

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6302

NMB NO. 195
AWARD NO. 196

PARTIES TO DISPUTE

CARRIER

Union Pacific Railroad

Carrier's File

1524366

AND

ORGANIZATION

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

System File

S-0948U-352

STATEMENT OF CLAIM

1. The Level 4 Discipline [ten (10) day suspension without pay] imposed upon Mr. Steve Sudik for his alleged violation of Rule 32.1 (Securing Equipment Against Undesired Movement) while assigned as an assistant machine operator on Gang 9390 in connection with the derailment of the Buck Undercutter on April 29, 2009 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.
2. As a consequence of the violation referred to in Part 1 above, Mr. S. Sudik shall now have the aforesaid discipline removed from his record and be compensated for all time lost as per Rule 48(h) of the Agreement.

STATEMENT OF BACKGROUND

Claimant was first employed by the Carrier on June 11, 1997. At the time the events occurred that gave rise to the subject claim, Claimant was employed as a System Assistant Buck Undercutter Operator and was working on Gang No. 9390 at Wendover, Utah.

By way of description, a buck undercutter is a piece of machinery that is equipped with hi-rails to ride on the track and generally has two (2) articulated booms with brush cutting attachments which allow for the cutting of brush and small trees on both sides of the track at the same time. Most on-track undercutters have controls on both sides of the machine. Generally, one (1) side of the machine operates the movement of the machine in forward and reverse motion as well as regulates the speed in which the machine makes such movement(s). There are also hand and foot controls on this same side of the machine, which activates and controls one (1) of the articulated booms with a brush cutting attachment. The operation of the forward and reverse movements, the speed of such movements and the articulated boom with a brush cutting attachment on this side of the machine is performed by one (1) operator. On the opposite side of the machine is a separate set of hand and foot controls which activates and controls the other articulated boom with a brush cutting attachment and this side of the machine is operated by a second machine operator.

In addition, to the two (2) machine operators, an assistant machine operator also known as a machine operator helper is typically assigned to the buck undercutter in the event one of the machine operators is absent or for some reason is unable to perform his regularly assigned duties. When both machine operators are present and performing their respective duties in operating the buck undercutter, the assistant machine operator is performing the assigned duties of this position which includes, ordering parts for the specific machine and making arrangements for moving the machine to a different location in the event the gang to which the machine is assigned moves.

On the date of the incident in question, April 29, 2009, the buck undercutter machine (UP 902050), with a flat car attached to it was assigned to Gang 9390 located in the Nevada Rail Yard in Wendover, Utah. The Machine Operators assigned to the buck undercutter on that date were Kevin. Crowley and Michael Leimbacher and the Assistant Machine Operator was the Claimant herein. The record evidence reflects that on this date, both Machine Operators and Claimant were preparing to tie down the buck undercutter for a gang move to Fernley, Nevada. As part of this preparation, a new chain needed to be re-strung on the machine and during the time this task was being performed, Machine Operator Crowley was operating the controls of the machine and Claimant was standing at the machine's downhill arm ensuring that the new chain did not snag any ties or rail as it was being strung. According to the record evidence, once the new chain was in place, Claimant proceeded to the Gang's assigned work truck leaving Machine Operators Crowley and Leimbacher to complete any final operations of the machine necessary to tie it down and secure it from undesired movement. At the work truck, Claimant began making phone calls pertaining to the acquisition of parts and materials such as, wear plates and cutting teeth, for the machine and for accomplishing the move to Fernley, Nevada. In addition to making these phone calls, he and Foreman S. Napier began discussing the impending move of the machine. During this time, Machine Operator Leimbacher tied down the buck undercutter, that is, he secured the

breaks on the machine thereby ensuring the machine would not make an undesired movement. From his location at the work truck, Claimant observed Leimbacher secure the brakes. With the machine secured, Leimbacher and Crowley then joined Claimant in the work truck who was still engaged in conversation with Foreman Napier. Once inside the work truck, Leimbacher informed Claimant the buck undercutter had been tied down. Thereafter, Leimbacher, Crowley, and Claimant left the location of the machine breaking for the lunch time hour during which time the buck undercutter rolled backward and derailed approximately ten (10) feet off the track. According to the record evidence, the buck undercutter was re-railed without complication and without anyone incurring an injury.

