

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 171
AWARD NO. 172

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1505184

AND

ORGANIZATION

Brotherhood of Maintenance of Way Employees
Division of International Brotherhood of Teamsters

System File

J-0848U-260

STATEMENT OF CLAIM

1. The Carrier violated applicable provisions of the 2001 Collective Bargaining Agreement when it imposed a level three (3) discipline which consisted of requiring one (1) day of training without pay and development of a Corrective Action Plan upon return to work on Claimants Kent Steiner, David Lamarine, and Jeff Bailey for alleged violation of General Code of Operating Rules (GCOR, effective April 3, 2005), Rules 70.3, (Job Briefing) and 42.11.1 (Speed When Passing Through Switches or Derails), and as contained in the Maintenance of Way and Signal Rules, effective April 1, 2004, in connection with their having derailed the Super Vac, VM-170 Machine at the West Switch at Fraser Siding on February 11, 2008.
2. As a consequence of the violation set forth in Part 1 above, the Organization requests as a remedy that the discipline imposed be reversed and all references to this disciplinary action be expunged from Claimants' work records; that Claimants be compensated for the one (1) day of training without pay served on April 18, 2008 and be made whole for all lost time hours, travel and lodging benefits they would have received had they been allowed to work on April 18, 2008

STATEMENT OF BACKGROUND

On the incident date in question, February 11, 2008, Claimants Steiner, Lamarine and Bailey were assigned to REO operators on Gang 5615. All three (3) Claimants acting as a crew were assigned the operation of Super Vac VM-170. Their specific assignment was to move the machine from East Portal to the wye (or y) at Tabernash, then onto Bay City East and from there onto to Denver. In the process of moving to Denver, the Dispatcher required Claimants to clear up at the siding at the west switch at Fraser. The record evidence establishes that from the distance they were from the switch in a stopped position they were too far from the switch to determine if it was properly lined and locked for their movement. However, when they were able to ascertain that the switch was gapped as they moved in close proximity to the switch, Claimants assert the emergency brake was applied but the machine continued to roll on through the switch, and as a result a derailment occurred.

CARRIER'S POSITION

Carrier submits the issue at hand relative to this instant claim is the lack of confirmation by any of the three (3) Claimants that the switch was properly lined for traffic into the siding. Carrier argues the Claimants all had positive means to ensure that the switch was properly lined for their movement before passing through the switch at the Fraser Siding which is specifically required pursuant to GCOR Rules for on-track operation of the Super Vac VM-170 and Maintenance of Way Rule 42.11.1 which provides in pertinent part the following:

Operators must look to ensure that switches are properly lined for movement before passing through the switches. Track cars must not exceed the speeds outlined below.

In referencing the testimony proffered at the March 31, 2008 Investigation, Carrier asserts that all three (3) Claimants testified there was a gap in the switch points prior to entering the switch and that they were moving toward the switch in the Super Vac VM-170 before positively ensuring the switch was properly lined. The testimony further reflects that none of the Claimants visually confirmed the switch was properly lined for movement **before** passing through the switch and none of the Claimants performed a Job Briefing and confirmed with the Dispatcher that the switch points were gapped. Carrier avers that such a Job Briefing with the Dispatcher to determine if the switch was properly lined would have prevented the Super Vac VM-170 from entering the switch with the points gapped which resulted in the derailment causing damage to both the machine and the switch as well as a delay to the trains for approximately four (4) hours.

Carrier notes that in and around 1:15 pm, Manager of Track Maintenance, J. S. Unbehaun received a call from Claimant Bailey that the machine had derailed. Upon

his arrival at the site of the derailment, Unbehaun observed that both wheels of the first axle and one wheel of the second axle of the VM-170 machine were on the ground. In interviewing Claimants, it was revealed that Bailey was physically operating the machine, though all three (3) Claimants were in the cab together. According to Unbehaun, Claimants had stopped at West Switch of Fraser and had secured new time into the siding at Fraser. The Dispatcher then operated the switch and all three (3) Claimants observed the switch move, though Claimants conceded they did not confirm with the Dispatcher that the switch was lined and locked nor did any of the Claimants exit the cab of the machine to proceed on foot to check the switch points. Rather, Claimants proceeded in the machine to the switch and when they realized the switch was gapped, Claimants asserted they attempted to stop the machine but the machine failed to stop in time, thus resulting in the derailment of the machine. In examining the switch, Unbehaun observed it was snow packed and the damage to the switch entailed bent rods and the switch machine was knocked out of adjustment.

