

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated July 6, 2009, B. L. Faulknier ("the Claimant") was charged with possible violation of Safe Way Rules ES-15 e and GS-3 and Operating Rules 700 and 727 in connection with an incident that occurred on June 18, 2009, on the Rivanna Subdivision at Maiden, Virginia, and directed to attend a formal Investigation to be held on July 17, 2009, in Huntington, West Virginia. As a result of various postponements jointly agreed to by the parties, the hearing in the Investigation was not held until October 22, 2009.

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant began his service with the Carrier on June 19, 2000. At the time of the incident he held the position of Trackman, although, according to his testimony, he has previously held positions of Foreman, Equipment Operator, Track Inspector, Welder,

Welder Helper, and Vehicle Operator. On June 18, 2009, the Claimant was assigned to operate a backhoe and work together with a spiker machine crew to install ties in the switch at Maiden, Virginia.

The employee in charge of operating the spiker was R. E. Woodson. The operator controls forward and backward movement of the machine by means of a pedal. He uses a button on the control button to guide a device on the spiker machine called nippers to grab or release railroad ties during the spiking process. The other operator on the machine was J. G. Taylor, whose task was to drive spikes into the ties in coordination with the nipping operation of Mr. Woodson. Mr. Taylor had no part in moving the spiker machine forward or backward.

The Claimant testified as follows regarding how his injury occurred. Mr. Taylor informed the Claimant that he needed more spikes. The Claimant drove his backhoe to the section truck where there were kegs of spikes in the bed of the truck. He took some kegs from the truck and placed them in the bucket of the backhoe. He got back into the backhoe and drove back to the spiker, which was stopped on the track. He had a job briefing with operators Woodson and Taylor regarding where to place the backhoe in order to be able to move the kegs of spikes from the bucket of the backhoe to the back of the spiker in the most efficient manner, i.e., without having to carry them any further than necessary.

In accordance with what was discussed, the Claimant parked the backhoe at a right angle to the track with the front edge of the bottom of the bucket resting on the ground next to the outer rail of the track. The height of the bucket was about thigh-level of a standing person. The backhoe was parked about two and a half feet behind the back of the spiker machine which sat on the track. The spiker is a wide machine, and its body

extended several feet beyond the outer rail of the track on the side of the track where the backhoe was parked. The back frame of the spiker and the side of the backhoe bucket thus formed the walls of a kind of passage about two and a half feet wide where one could stand next to the track and move the kegs of spikes from the bucket to the floor of the back of the spiker.

The Claimant was standing in the two and a half foot space described above for the purpose of moving the kegs of spikes from the bucket to the back of the spiker when suddenly the spiker machine moved a couple of feet backwards, pinning the Claimant's leg against the bucket and injuring the leg. He testified that the motor of the spiker was running at the time, but the machine was stopped. On-Track Worker Rule 727, Spacing of Equipment, provides in pertinent part as follows:

1. Work (Red) Zones:

a. Red Zone for on-track equipment is defined as a point 15 feet in front of the machine to a point 15 feet behind the machine or 10 feet behind the machine or 10 feet beyond the maximum reach of any extended portion of the machine, in any direction, which ever is applicable.

* * *

c. Roadway workers must not enter a machine's Red Zone without first communicating with the operator to establish safe work procedures.

* * *

In describing how the accident happened the Claimant testified, "[B]efore entering the red zone I spoke with Mr. Taylor and Mr. Woodson and we briefed and then I proceeded and the machine struck my leg and pinned me." The hearing officer asked the Claimant where he job briefed when he brought the spikes to the spiker. He stated, "At

the side of the machine.” Asked if the spiker was running at the time, the Claimant testified, “The motor was running.” Questioned if all work was stopped when he proceeded to transfer the spikes from the bucket to the spiker, the Claimant testified, “That is correct. The parking brake on the backhoe was engaged when I got out of it and the spiker was sitting there and to my knowledge it was not being run.”