As a result of the derailment, Claimant was cited by Carrier to attend formal investigation to develop the facts and place responsibility, if any, with an alleged failure to secure equipment and track car against undesired movement. Carrier informed Claimant that if the allegations were sustained, it would constitute a violation of Rule 32-1, Securing Equipment Against Undesired Movement as set forth in the General Code of Operating Rules (GCOR), effective April 3, 2005, and as contained in the System Special Instructions, effective November 17, 2008 and in Air Brake and Train Handling Rules, effective April 1, 2004. Further, Carrier informed Claimant that if he were found to be in violation of the cited Rule 32-1 it constituted a Level 3 Discipline and coupled with his current status of a Level 3 on his record the discipline assessed under its UPGRADE Discipline Policy might be a Level 4 consisting of either a ten (10) day suspension without pay or, up to five (5) days of training without pay and the requirement of having to pass the necessary operating rules exams and equivalent in order to return to work. Additionally, a Corrective Action Plan would have to be developed prior to returning to work. Rule 32-1 reads in full as follows:

Rule 32.1: Securing Equipment Against Undesired Movement

Crew members are responsible for securing standing equipment with hand brakes to prevent undesired movement. The air brake system must not be depended upon to prevent an undesired movement.

When leaving cars unattended use the following steps to determine the number of hand brakes to be applied:

- ***On a descending grade with slack bunched, apply the hand brakes on the low end of the cut of cars. To verify the hand brake(s) applied will prevent movement, release all air brakes. (See guideline below when unable to verify sufficient hand brakes applied).***
- ***On an ascending grade with slack stretched, apply the hand brakes on the high end of the cut of cars. To verify the hand brake(s)***

applied will prevent movement, release all air brakes. (See guideline below when unable to verify sufficient hand brakes applied).

- ***At other locations where the crew has determined that equipment will not move with all brakes released, after slack is adjusted, apply enough hand brakes to hold the equipment. Sufficient hand brakes must be applied to prevent undesired movement of equipment from outside forces or when coupled to by other equipment.***

Note: Retaining valves on the cars to be left must be in the EXHAUST position.

The number of hand brakes to be applied depends on:

- ***Grade.***
- ***Number of loaded and empty cars, and type of car.***

The formal investigation commenced June 19, 2009 and by written notice dated June 24, 2009, Claimant was informed by Conducting Hearing Officer, Manager, Maintenance of Way Equipment Operations, Joseph F. Hendricks that after his careful review and consideration of all the testimony contained in the hearing transcript, he found more than a substantial degree of evidence presented to warrant sustaining the charge against him for violation of GCOR Rule 32-1. As a result, Hendricks informed Claimant he was being assessed a Level 4 discipline consisting of a ten (10) day suspension without pay and that the suspension would commence on June 23, 2009 and end on July 2, 2009.

Subsequent to Claimant's receipt of the above Notification of Discipline Assessed, the Organization filed the subject claim that is now before the Board for its consideration and disposition.

CARRIER'S POSITION

In brief, it is Carrier's position that it is the responsibility of all three (3) crew members and that includes Claimant for setting the handbrake and ensuring that the brushcutter machine was secured. Carrier notes that Mike Dick, Work Equipment Supervisor provided the following written statement regarding the subject derailment incident:

In my conversation with Michael Leimbacher he said it was not his responsibility to set the brake, and he would not take the blame for someone else. Mr. Leimbacher also said Steve Sudik was the last one in the cab. In the conversation between Gary Dooley [the Manager

Maintenance of Way Equipment and the Charging Officer] and each involved, all three (Kevin Crowley, Steve Sudik and Michael Leimbacher) said it was all there responsibility to make sure the hand brake was set before they left.

Notwithstanding Claimant's closing statement at the hearing which Carrier deems self-serving at best, that "for the most part I do not believe I'm responsible for the incident" Carrier notes Claimant acknowledged he has held seniority on this type of equipment for five (5) years substantiating that he knew full well the procedures and requirements for securing equipment, as well as track conditions. Carrier contends that based upon Claimant's own testimony and that coupled with the testimony of other witnesses, such supports the charge that Claimant along with Machine Operators Crowley and Leimbacher failed to ensure the buck undercutter was properly secured before leaving for the lunch hour break and that this failure on the part of all three (3) crew members directly resulted in the uncontrolled movement and resultant derailment of the buck undercutter machine.

