

Public Law Board No. 6204

Parties to Dispute

Brotherhood of Maintenance of Way
Employees

vs

Burlington Northern Santa Fe

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Case 13/Award 13

Statement of Claim

Claim of the System Committee of the Brotherhood that:

1. That the dismissal of Machine Operator J.A. Korgel for his alleged involvement in the September 30, 1998 injury of Laborer Roy Faldalen was without just and **sufficient** cause, based on an unproven charge, and in violation of the Agreement.
2. As a consequence of the violation referred to in Part (1) above, Machine Operator J. A. Korgel should be reinstated to his position, paid for all lost time (including overtime), made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the November 3, 1998 letter from Mr. B. P. Chatten, Assistant Division Engineer.

Background

The Claimant was advised on September 30, 1998 to attend an investigation in order to determine facts and place responsibility, if any, in connection with an alleged incident which occurred on that same day near Summit, South Dakota. According to the charging letter the Claimant struck the left leg of co-worker, Laborer Roy Faldalen, with the machine he was operating. According to the charging letter Laborer Faldalen was injured as a result of this accident. After an investigation into this matter was held on October 4, 1998 the Claimant was advised on October 9, 1998 that he had been found

guilty as charged and he was dismissed from the service of the Carrier. This discipline was appealed by the Vice General Chairman with the Division Superintendent. This appeal was denied. The claim was **then** appealed up to and including the highest Carrier officer designated to hear such. Absent settlement of the claim on property it was docketed before **this** Board for final adjudication.

Discussion & Findings

A review of the record in this case shows the following. The Claimant was operating a machine known as an anchor adjuster. The day in question was a clear, dry day and visibility was good. The record establishes **that the** Claimant and the track employees working with him had a job briefing prior to the incident here at bar and it was determined that the anchor adjuster would be operated behind Laborer Faldalen **and** another employee. All employees working at this site, including the Claimant who was the operator of the anchor adjuster, were alerted of the requirement that the latter machine stay at a safe distance between Laborer Faldalen and his co-worker as they were working on the track.. Since the machine which the Claimant was operating struck Mr. Faldalen in the leg the Board can but conclude, as the record of the investigation establishes, that the Claimant was not operating the machine at a safe distance behind his co-workers. Tests were done, twice, on the machine after the incident occurred by traveling mechanics and the brakes on the anchor adjuster were found to be in good working order. There is evidence to this effect in the record: both documentary and testimony. The Claimant, in

testimony at the investigation, on the other hand, states that when Laborer Faldalen was struck by the machine the Claimant was "...**looking** down at the brakes (of the machine) because they weren't working...". There is no evidentiary support for any malfunction of the machine's brakes in the record here before the Board except this testimony by the **Claimant**.

Looking specifically at the testimony given by witnesses at the investigation the Board observes the following.

According to testimony at the investigation by track Laborer Faldalen **the** incident happened about ten minutes after 12:00 noon, or about 40 minutes **after** he and his fellow track workers had finished their lunch on the date of September 30, 1998 near **MP** 627.8 which is close to Summit, South Dakota. The Claimant was supposed to stay behind the track workers on the track machine he was operating. For the most part the Claimant was operating the machine about 50-60 feet behind the **trackmen** --- which was a safe distance ---who were applying rail anchors although there had been agreement that he was permitted to operate it ^{**FOR LR**} ~~some~~ closer to the **trackmen**, according to another witness whom we will cite shortly. There was also another machine operating in front of **the trackman** which stayed about 75-100 feet in front of them. But, according to Faldalen, shortly after noon while they were working on the track he "...**was** struck by the **machine** that was being run by James Korgel..." which just ran into him. Faldalen testified that he "...**was** straddling the ties facing north, tightening up an anchor..." when the **machine** struck him. According to Faldalen the "...machine hit (him) and then (he) dove for the ditch...". **The**



only warning he had of the machine approaching him was his fellow worker yelling to **him** to look out. When the machine hit Mr. Faldalen he “...**felt** (his) knee go over then (he) felt pressure off (his) knee and (he) just dove out because (he) didn’t know how far (he) was gonna get pushed, drug or whatever...”.

According to testimony by **Mr.** Faldalen’s fellow track worker who was **Mr. Neset**, he “...**saw** what happened. (He) was behind Roy (Faldalen) **and...jumped** out of **the** way when the machine was coming and (he) hollered...” for Faldalen to “...get out of the way...”. According to Neset he was adjusting anchors on the south rail at **that** point on the track where the accident happened and he “...**looked** up and...saw (the machine) coming and jumped out of the way and hollered...”. According to this witness the machine would have hit him first had he not jumped out of the way since he was several railroad ties closer to the machine than **Mr.** Faldalen was as it unexpectedly approached both of them.

Testimony by the Assistant Gang Roadmaster at the site where the accident occurred is that there is a normal “...**minimum 50-foot** work rule...” but on the day in question the gang had established a 30 foot rule for the space between the machines and the **trackmen** because of the work being done on the track. This witness testified that two different tests were done on the machine’s brakes which the Claimant was operating on the day in question and that “...no defects were found...” in the machine’s braking system.

Testimony by the Claimant at the investigation centers on what he claims to have been the improper working order of the brakes of the machine he was operating on the day in question. All other evidence relating to this point, as noted earlier, suggests that

the brakes on the machine were working properly. The only conclusion **which** the Board can draw, therefore, from the record before it on this case is that the accident was caused by negligence on the part of the Claimant. **The** accident was not caused by faulty brakes on the machine.

The record establishes that not only was track worker Faldalen hit by the machine and **that** potential serious injury to his foot ^{was RCR IR} **avoided** by his quick thinking when he dove into the ditch, but that had **trackman** Neset not been alert, he also was in a position to have been seriously injured. The scenario before the Board in this case is simply that of a machine operator in the process of running down two of his fellow workers. The charging letter states that Laborer Faldalen was injured. There is no evidence that he was seriously injured. In view of what happened, the Board views that as providential. Faldalen certainly could have been seriously injured had he not reacted to the situation as quickly as he did. Reasonable minds would conclude that the same is true for **trackman** Neset.

The operant Rules at bar in **this** case are the following.

Rule 1.1.1 General Responsibilities

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

Rule 1.1.2

Employees must be careful to prevent injury to themselves and others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

The record before the Board sufficiently establishes that the Claimant was guilty of

violation of these rules. On merits the claim cannot be sustained.

The seriousness of the offense involved in this case had the potential of causing serious injury to the Claimant's fellow workers because of negligence. This, plus the Claimant's prior record, also involving discipline for safety infractions, which a Board such as this may consult in framing conclusions about the propriety of the quantum of discipline, fails to convince the Board that the Carrier's determinations here were not proper. It will rule accordingly.

Award

The claim is denied.



Edward L. Suntrup, Neutral Member



Thomas M. Rohling, Carrier Member



Roy C. Robinson, Employee Member

Date: 10/10/01