The Claimant was asked how, if there was no work being done with the spiker, it rolled back? He replied, “That I don’t know, I’m not a mechanic.” The hearing officer asked the Claimant, “Are you stating that Mr. Woodson and Mr. Taylor acknowledged that you could enter into the red zone and that it was safe for you to enter into the red zone?” “Yes, they did,” the Claimant stated. “We job briefed on it and I did not go through that red zone until we communicated and everybody was clear on what we were going to do.” In his opinion the machine was secure and would not move, the Claimant testified. “If you job briefed and you determined that the machine was not going to move,” the hearing officer questioned the Claimant, “how did the machine move?” “On my knowledge,” the Claimant answered, “the failure of the machine is what caused the incident.” The Claimant estimated that the spiker moved about 18 inches or two feet.

The hearing officer questioned the Claimant as to whether the spiker machine should have been turned off as opposed to merely being stopped. The Claimant replied, “Only if the rule had stated so.” The Claimant added, “If the rule had stated ‘cut it off,’ that’s what we’d have done.” The hearing officer asked the Claimant if in their job briefing it was determined that Mr. Woodson and Mr. Taylor would be working while he brought the spikes to them. He stated, “No, they were not working.”

The hearing officer noted that the Claimant had testified that the spiker machine was running and asked him, “What communication did you have with Mr. Taylor or Mr.

Woodson that it was okay for you to come on in to unload spikes?" The Claimant answered:

I approached the machine on Mr. Taylor's side of the machine, got his and Mr. Woodson's attention. Notified them that I had the spikes in the bucket. They acknowledged my presence there, the spikes in the bucket of the backhoe and we discussed me going through there and loading the spikes on the back of the machine. And upon my walking through that red zone they were setting on the machines like this. Grandy [Mr. Taylor] was looking this direction to me and Woody was looking, Mr. Woodson and Mr. Taylor were watching me as I walked through. I have no reason to believe that they would have done anything to jeopardize me.

Ron Hale, Engineer of Track, the charging officer of the Carrier, conducted an investigation the next day, June 19, 2009, at the scene of the incident. Mr. Hale testified that what prompted the hearing in this case was that "we were told by the employees that the nippers on the machine had slipped off the tie—causing the machine to move backwards in an eastward direction, pinning the employee between the machine and the backhoe." During the reenactment of the incident on June 19, 2009, in the presence of Mr. Taylor, the nippers were made to slip off the tie a number of times, but not once when this happened did the spiker machine move. The reason the machine did not move, Mr. Hale explained, was that once you take your foot off the pedal, the brake is automatically engaged on the machine. Mr. Hale testified that in his opinion there is no way that the accident could have happened as claimed by the employees because there is an electric eye that engages the brake when the pedal is released.

The employees, according to Mr. Hale, told him that they had a job briefing after

which the Claimant went to the truck to get spikes, loaded them in the front end of the backhoe bucket, and drove the backhoe back to the spiker. Then, Mr. Hale continued, the Claimant sounded the horn on the backhoe, and Mr. Woodson and Mr. Taylor, the operators on the spiker, acknowledged his presence. The Claimant, Mr. Hale stated, then positioned his backhoe with the bucket on the rail, dismounted the backhoe, and went between the two machines. His understanding, Mr. Hale testified, was that the job briefing they had consisted of the Claimant sounding his horn and the acknowledgment by Mr. Woodson and Mr. Taylor that he was going to come in behind the spiker.

If there had been a complete job briefing, Mr. Hale testified, the incident would not have happened because they would have identified the safe job procedures, including the shutting down of the spiker machine, before the Claimant entered the red zone. Mr. Hale read into the record Engineering Department Safety Rule ES-15 e, which states:

ES-15 Mechanized Equipment

Operator must: * * *

e. Stop equipment when the operator's attention cannot be directed exclusively to controlling the movement.

General Safety Rule GS-3, Job Briefing, was not followed, Mr. Hale testified, in that a thorough job briefing was not held, just a sound of the horn and a nod of the head. The operators of the spiker, Mr. Hale stated, should have gotten off of the machine and discussed the sequence of steps to be followed in delivering the spikes and the hazards involved. The spiker, Mr. Hale asserted, should have been shut down so that it could not move. The Claimant, Mr. Hale stated, would then have had a safe place in which to work. Mr. Hale also cited On Track Worker Rule 700, Job Briefing, as another rule that would require a more thorough job briefing than was had in this case.