ORGANIZATION'S POSITION

The Organization submits that the derailment occurred not as a result of Claimants having violated Rules 70.3 and 42.11.1, but rather that the VM-170 Vac Truck brakes malfunctioned. According to the Organization, Claimants approached the west switch at Fraser moving approximately one (1) to three (3) miles per hour and when Claimants observed the switch was gapped, Claimant Bailey immediately applied the brakes and when the machine failed to stop, Bailey applied the emergency brakes as well. However, notwithstanding the application of both the regular and emergency brakes, the machine continued its forward movement thereby rolling through the gapped switch resulting in the machine's partial derailment.

In further support of its position the brakes on the VM-170 Vac Truck was the cause of the derailment, the Organization cited the collaborative written account of the incident provided by the Claimants, in pertinent part as follows:

After we rerailed the machine, we backed down the hill about 50 feet, stopped the machine and the brakes held good until we were ready to proceed into the siding after all the ice and snow was removed from the switch with picks and shovels for about 1 ½ hours. Then there was another problem. Bailey was moving the machine up the siding, stopped at the road crossing and the machine just started rolling backwards with the brake levers on. Kent was able to get off of the machine and set the hand brakes to stop it. Bailey was finally able to get the machine up the siding and park it. We set the hand brakes and put a derail out behind the machine for the night. The next day we got the machine running and were coming onto the main track and the brakes failed again, even after doing our brake test and running air line antifreeze thru the system. To stop the machine we had to set the hand brakes again. We

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contacted managers Jeff Unbehaun and Corkey Maestes. Corkey came to the conclusion that we can't move the machine because the brake shoes do not work right when it is too cold. Corkey told us not to move the machine and he would try to get a work train to move the machine to Denver.

We had no problems stopping the machine until this cold snow blowing blizzard day at the west switch of Fraser. All three of us operators believed that the cold weather and what seemed to be intermittent mechanical brake failure caused this situation.

The Organization asserts a thorough review of the record reveals that the aforementioned statement by Claimants went un-refuted both at the investigation and throughout the on-property handling of this subject claim. The Organization submits there exists a long established principle that un-refuted and un-denied statements must be accepted as fact and in support of this assertion, references NRAB Third Division Awards, 12840, 16430, 20041, and 20083. The Organization holds that it can only be concluded that Claimants' statement pertaining to the failure of the VM-170 Vac Truck's brakes is accurate and factual and was the cause of the incident involved here.

In addition to its main contention the malfunction of the Truck's brakes was the cause of the derailment, the Organization argues that the Hearing Officer deprived Claimants their right to a fair and impartial investigation and therefore, the instant claim must be sustained. In support of this contention on procedural grounds, the Organization asserts that the Hearing Officer possessed a pre-conceived judgment of Claimants' guilt as best illustrated by the following leading question, to wit: ***"You know, in listening to both you and Mr. Bailey, I think that you guys are attempting to blame the equipment for not stopping, that a gap switch point would cause the derailment"***.

The Organization submits that for all the foregoing reasons asserted, that the instant claim must be sustained by the Board in its entirety.

CARRIER'S REBUTTAL POSITION

As to the first of two affirmative defenses asserted by the Organization, to wit, the claim the brakes of the machine were faulty and thus responsible for the derailment, Carrier notes it befalls the Organization to bear the burden of proof in support of its position. Carrier notes that this support emanates solely from the testimony proffered by the Claimants and their collaborative written statement. Carrier argues that such evidence is self-serving noting that each Claimant was facing the same discipline thus revealing the motivation on their part to place the blame for the derailment somewhere other than on their failure to comply with the cited rules. Carrier notes that the machine was required to stop numerous times prior to the derailment and that all three (3) Claimants confirmed no problems arose with the machine's brakes during those stops. Moreover,

Manager Unbehaun testified that none of the Claimants mentioned faulty brakes as possible cause of the derailment during his interview with them immediately following the incident. Carrier submits that if the brakes had failed, Claimants had a duty to immediately report that situation to prevent an unsafe machine from being operated. The fact that Claimants made no such report shows that Claimants did not feel the faulty brakes caused the incident nor were a hazard.