Carrier submits it has met its burden of proof, here by substantial evidence to show Claimant's culpability pertaining to the derailment, and that Claimant's rights in all respects have been carefully guarded. As such, Carrier respectfully requests the Board to rule that it is not required to vacate the properly assessed progressive discipline issued to Claimant under its well established and supported UPGRADE Discipline Policy.

ORGANIZATION'S POSITION

The Organization asserts that an Assistant Machine Operator has distinct duties different from those of a Machine Operator and that unless the Assistant Machine Operator is performing the duties of a Machine Operator in a Machine Operator's absence, the Assistant Machine Operator has no responsibility for setting the brakes and securing a piece of rail equipment such as here, the buck undercutter machine. The Organization submits that the evidence adduced at the formal investigation does not support Carrier's position that Claimant, as the Assistant Machine Operator had any responsibility for setting the brakes of the buck undercutter thereby preventing an undesired movement of the machine since the evidence substantiated that both Machine Operators were present and performing their respective duties on the incident date in question and that one of those duties was to secure the machine. Since both Machine Operators Crowley and Leimbacher were present, Claimant was only responsible for performing the duties of an Assistant Machine Operator which does not include setting the brakes and securing any piece of rail equipment, here the brushcutter machine. The evidence adduced at the hearing clearly shows that Claimant was performing the duties of his Assistant Machine Operator position which related to the general operation of the machine and included assisting in the re-stringing a new

chain for the buck undercutter and thereafter making phone calls that were critical for acquiring parts and materials for the buck undercutter and for accomplishing the Gang move to Fernley, Nevada. The evidence adduced clearly shows that he was located outside and away from the brushcutter machine when making the various phone calls while Machine Operators Crowley and Leimbacher were tying down the machine. This last point is supported by the handwritten statements submitted by both Leimbacher and Foreman Napier. Contrary to Michael Dick's written statement cited by the Carrier, Leimbacher in his statement dated May 1, 2009 averred, "I was the one who tied the machine down before we left for lunch. Mr. Sudik was on phone talking to BTI Dan and also talking to the Truck Foreman Sam [Napier]. Leimbacher's statement also refuted Dick's statement that Leimbacher told him Claimant was the last one in the cab. Napier's undated written statement corroborates Claimant's account he was talking to him at the time Leimbacher was tying down the brushcutter and Napier concluded his statement by asserting, "He, (meaning Claimant) could not have been responsible for the derailment".

The Organization maintains that based on the foregoing argument asserted which was proffered during the on-property handling of the claim, the Claimant is entitled to the full remedy requested. As such, the Organization respectfully requests the Board to sustain the claim in its entirety.

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.

The Board is in full concurrence with the Organization's position. The Board has no doubt that Carrier erred in assessing any quantum of discipline on Claimant as under the prevailing circumstances, it cannot be concluded based on the evidence adduced at the hearing that Claimant had any responsibility for the derailment of the brushcutter machine. If anything, the written statements submitted by Leimbacher and Napier should have been given great weight and credibility by Carrier in refuting the written statement submitted by Dick and proving the opposite of what Carrier concluded, that Claimant was correctly performing the duties of his position as Assistant Machine Operator and, as such, it was not within the purview of his duties to set the brakes and secure the brushcutter machine.

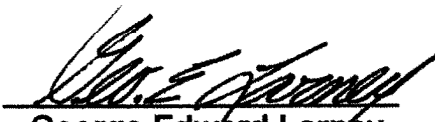
Based on the foregoing findings, the Board rules to sustain the claim in its entirety and to award the remedy the Organization requested. This Award is to become effective within sixty (60) days from the date signed by the Parties.

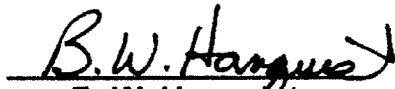
PLB NO. 6302

Award No. 196

AWARD

CLAIM SUSTAINED


George Edward Larney
Neutral Member & Chairman


B. W. Hanquist


T. W. Kreke

Chicago, Illinois

Date: Sept 12, 2011