Jim Seeders, an equipment mechanic with the Carrier for 31 years, was assigned to go to the site of the incident on June 19, 2009, to check out the spiker machine. His inspection, he stated, showed that the brakes were “probably 60% to the good” and “all the machine checked out satisfactorily.” He found nothing with the machine, he testified, that would cause it to roll backwards on its own. He cycled the machine three or four times, he stated, and it worked through its functions properly.

Regarding nippers on a spiking machine, Mr. Seeders testified that on a good tie nippers would hold virtually 100 percent of the time. “You take an old tie where the bottom of it is soft,” he stated, “I’ve seen nippers . . . slide off the ties.” During the reenactment of the incident, he testified, the nippers did not come off the ties. At a switch, Mr. Seeders stated, because of the angle at which ties go into the switch, that could contribute to nippers slipping off.

The hearing officer asked Mr. Seeders whether, if the nippers slipped off, the machine would move backwards without the foot pedal being depressed. He answered, “. . . I couldn’t say. I’ve seen . . . your nippers slip off with just the up force of the nippers coming up . . . will vibrate the machine.” The braking system of the machine is engaged, Mr. Seeders testified, so long as you don’t touch the foot pedal.

The following additional testimony was given by Equipment Mechanic Seeders:

\ Q. (By Organization Representative): So based on your testimony previously when you stated that it is possible that if a spiker was nipping a tie that was old and under strain that it could possibly move back, 2 feet is not a very long distance for it to actually . . .

A. (By Mr. Seeders): No. If the rail was oily – you know, I know the machine probably leaked oil as most do. It’s possible it could have slid on the rail, yes sir.

The hearing officer then asked Mr. Seeders the following questions:

Q. (By hearing officer): Mr. Seeders, again – this braking system is engaged unless the pedal is pressed, correct?

A. (By Mr. Seeders): Correct.

Q. (By hearing officer): So for this to move, it would have to be done under the braking system applied, correct?

A. (By Mr. Seeders): In order for the machine to move you have to press the pedal, yes – correct.

After the testimony of Claimant Faulknier, Equipment Mechanic Seeders was called back by the hearing officer to testify and asked if the spiker would on its own move back if it was “in non-operational mode” and the pedal was not depressed. He answered, “No. If the machine was not functioning in any way, the machine should sit there.” He was asked “if the nippers come straight up, would that propel the machine?” He answered that it was his opinion that if the machine “was on a little bit of a bind” and the nippers came straight up “it could . . . move the machine forward or reverse, one way or the other, just as long as there’s a little bit of bind.” He added that “if your rail is wet, rails got oil on it, it don’t take much to move a machine when it’s wet.”

Equipment Operator Woodson testified that he has been an Equipment Operator since 1981. He had a job briefing, he stated, regarding what he was going to be doing with regard to the loading of the spikes. Mr. Taylor told the Claimant that they needed some more spikes, Mr. Woodson stated, and Mr. Taylor instructed the Claimant to take the backhoe and bring some spikes over. After the Claimant brought the backhoe back, Mr. Woodson stated, he got off of the backhoe and asked where they wanted him to put the spikes. They stopped the spiker but did not turn it off. The machine was running, Mr.

Woodson stated, and the nipper was clamped to the tie. He and Mr. Taylor, Mr. Woodson testified, did not do any more work.

The hearing officer asked Mr. Woodson what was discussed during the job briefing concerning how the Claimant was to enter into their red zone. He answered, "Well he told him bring the backhoe bucket around, and he brought the backhoe bucket around, and we unloaded it." The Claimant, Mr. Woodson continued, was putting the spikes on the spiker machine "and Mr. Taylor and I were taking the spikes and dumping 'em over in there in the chute. . . ."

The hearing officer asked Mr. Woodson whether, when the Claimant came back with the spikes, a job briefing was held with him to limit the hazards of his entering the spiker's red zone. He answered that they stopped completely and had a job briefing. If they had a job briefing and identified the hazards, the hearing officer asked, why did the machine roll backwards? Mr. Woodson suggested that "when the nippers came up I guess it threw the machine back. It wasn't because we were working," Mr. Woodson insisted, "because we had completely stopped working." Questioned by the hearing officer if the machine had ever done the same thing previously, Mr. Woodson testified that previously he had seen the nippers come up, but "the machine did never move back."

