

PUBLIC LAW BOARD NC. 4402

PARTIES)
TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
 BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT OF CLAIM

1. The thirty (30) days' suspension imposed upon Track Foreman D. R. Piurkowski and the fifteen (15) days' suspension imposed upon Machine Operator R. D. Elliott for alleged '... violation of Rules 9-B and 35 of the Rules of the Maintenance of Way Department when the Loram 6 Rail Grinder struck Ballast Regulator BNX-60102 at MP 284.71 on the Fourth Subdivision on November 25, 1986.' was arbitrary and capricious, without just and sufficient cause and an abuse of the Carrier's discretion (System File #2 Gr./GMWA 87-3-11).
2. The Claimants' records shall be cleared of the charges leveled against them and they shall be compensated for all wage loss suffered.

OPINION OF BOARD

At the relevant time, Claimants Piurkowski and Elliott held positions as Track Foreman and Group 3 Machine Operator, respectively. As a result of charges dated November 26, 1986, investigation held on December 8, 1986 and by letters dated December 22, 1986, Claimant Piurkowski received a 30 day suspension and Claimant Elliott received a 15 day suspension resulting from the collision of a Loram 6 Rail Grinder striking Ballast Regulator BNX-60102 on November 25, 1986.

On the day of the incident, Claimant Elliott was operating the ballast regulator in an easterly direction working in conjunction with the rail grinder. Claimant Piurkowski was on board the ballast regulator with Claimant Elliott. After clearing the main line at Stoddard Siding (MP 286.6) for a freight train, the regulator continued with its work several minutes ahead of the rail grinder. In the process of returning to its work location, the rail grinder's crewman spotted what was thought by him to be a brush fire approximately one-quarter of

a mile to the east of the grinder which, in fact, was dust caused by the regulator. After it became known to the rail grinder operator that what was thought to be a brush fire was in fact the regulator, the rail grinder was unable to slow down to avoid striking the regulator.

S. J. Schuler, the Loram employee who was operating the rail grinder, explained (Tr. 34, 36):

A. ... I knew approximately where we were, not exactly. I was depending on the caboose, the pilot, to let me know, and I was getting close. I come around the curve, and seen smoke, which was actually dust from the ballast regulator. I was probably a machine or machine and a half before I knew it was the ballast regulator. I thought it was the fire that I was going to the next curve.

* * *

Q: Okay, but you did know that there was a ballast regulator east of you, is that correct?

A. Yes.

Claimants unsuccessfully tried to outrun the rail grinder by placing the regulator in reverse. Claimants were uninjured as they jumped to safety but some damage (estimated by Roadmaster J. D. Haney at approximately \$1600 (Tr. 4)) was sustained to the regulator. Haney's F-27 report summarized the incident consistent with the testimony of the rail grinder operator:

Ballast Regulator, BNX 60102, was working east. Loram Rail Grinder No. 6 traveling east, thought there was a brush fire, which was the dust of the regulator. Loram Rail Grinder went to put out the fire and struck Ballast Regulator.

The collision occurred at MP 284.71. The record establishes (Tr. 9) that the rail grinder should have started grinding at MP 285.1 but went past that point when it struck the regulator. Further, at that time, the regulator's protected limits were from MP 287 to MP 292. However, the rail grinder was operating within its protected limits when it struck the regulator. Further, although the regulator was in radio contact with the rail grinder, no yellow flag protection was established between the regulator and the rail grinder.

However, according to Roadmaster Haney (Tr. 5):

Q. To your knowledge, had there been instructions given from the ballast regulator to the Rail Grinder that he was in the area and to look out for him?

A. To my knowledge, there had been instructions, yes.

According to Schuler, who was operating the rail grinder (Tr. 36):

Q. In your radio transmission with Mr. Brown or whomever you spoke with, was it understood that this ballast regulator would be near the location where you would be stopping to proceed grinding again?

A. I was told it was ahead of us somewhere ahead of us, and to keep an eye out.

Q. Yet you still assumed when you saw the dust and debris that was a fire and couldn't be the ballast regulator, is that correct?

A. Yes.

Further, according to Assistant Foreman D. Brown (who was in the caboose of the rail grinder unit) after coming out of the siding (Tr. 11):

Q. Did you notify ballast regulator Operator R. D. Elliott that you were coming out?

A. Yes, I did.

Q. What was his reaction?

A. He told me that he was working ... at that time he was working east of the area that had already ground.

* * *

Q. Did he [Claimant Elliott] instruct you to look-out for him or anything?

A. Yes, he did.

The record also establishes that Claimant Piurkowski did not read the current line up to other members of his crew. However, Claimant Piurkowski testified that he instructed the crew that there would be a train coming and what to watch out for.

The Carrier's arguments for upholding the discipline given to Claimants are that the

regulator, which was under Claimants' control, was operating outside of protected limits; no flag protection was afforded and that Claimant Piurkowski committed additional rule violations by not reading the line up to all crew members. The Organization argues that flag protection was not necessary because the grinder and regulator were working in conjunction with each other; the entire area had been flagged by the rail grinder; there was direct radio contact between the regulator and the rail grinder; and, in this circumstance, it was not "practicable" within the meaning of Rule 9B to have a flag between the grinder and the regulator. With respect to Claimant Piurkowski's failure to read the line up, the Organization asserts that such a failure was a mere technical violation unrelated to the collision.

Substantial evidence does not exist to support the imposition of discipline in this matter. The Carrier recognizes (Carrier Submission at 8) that the collision "may not have been totally the responsibility of Claimants actions and rule violations" The charges against Claimants are specific in terms of the alleged misconduct. The investigation was "for the purpose of ascertaining the facts *and determining responsibility* in connection with Loram 6 Rail Grinder striking Ballast Regulator BNX-60102, November 25, 1986, 10:30 a.m., at Mile Post 284.71" [Emphasis added]. The record reveals, without question, that the "responsibility" for the collision rested with the rail grinder operator and not with Claimants. The evidence demonstrates that the rail grinder operator, although being made fully aware that the regulator was ahead of him as a result of radio contact with the regulator, nevertheless mistook the regulator's dust for a brush fire and then proceeded past his designated starting point to put out that fire only to come upon the regulator performing its normal duties. While the record reveals that, in accord with the Carrier's position, the regulator may have been outside of its limits, there was no yellow flag protection (although there was radio contact) and that the line up was not read to the crew, in light of the clear and obvious error made by the operator of the rail grinder, there has been no nexus


demonstrated between those asserted rule violations and the responsibility for the collision which was the purpose of the investigation. Stated differently, in light of the rail grinder operator's conduct, we are satisfied that even if Claimants followed the rules to the detail argued by the Carrier in this matter, because of the rail grinder operator's error, there nevertheless would have been a collision. Surely, Claimants are required to follow the Carrier's safety rules. But, under the unique facts of this case with the error committed by the operator of the rail grinder and, by the nature of its charges against Claimants, the Carrier is still obligated to demonstrate the "responsibility" of the Claimants for the collision. This record reveals that the "responsibility" for the collision belonged to the rail grinder operator and not with Claimants. The discipline cannot stand.

AWARD

Claim sustained. The suspensions shall be rescinded and Claimants shall be compensated for time lost.


Edwin H. Benn
Neutral Member


E. J. Kallinen
Carrier Member


P. S. Swanson
Organization Member

Denver, Colorado
March 11, 1991