The second affirmative defense proffered by the Organization is that Claimants complied with the cited rules they were charged with having violated. Specifically, the Organization contends complete job briefings occurred between the operators and the dispatcher and amongst themselves; and the rules do not require a ground inspection of the switch. The Carrier rejects the Organization's contention conceding that while Claimants job briefed with the Dispatcher to have the switch moved, they nevertheless failed to determine amongst themselves how they would ensure the switch was properly lined. Carrier notes that all three (3) Claimants simply assumed the switch would become lined for their movement and the record is clear the "how" of that outcome was never discussed.

As to the contention that Rule 42.11.1 does not require a ground inspection, Carrier admits the Organization is correct, in that the Rule does not specifically require a ground inspection. In fact, Carrier notes, a review of the hearing transcript reveals that Manager Unbehaun never testified that Claimants violated the rule because they failed to perform a ground inspection. However, Rule 42.11.1 does require operators to *"ensure that switches are properly lined for movement before passing through the switches"*. Carrier asserts the record evidence shows that Claimants failed to comply with this part of the rule. Manager Unbehaun testified that Claimants could have performed a ground inspection or confirmed with the Dispatcher the switch was lined and locked. However, Carrier notes the record evidence establishes that Claimants took no such action to ensure the switch was properly lined. Thus, Carrier contends, the Organization's affirmative defenses fail to mitigate the Claimants' culpability.

As to the procedural objections raised by the Organization that Claimants did not receive a fair and impartial investigation, Carrier asserts these objections are not valid contending just the opposite, that Claimants were offered and afforded all the requirements of due process as so provided in the controlling Collective Bargaining Agreement. Additionally, Carrier notes that the discipline assessed the Claimants was extremely lenient in that it entailed only one (1) day off without pay when it could have assessed up to five (5) days off without pay.

FINDINGS

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

At the outset, the Board finds no merit in the Organization's contention that Carrier's Hearing Officer's conduct of the investigation afforded Claimants deprived them of their due process rights to a fair and impartial proceeding. The Organization based this contention solely on one comment by the Hearing Officer which it contended showed the Hearing Officer pre-judged the guilt of all three (3) Claimants. We disagree with this interpretation of the Hearing Officer's statement. Rather, we interpret what the Hearing Officer said as a clarification as to what was being testified to, to wit, that there was a failure of the brakes on the truck to stop it from rolling through the switch that was not properly lined for the movement. In fact, the Hearing Officer's statement the Organization objects to, constitutes the primary argument it advances here to prove that Claimants' were not to blame for the derailment of the Vac Truck VM-170.


In our review of the whole of the record evidence, we find some merit to the Organization's position that there was an intermittent problem with the brakes that somehow was caused by the very cold and blizzard weather conditions that were present on February 11, 2008, the incident date in question. However, we find this defense of Claimants not to be favorable to them; rather, we are persuaded this presents a greater argument in justification of compliance with the cited two (2) Operating Rules that required Claimants to make sure the switch was properly lined prior to moving through the switch. The record evidence clearly shows by Claimants' own admission that not one of the three (3) of them initiated any action to ensure that the switch was properly lined. The very fact that in the stopped position they were too far away from the switch to observe whether or not the switch was properly lined combined with the prevailing blizzard like weather conditions were factors that made it imperative that they go the extra mile to make sure the switch was properly lined and, that extra mile was for one of the Claimants to exit the truck and walk over to the switch even though Rule 42.11.1 does not require such a ground check.


Accordingly, based on the foregoing findings the Board rules to deny the claim in its entirety.


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Claim Denied


George Edward Lamey
Neutral Member & Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member

Chicago, Illinois

Date: July 27, 2010