The hearing officer asked Mr. Woodson what safe work procedures were established before the Claimant entered the red zone to make sure that the machine was not going to move. He stated, "We stopped working the machine." Mr. Woodson testified that he is not aware of any CSX rule that requires one to turn off a machine (as opposed to stopping the machine from moving) before someone enters the machine's red zone. When questioned by the hearing officer about compliance with Rule ES-15 e, Mr. Woodson testified, "We did stop the equipment."

John Taylor testified that he, Mr. Woodson, and Claimant Faulknier had a job briefing before the Claimant entered the spiker's red zone. He was present at the reenactment of the incident, Mr. Taylor stated, and the nippers came up several times. When that happened, the machine did not move backwards. The hearing officer asked Mr. Taylor, "Was all work stopped prior to this job briefing?" He answered, "Yes sir." The hearing officer asked, "Did you all agree that Mr. Faulkner could enter into your red zone and that you would not be working?" Mr. Taylor answered, "That's correct." The hearing officer asked, "Did you all agree that it was safe for Mr. Faulknier to enter the red zone?" Mr. Taylor answered, "We had a job briefing and communicated we knew what was going to happen." The hearing officer asked, "It was all agreed that the machine would not be worked, correct?" Mr. Taylor answered, "Yes sir."

The hearing officer asked "what was discussed in your job briefing prior to Mr. Faulknier entering into your red zone?" Mr. Taylor answered:

We were running low on spikes, told him to come there. He come there, talked to me, talked to Woodson, we communicated news of what the job was, you know, to do. He was gonna give us spikes. He was taking the lids off, putting them in that bucket, setting 'em up there, you know, with the top off of 'em. And we were looking at it, we were dumping spikes into the tray, you know what I mean?

The following questions and answers between the hearing officer and Mr. Taylor then ensued:

- Q: When Mr. Faulkner brought the spikes back to your location to load 'em into the machine, did you stop at that time to discuss how he was actually going to put 'em on the machine, or had you already discussed him coming into your red zone and working, or unloading the machine?
- A: No. We, you know, told him take the lids off, when these spikes, he was doing that to make it easier while he was just setting 'em in position for us. And we knew that he was back there. I was looking at him. Real close enough to touch, you know what I mean?
- Q: In your opinion, under GS-3 Job Briefing, if a proper job briefing was done,

how do you [if] all hazards was identified, . . . what in your opinion caused Mr. Faulknier to get hurt?

A: We conducted a job briefing and the equipment malfunctioned is what caused Mr. Faulknier to get hurt. When the nippers released romped off the tie and went back and it squeezed his leg.

Q: This was done with the machine in non-operational mode and you and Mr. Woodson just setting there looking at Mr. Faulknier as he entered into the red zone?

A: Yes

Dewey Jewell, Regional Manager for the Work Equipment Group, whose job is to oversee work equipment needs, testified that if nippers come up off of a tie, they would come directly straight up and would not kick to the front or the rear. The brakes on the spiker machine are spring loaded, he stated, and it takes hydraulic pressure to release the brakes. When the travel pedal is placed in neutral position, he testified, the spring overtakes and pushes the brakes back on. As the brake shoes wear, he explained, they progressively spring out to maintain the braking capacity of the machine. Mr. Jewell expressed the opinion that even if the nippers would have come up, the spiker machine would not have overrid the braking system and moved backwards. To shut down the machine, he stated, you have to turn off the power switch on the control console. In his opinion, Mr. Jewell testified, the Claimant was not injured as the result of a mechanical failure of the spiker machine. He has been with work equipment for 33 years, Mr. Jewell stated, and he has not seen a situation where a spiker machine moved without the pedal being pressed just by the nippers coming up.

Mr. Jewell inspected the brakes and other functions on the machine on July 30, 2009, in connection with a good faith challenge regarding the machine made on July 29, 2009, by the Claimant. According to his testimony and a written report regarding the

results of the challenge, he found that the brakes and other machine functions performed correctly and that there was no safety issue.

