at which he intended to stop, he heard two short blasts from a horn and felt an impact. He got out of the vehicle and observed that he had struck the front left side of Mr. Escalante's vehicle. He described the scene:

I got out of the vehicle, went back to see what had happened, and that's when I saw Danny Escalante in his Blazer or Tahoe with a pager in his left hand, cell phone in his right hand, radio cord strapped across his knee and his other leg propped up on his steering wheel. He was just looking at me like what did I do and I was looking at him like what just happened, . . . [Transcript page 25].

On cross examination, the seeds were sown for the Organization's suggestion that Mr. Escalante's vehicle may have struck the Claimant's vehicle:

Q. Did you feel at the time that he might have been pulling up behind you and was looking for the broken rail with a spotlight?

A. I felt like, yes, he could have easily pulled up behind me at the same simultaneously while I was backing up.

Q. So it was possibly both of you could have been moving at this particular time?

A. That's an extreme possibility to me. [Transcript pages 31-32].

There were three machine operators on their machines on the track, but none of them saw anything until after the impact, he said.

Mr. Escalante testified that when he arrived at the site of the broken rail, he stopped the vehicle he was driving with the lights on and the motor still running. He had his spotlight directed at the break. He got out of the vehicle and observed the Claimant descending from an on-track machine and going to his vehicle. When the Claimant entered his vehicle, Mr. Escalante observed the back-up lights come on. Mr. Escalante said he jumped into his own vehicle and attempted to

contact the Claimant by radio, at the same time putting his own vehicle into reverse. His vehicle was then struck by the Claimant's backing vehicle. He testified that he did not observe the Claimant checking for obstructions before he began backing.

On December 4, 2002, the Claimant was issued a letter advising him of the Carrier's disciplinary decision. In pertinent part, this letter reads as follows:

This letter will confirm that as a result of formal investigation held on November 7, 2002, concerning your operating company vehicle A6769D and backing into parked vehicle 14550 which was parked on the (track side) north side right of way at approximately mile post 970.3 on the Bakersfield Subdivision on August 22, 2002, at approximately 12:20 a.m., which caused approximately \$1,500 damage to the front driver's side of the parked vehicle; you are issued a ten (10) day record suspension for violation of Rule 1.2.3 (Alert and Attentive) of the Maintenance of Way Safety Rules . . . Additionally, you have been assigned a probation period of one (1) year. If you commit another serious rule violation during the tenure of this probation period, you will be subject to dismissal.

The Carrier's disciplinary decision was promptly appealed by the Organization's General Chairman. The Organization argues that Mr. Escalante appeared to be driving with a spotlight in one hand, looking for a broken rail, a cell phone in the other hand, the company radio in his lap, steering with his knee and moving forward in the middle of the road. The Claimant testified there was no one behind him when he entered his vehicle. The Organization admits, "With no witnesses it is hard pressed to say who was at fault."

The Organization also pointed to the poor visibility, total darkness. The windows on the vehicle driven by the Claimant were tinted, thus further diminishing his visibility. The tinting was removed from the windows after the accident. The Organization further admits that only perfunctory and inadequate precautions were taken by both of the drivers to prevent the accident.

The Carrier rejoins that the Organization's efforts to suggest the possibility that Mr. Escalante caused the accident cannot be supported by even the testimony of the Claimant. The Carrier points to this admission by the Claimant on redirect examination:

Q. And you can't state for a fact whether Mr. Escalante was parked or in motion?

A. No, I can't. [Transcript page 33].

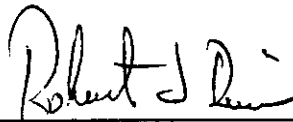
The Carrier argues that the Claimant backed into a vehicle parked behind him, and was clearly not alert and attentive, as required by Maintenance of Way Safety Rule 1.2.3. If the Claimant's visibility was diminished by the tinting on the windows, that fact would have required

even greater care on his part, by getting out of the vehicle to examine his intended route, or by backing with his head out the window. The Carrier believes the ten-day record suspension was fully warranted and not an abuse of its discretion.


The Board is persuaded that responsibility for the collision is primarily in the hands of the Claimant. Almost intuitively, those of us that drive know that backing up presents much greater hazards than forward movements, because the driver is facing the wrong way and must rely on mirrors and uncomfortable head and eye movements to obtain clear lines of sight. The hazards are exacerbated by darkness in unlighted areas, as this was. Even if Mr. Escalante's vehicle was moving at the time, as the Organization suggests, it is clear that inadequate precautions were taken to prevent the collision. Even if Mr. Escalante bore some degree of responsibility for the collision, that does not diminish the Claimant's responsibility. As for the tinted windows, the Board believes that condition required an even greater degree of care on the Claimant's part. The Board cannot find any reason to reverse the Carrier's disciplinary decision. The Claimant's record in his short career is not spotless. A ten-day record suspension is not very severe for these circumstances; perhaps the Carrier's moderation in assessing this penalty reflects the possibility of shared responsibility.

AWARD

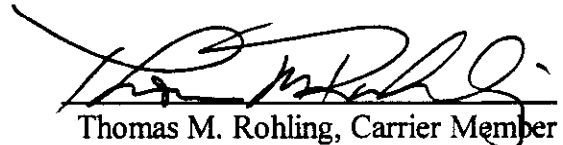
The claim is denied.



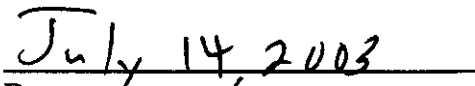
Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member



Date