

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 6986

BNSF RAILWAY COMPANY

(Former St. Louis – San Francisco Railway Co.)

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 6986 Case No. 13
Carrier File No. 12-07-0049
Organization File No. B-3041-2
Claimant: Virgil L. Bonham

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on February 23, 2007, when Claimant Virgil L. Bonham was assessed a Level-S 30-day Record Suspension for violating Maintenance of Way (MOW) Operating Rule 1.1.1 – Maintaining a Safe Course when he decided to turn his machine without assistance.
2. As a consequence of the Carrier's violation referred to in part (1) above, all references to this incident shall be removed from Claimant's personal record.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant, who is employed by the Carrier as a Machine Operator, caused substantial damage to a large piece of equipment, a Model C Spiker, on February 23, 2007 by attempting to turn it around on a section of track without assistance by a co-worker. This Model C Spiker is pictured in photographs as being more than six feet high, more than six feet wide and at least fifteen feet long and its estimated weight exceeds twenty thousand pounds. The equipment teetered and fell on its side, causing substantial damage and requiring replacement of the turntable underneath the equipment. The Carrier imposed a Level-S thirty-day record suspension, plus a three-year review period, on the Claimant for violation of Maintenance of Way Rule 1.1.1-Maintaining Safe Course because, according to the Carrier, the Claimant negligently undertook this procedure without enlisting the aid of co-workers as required by Rule S-1.2.7, which prohibits performing "a task alone that can only be performed safely by two or more people".

The Organization grieved the imposition of discipline as being without just cause, as the Claimant had successfully completed this maneuver numerous times in the past without incident. Consequently, in the absence of any explicit work rule mandating a minimum staffing of more than one employee to perform this particular maneuver, the

imposition of a thirty-day suspension was excessive. According to the Organization, the Model C Spiker was not damaged because of any negligence by the Claimant or because too few employees were involved in the maneuver of turning the equipment, but because rotted railroad ties underneath the section of track where the maneuver was executed crumbled, causing the track to give way and the machine to tip.

The Organization further asserted that the suspension of the Claimant was procedurally defective because the Carrier's representative on the property fulfilled multiple roles both in the imposition of discipline and the review of the discipline imposed on the Claimant, and because the Carrier violated Rule 90 because the Carrier failed to reply to the Organization's appeal within the requisite sixty day limit.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was submitted for adjudication by Public Law Board No. 6986.

FINDINGS AND OPINION

Photographs in evidence demonstrate several aspects of the incident underlying the imposition of discipline in the instant case. First, the Model C Spiker machine is a very large, heavy piece of equipment. It appears in photographs to be at least six feet wide, six feet tall, and fifteen feet long, certainly larger than a pickup truck. According to the testimony, the Spiker sits on a turntable, which enables the machine to change directions as necessary. Attempting to turn this equipment by only one employee seems a risky undertaking, given the size of the unit, notwithstanding that the Claimant or other employees may have routinely performed this maneuver single-handedly in the past.

The Carrier is entitled to promulgate a work rule mandating that this particular maneuver be performed by no fewer than two employees, or more employees, if the Carrier so determines. However, no such explicit determination has previously been made and communicated to the Claimant or his colleagues, other than the general exhortation to use common sense and prudence in performing assigned tasks that is articulated in Rule 1.1.1 and Rule S-1.2.7.

The Organization's contention that the damage caused when the machine tipped over on February 23, 2007 was primarily caused by defective railroad ties giving way has not been persuasively demonstrated

by the documentary evidence or by testimony at the investigatory hearing. Photographs in evidence depict railroad ties that appear brittle, with small parts of the ties having broken away. However, these photographs do not establish that these were the ties under the section of rail on which the machine was situated or that the ties failed, broke, or crumbled in a way that caused the rail to buckle or the machine to fall between the rails.

The Carrier reasonably concluded that the more probable cause of the accident was the unbalance of the machinery resulting from its being turned by only one employee at one end. Furthermore, the standard operating procedures for effectuating such maneuvers require that the machine be moved to a section of rail that is adequately supported. If the ties were as dilapidated as the Claimant contends, he should not have attempted to turn the machinery on a section of rail resting on such ties. Consequently, the Carrier has demonstrated by substantial evidence that the Claimant is culpable for having undertaken this maneuver single-handedly in the particular location where the accident occurred, resulting in substantial damage to Carrier equipment, estimated at \$857.06 to repair.


The Organization has been unable to demonstrate persuasively that any physical defect in the railroad ties was a proximate cause of the derailment of the Model C Spiker machine. Moreover, it was incumbent upon the Claimant to be sure that he was performing this maneuver on a firm section of track. In view of these findings, there is no basis in the evidentiary record to overturn the Carrier's initial determination regarding the Claimant's culpability.

However, as the Claimant did not violate a clearly articulated Carrier standard operating procedure for turning this machine nor did he deviate from the instructions of his supervisor or ignore any demonstrated prevalent practice regarding the number of employees used to turn this Model C Spiker machine and similar machines, the imposition of a thirty-day suspension is deemed unduly harsh, as even an unrelated subsequent offense could materially adversely effect the Claimant's continued employment. Consequently, the Carrier has not satisfied its burden of persuasion to establish that just cause exists to impose a Level S-thirty-day record suspension on the Claimant Virgil L. Bonham.

The suspension shall be reduced to a written warning, and the Claimant shall be made whole for any adverse consequences attributable to the thirty day suspension imposed. The three year review period is reduced to a twelve month period beginning on the date of the incident.

The Organization's contention that the Carrier's Hearing Officer denied the Claimant a fair investigatory hearing has not been persuasively established. Neither is the Carrier's delay in responding to the appeal in the instant case cited by the Organization sufficient to invalidate the Board's consideration of the instant claim on the merits.

We so find.


Daniel F. Brent, Impartial Chair

Dated: October 24, 2008

() I concur. () I dissent.


Carrier Member

Dated: November 12, 2008

☒ I concur. () I dissent.


Organization Member

Dated: Oct. 31, 2008