Assistant Roadmaster Kenny Emerson took the Claimant to the hospital on June 18th. The Claimant, Mr. Emerson testified, told him that he went to load some spikes on the spiker and that somehow or other the spiker got kicked back and caught his leg between the spiker and the backhoe bucket. Mr. Emerson was in charge of the reenactment of the incident the next day. The reenactment, he stated, was conducted at the position on the track which Mr. Taylor said appeared to be the location of the incident. They tried several times, Mr. Emerson testified, in Mr. Taylor's presence to get the machine to kick back by releasing the nipper but could never get the machine to move or get into travel mode.

Mr. Emerson expressed the opinion that the only way that the machine could have moved back if it was stopped but not shut off was that "the traverse pedal had been hit at the time that he [the Claimant] come in between the machine[s]." After the Claimant was attended to at the hospital and he got back to the Scottsville office, Mr. Emerson testified, he approached Mr. Taylor and Mr. Woodson and asked them what happened. They told him, he stated, that they were stopped and were not working at the time; that the nippers just released, and the machine rolled back pinching the Claimant's leg between the machine and the bucket. And they said, Mr. Emerson continued, that when they heard him scream when he was caught between the machines, they pulled the machine up and shut it down and proceeded to help the Claimant.

At Scottsville, Mr. Emerson testified, he asked Mr. Taylor and Mr. Woodson to give him written statements about the incident. Mr. Taylor wrote the following statement:

June 18 2009

I J. G. Taylor while operating south side of SD9536 asked B. L. Faulknier to get some spikes. He returned with spikes in backhoe bucket and we communicated [sic] for backhoe to come in tracks east of spiker, the rear to unload spikes. Spiker was spiking and nippers released and rolled east into leg into backhoe bucket.

/s/ J. G. Taylor

Mr. Woodson gave the following written statement:

06/18/09

Chilly [Claimant Faulknier] was asked to get spikes off back of the truck. So he took the backhoe and got them, then he came back with them and put the bucket down and got them off. While getting them off after he had discussed with us he started unloading. The spiker never moved backward no it moved forward. The nipper came off the tie after spiking and the machine moved because the ties sometimes go it [?] crooked in a switch and the rippers don't catch them exactly right. We heard Chilly holler and we looked around. He was behind the machine hurt.

/s/ Robert E. Woodson

Assistant Roadmaster Emerson testified that he did not believe that communication among the three employees was at the required level. "I think the proper way that they should've done it," Mr. Emerson stated, "was to shut the machine down before entering in between the two pieces and stopped working, which I don't believe was done."

On cross-examination Mr. Emerson testified that for the reenactment the spiker machine was shut off and the parking brake set. There were a few small leaks on the machine, Mr. Emerson acknowledged, but nothing, he stated, that would keep it from being operable. Mr. Emerson described what they did to try to get the machine to move as follows:

We dropped the nippers in various positions leaning more towards one side of the tie with the other and clamped . . . the tie in a bind position [and] while the nippers were clamped moved the machine up to where there was a lot pressure on the back side of the nippers. And then allowed the nippers to come up and see if it would shift the machine backwards. We done that both ways. And we dropped the nippers in various different locations trying to get it to jerk the machine.

According to what Claimant Faulknier told him on the way to the hospital, Mr. Emerson stated, he had not yet begun to unload the spikes at the time he was injured.

Assistant Roadmaster Emerson testified on cross-examination that he has had an opportunity to run a spiker on a regular basis, and it never happened that the machine moved if it was in a bind and the nippers released. Even if the machine was in a bind, Mr. Emerson insisted, and the nippers released, it was impossible for the machine to move a few feet, but a couple of inches was possible. When told on cross-examination that a CSX mechanic had testified to the contrary, Mr. Emerson maintained, "I've never seen one move more than one or two inches."

The hearing officer recalled Mr. Woodson to testify and asked him the following question:

In your statement basically you said we heard Chilly holler and we looked around and he was behind the machine hurt. Previously you had made a comment that you, Mr. Faulknier and Mr. Taylor had had a job briefing and you all agreed that no work was to be done and that you was not operating the machine when Mr. Faulknier entered into the red zone. How come in this statement you basically act like you was surprised when you heard Mr. Faulknier holler and then you looked around and he was hurt?

