

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 252**

PARTIES TO DISPUTE:
(Brotherhood of Maintenance of Way Employees
(The Burlington Northern Santa Fe Railroad (Former
(ATSF Railway Company)

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement on August 29, 2003, when it issued the Claimant, Mr. C. J. Plant, a 30-day record book suspension and 1-year probation, for allegedly failing to be alert and attentive and not complying with instructions received in a job safety briefing; in violation of Maintenance of Way Operating Rules 1.1, 1.1.2, 1.6, and 1.13 and Maintenance of Way Safety Rule S-1.1.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately remove any mention of this incident from the Claimant's personal record and make him whole for any wages lost account of this alleged violation.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

Claimant, in stepping over unsecured ribbons of rail, suffered an injury when the rail turned on its side onto the arch of his foot.

The crew was cropping and welding used rail in order to lay out several new yard tracks. The rail were standing unsecured along the right of way.

When the crew first started work, there was a job briefing cautioning all members

of the gang to be careful of the rails laid out but unattached, particularly when the loader was working in, around and over the unattached rails.

There is testimony that ribbons of rail unattached almost have a mind of their own as they can roll or lash when cutting out bad spots and/or welding pieces together they can fall off of the blocking.

Claimant was working a distance from the loader. He walked away from his truck in order to hear over his radio. Upon completing his conversation and walking back to his truck, he spotted a weld that did not look right. He moved closer, stepping over a ribbon of rail that turned over on his foot.

Claimant was charged with not being alert and/or attentive as in stepping over the loose rail, he stepped too close to the rail that turned over at the instant he planted his foot. The ball of rail fell on the arch of his foot. The ground was firm and it required lifting the rail off of his foot.

The Carrier argues that when Claimant stepped over the rail, either foot must be in excess of seven inches from the rail to preclude this type of injury from occurring.

Also set forth in the investigation is testimony that the rail, in the heat, can whip or even roll.

What is known is that the rail turned and fell on Claimant's arch but no one witnessed the incident. It is not known if the rail moved of its own volition. Claimant stated the loader was stationary when the incident occurred. The Carrier must prove that Claimant suffered the injury and in doing so, stepped too close to the rail. No one has come forth to testify that the rail was or was not moving on its own. The only facts the Carrier knew was that the rail was seven inches in height and when the rail fell on his

arch he must have stepped too close.

The Carrier held an inquiry and charged Claimant for the mishap, alleging he was not alert to his footing. Obviously, the rail turned over on its own but no one has testified the rail did not also lash or snake several inches or move when it turned over.

The Carrier's version could be factual, but there is no factual evidence as to what actually occurred. The Rules Claimant has been charged with violating could be cited in almost any case, but it is not evident that Claimant was in violation.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the award effective on or before 30 days following the date the award is adopted.


Robert L. Hicks, Chairman & Neutral Member


Rick B. Wehrli, Labor Member


William L. Yeck, Carrier Member

Dated: 7-9-04