Mr. Woodson answered:

I wasn't looking at him unload the spikes. . . . I'm done with the spikes I'm done spiking my chute. That's when I heard him holler. I just looked around done spiking the chute. I wasn't working the machine. I wasn't directing my attention to him. Why would I [have] sat up there and look at him do all the work and we supposed to be helping with the spikes. I was driving the spikes down there in the chute after he opened them up and I heard him holler that's what I mean I looked back. Quite naturally I wouldn't run no machine when I was looking around. That's what I was talking about.

Asked by the hearing officer if he could have hit the pedal in the process of loading the spikes, Mr. Woodson stated, "No sir, I couldn't."

The hearing officer asked Mr. Woodson if he would not consider loading spikes in

the chute contrary to his testimony that they had a job briefing and that all work was stopped. He answered that the chute "is a big bucket" situated between both operators and does not have anything to do with the controls of the machine.

According to Mr. Woodson's testimony (Tr. 105), the sentence in his written statement that says, "The spiker never moved backward no it moved forward." should have said, "The spiker never moved backward nor it moved forward." By that, he explained, he meant that they had already spiked the tie that was there, and the machine was standing still. He clarified that he was not saying that they were spiking but that they had completed the spiking and that the machine moved after they had completed the spiking.

The hearing officer also recalled Mr. Taylor to testify and asked him what he meant in his written statement by "Spiker was spiking and nipper released and rolled east into leg into backhoe bucket." He stated that "it was our job for the day on the spiker is what I meant." Mr. Taylor testified that the previous testimony was correct that he, Claimant Faulknier, and Mr. Woodson had a job briefing and that he and Mr. Woodson had stopped work and were looking at Mr. Faulknier when he entered the red zone.

The hearing officer recalled the Claimant to testify and asked him, "Was Mr. Woodson looking directly at you when you entered in the red zone?" He answered, "Until he turned around to ___ check in the bend." He was asked whether, when he entered the red zone of the spiker, it was his opinion that the spiker was not going to move. He answered, yes, that it wasn't going to move. He acknowledged that, in fact, the spiker did move and stated that it was "due to a machine failure."

By letter dated November 10, 2009, L. M. Wharton, Division Engineer, notified the Claimant of the Carrier's finding "that the charges against all principals were proven

without a doubt. CSX Operating Rules 700 and 727 and Safe Way Rules ES 15e, GS-3 were violated,” the letter continued, “when Mr. Faulknier entered into Mr. Woodson’s and Mr. Taylor’s red zone without all having a proper job briefing first.” The letter characterized the evidence presented at the hearing as follows:

The hearing centered on if the principals had a proper job briefing; and if they did, then why was Mr. Faulknier struck by the spiker? The principals’ testimony centered on machine failure of the spiker. They all agreed that all work was stopped, they had a job briefing and they were watching Mr. Faulknier enter the spiker’s red zone when he was struck.

The letter reviewed the prior discipline assessed against the Claimant under the Carrier’s IDPAP Policy, including a 34 actual days’ suspension upheld by an arbitrator, all within the past three years. The letter concluded as follows:

After a thorough review of the transcript, personnel record; and based on the evidence and testimony that has been given, the charges upon which this investigation was based were upheld. It was determined that an inadequate or no job briefing was held thus allowing you to be struck by the spiker. It is my decision that the discipline to be assessed in your case is 60-days actual plus suspension of all Machine Operator’s rights for a period of one year between November 11, 2009 and November 11, 2010. Your actual days off will start on November 11, 2009 and run to January 10, 2010.

It should be noted that separate charge letters were also sent to Mr. Taylor and Mr. Woodson. A single consolidated hearing was held in the cases of all three employees on October 22, 2009. However, separate decision letters were sent to each employee. The charges were also sustained against Mr. Taylor and Mr. Woodson. Both men were assessed 30-day actual suspensions. Their cases are before this Board respectively as Cases Nos. 60 and 61.

The decision letter of November 10 , 2009, accurately characterized the Claimant’s position regarding the cause of the accident as “machine failure of the spiker.” As the letter also notes, that, too, was the position of Mr. Taylor and Mr. Woodson. When the

Carrier attempted to reenact the incident, however, despite repeated attempts, it could not get the spiker machine to move forward or backwards by causing the nippers to release from the tie, even when the spiker machine was placed in a bind position. Further, Mr. Woodson has been an Equipment Operator since 1981, and he acknowledged that it has never previously happened to him that the spiker machine moved forwards or backwards as the result of the nippers coming off a tie. Nor did Mr. Taylor claim to have ever witnessed such an occurrence previously.

In addition, Mr. Emerson, who had personally operated a spiker machine for a period of time, testified that it was not possible for the machine to move more than an inch or two as a result of the nippers coming off of a tie. Regional Manager Jewell, whose experience with work equipment spans 33 years, testified that in his experience he has not seen it happen that a spiker machine moved just from the nippers coming up.

The only testimony to support the claim that the release of the nippers propelled the spiker backwards was that of Equipment Mechanic Seeders. From his testimony, however, it is clear that the only movement he personally observed as a result of nippers coming off of a tie was vibration of the machine. Thus he stated when asked by the hearing officer whether the machine would move backwards without depressing the foot pedal if the nippers slipped off, "It all depends on . . . how much twist the nippers were in . . . I've seen a machine move . . . your nippers slip off with just the up force of the nippers coming up will make them, will vibrate the machine – yes." (Tr. 27). That testimony is consistent with Assistant Roadmaster Emerson's testimony that it's possible that the machine might move an inch or two. The Board has carefully scrutinized the transcript, and nowhere in the transcript is there any testimony by Equipment Mechanic Seeders that he personally observed a spiker machine do anything other than vibrate

where the nippers came off the tie without the travel pedal being depressed.

From the Carrier's decision in this case it is clear that it did not credit the testimony of the witnesses who attributed the movement of the spiker to the nippers slipping from the tie but, on the contrary, credited the testimony of Assistant Roadmaster Emerson and Regional Manager Jewell that the spiker could not move as much as two feet as the result of nipper slippage. The Carrier's credibility determination on that factual issue was supported not only by substantial evidence but by a preponderance of the evidence. The Board so finds.

The Carrier found that the Claimant violated Operating Rule 727, Spacing of Equipment. The pertinent portion of the rule reads:

- c. Roadway workers must not enter a machine's Red Zone without first communicating with the operator to establish safe work procedures.

The fact that the Claimant got his leg pinned between the bucket of the backhoe and the rear of the spiker would indicate that he did not establish safe work procedures with Mr. Woodson and Mr. Taylor before entering the spiker's red zone. The defense of machine failure does not hold up because no credible evidence was presented of any kind of operating failure that could have caused the machine to move on its own after it was stopped with the brake engaged. The claim that nipper slippage could have caused the spiker to move has been shown to be without substance.

The evidence shows that as the Claimant was placing the spikes onto the back of the spiker, the two operators of that machine ceased watching him and started loading the spikes into the chute on the machine. Thus Mr. Woodson testified, "He [Claimant Faulknier] was unloading spikes, putting on back up spikes and Mr. Taylor and I were taking the spikes and dumping 'em over in there in the chute so we can get a hold of

'em." (Tr. 50). When recalled to testify, Mr. Woodson reiterated, "... I wasn't directing my attention to him [Claimant Faulknier]. Why would I sat up there and look at him do all the work and we supposed to be helping with the spikes. I was driving the spikes down there in the chute after he opened them [the kegs] up and I heard him holler. . . ." (Tr. 103). Similarly Mr. Taylor testified that Claimant Faulknier set the kegs of spikes on the spiker machine with the lids off the kegs and "we were dumping spikes into the tray, you know what I mean." (Tr. 63). Further Mr. Woodson's written statement that "We heard Chilly holler and we looked around" indicates that both he and Mr. Taylor were occupied with other things and were not watching the Claimant when he became pinned between the two machines.

It is clear from the testimony that the Claimant remained in the red zone of the spiker while removing kegs of spikes from the bucket of his backhoe, carrying the kegs to the spiker, placing them on the back of the spiker, and removing the lids from the spiker while the spiker machine was running, although stopped, and the two operators of the spiker were busy dumping the spikes into the spike chute. It should have been evident to the Claimant that so long as the spiker was running and the operators were doing some kind of work on the machine there was a danger that something could go wrong to cause the machine to move and strike him, especially since, if the machine moved while he was between the two machines, he had no room to escape.

That is exactly what occurred in this case. Something happened that caused the spiker brakes to release and the machine to move. According to the evidence, the machine's brakes were functioning properly, and there was no safety issue with the spiker. A reenactment of the incident could not cause the machine to move despite several efforts to accomplish this. No witness had ever experienced a situation where the

machine had moved from a stopped position more than a couple of inches merely because the nippers slipped from a tie. This included Equipment Operator Woodson, who has been an Equipment Operator since 1981. Based on the evidence in the record, it is reasonable to assume that Mr. Woodson or Mr. Taylor did something to cause the brakes to release and the machine to move while the Claimant was in the spiker's red zone. They had the opportunity to do so because they were engaged in other tasks and not watching him for at least part of the time that he was in the machine's red zone. For the Claimant to be in the red zone of the spiker under the conditions that prevailed on June 18 when he was injured was a violation of Rule 727 1 c because it meant that the Claimant had entered the red zone without having established safe work procedures.

It may be that Mr. Woodson and Mr. Taylor were watching the Claimant when he first entered their machine's red zone, and only after he delivered the first keg did they decide to start loading the spikes in the spike chute. It may be that the Claimant did not expect that to happen and assumed that they would remain at the back of the spiker watching him and doing nothing else until all of the spikes were delivered and he was out of their red zone. If that were true, however, it would still be a violation of Rule 727 1 c because it would have meant that the Claimant had not communicated with the spiker's operators before entering the red zone to make sure that they did not do any kind of work on the machine so long as it was running and he was in the machine's red zone. There was no testimony or claim that safe work procedures were established, but that the spiker's operators intentionally or mistakenly departed from the safe procedures that had been agreed on.

The failure to properly communicate in violation of Operating Rule 727 was also a violation of General Safety Rule GS-3 Job Briefing. That is so because the

“communicating with the operator to establish safe work conditions” is another name for a job briefing. The elements of Rule GS-3 that were not complied with were the following: Discuss the sequence of job steps; Identify, eliminate, contain, or communicate all potential hazards related to the job; and Ensure understanding of the planned sequence of events.

The Board has carefully considered the degree of discipline assessed against the Claimant. It notes that the Claimant’s discipline is twice that assessed against the operators of the spiker, who each received a 30-day suspension. Certainly the Claimant’s violation was not more serious than theirs. It was their machine that struck the Claimant and not vice versa. Nevertheless in light of the fact that the other two employees have significantly less prior discipline on their records than the Claimant and the seriousness of the present incident, the Board has decided not to disturb the work suspension discipline. Probably there is nothing that is emphasized more in the railroad industry than the importance of safe job practices. The Board appreciates that the Claimant was only trying to do his job and contribute to the team effort. However, safety must always come first.

The Board finds no justification in the record, however, for the suspension of Claimant Faulknier’s Machine Operator rights. First, as noted, the Claimant’s machine did not strike anybody. Nor did it move after the Claimant stopped and parked it. There is no evidence in the record that the Claimant mishandled his machine in the present case or at any previous time.

The question was explored at the hearing of whether Rule ES-15 or any consideration of safety would have dictated that the Claimant shut off his backhoe machine in the circumstances of the present case. Rule ES-15 e states, “Stop equipment when the operator’s attention cannot be directed exclusively to controlling the

movement.” The rule does not say to “turn off” the equipment. The machine was stopped with the parking brake on. No rule was cited which would have required the Claimant to turn off his machine in the circumstances of this case.

Nor was there any substantial evidence presented that the backhoe presented a safety hazard by not being turned off as opposed to being stopped with the parking brake engaged. The Board finds that there is no support in the record for the Carrier’s suspension of the Claimant’s Machine Operator rights. The suspension of those rights shall be considered null and void, and he shall be made whole for any wages or other employment benefits lost as a result of said suspension.

A W A R D

Claim sustained in accordance with the findings.

O R D E R

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



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
February 24, 2010