

PUBLIC LAW BOARD NO. 4244

Award No. 211

Case No. 215

Parties to Dispute:

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(**BROTHERHOOD OF MAINTENANCE**
(**OF WAY EMPLOYES**
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(**-and-** (
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(**BURLINGTON NORTHERN SANTA FE RAILWAY**
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Statement of Claim:

1. That the Carrier's decision to suspend Eastern Region, Section Foreman J. W. Bright & Track Supervisor D. W. Morris from service for ten (10) days was unjust.
2. That the Carrier now rescind their decision and pay for all wage loss as a result of an Investigation held 9:00 a.m., October 17, 1996 continuing forward and/or otherwise made whole, because the Carrier did not introduce substantial, credible evidence that proved that the Claimant violated the rules enumerated in their decision, and even if the Claimant violated the rules enumerated in the decision, suspension from service is extreme and harsh discipline under the circumstances.
3. That the Carrier violated the Agreement particularly but not limited to Rule 13 and Appendix 11, because the Carrier did not introduce substantial, credible evidence that proved the Claimant violated the rules enumerated in their decision.

INTRODUCTION

This Board is duly constituted by agreement of the parties dated January 21, 1987, as amended, and as further provided in Section 3, Second of the Railway Labor Act ("Act"), 45 U.S.C. Section 153, Second. This matter came on for consideration before the Board pursuant to the expedited procedure for submission of disputes between the parties. The Board, after hearing and upon review of the entire record, finds that the parties involved in this dispute are a Carrier and employee representative ("Organization") within the meaning of the Act, as amended.

FINDINGS

The essential facts of the incident resulting in the formal investigation conducted on October 17, 1996, are as follows. On September 16, 1996, a work train was assigned the task of unloading ties in the vicinity of Plevna, Kansas. The work train consisted of seven cars, including a car top unloader. The top unloader, also referred to as a Hertzog machine, was operated by an independent contractor. According to the conductor who also was a subject of the investigation, an initial job briefing was conducted when the train and maintenance crews converged at the work site. The crews discussed the work which needed to be done, and the switching required to correctly position the top unloader on the work train. After the switching of cars on the main line at Plevna, and movement to the point where the

ties were to be unloaded, another job briefing took place. The work train crew had the main line until approximately 5:45 p.m.

As the work day drew to a close, the conductor and the track supervisor, claimant David W. Morris, discussed whether to proceed west to Sylvia, Kansas, or return to Plevna. A decision was made that heading in the direction of Sylvia posed a clearance problem, and the train headed east to Plevna. The Hertzog operator was informed of the need to secure his machine for movement of the train.

The section foreman, claimant J. W. Bright, confirmed the fact an initial job briefing took place at which time various operating rules were discussed. The briefing was performed by a roadmaster, Larry Jones, and all of the charged employees except for track supervisor Morris were present at the initial job briefing. At the time that the work train was ordered to clear the track, Bright was working on the ground counting ties. He denied that he was designated as the work train coordinator.

The track supervisor, David Morris, inspected track earlier in the day, and arrived at the job site as the work train unloaded ties between 2:30 and 3:00 p.m. Morris initiated another job briefing when he arrived because he was going to take over counting the ties, and he began instructing the train crew to move the train. He testified he was unfamiliar with the requirement of a designated work train coordinator under Instruction No. 26

pertaining to the system work train policy.¹ He was aware, however, of Section 81 of the Chief Engineers Instructions, effective January 1, 1996. This instruction provides, in relevant part:

81.22 CAR TOP UNLOADERS

Car top unloaders are backhoes modified to unload material from gondolas while sitting on top of the gondola. They also can load the gondolas the same way.

Before beginning work, hold a job briefing with the Hertzog operator, train crew, and maintenance personnel according to Section 81.24.2. Communicate the following instructions at each job briefing:

When Moving Car Top Loaders:

* * *

(4) A car topper must not bridge two cars while the work train runs to or from the job site or when switching. When moving a car topper from one project to another, such as in regular train service or special work train, secure the car topper within the car and inspect it to make sure no clearance problems exist. (Underlining supplied).

1. No. 26 of the Special and Timetable Instructions states, in pertinent part:

The conductor is in charge of and will be responsible for all work train movements. The safety of the overall train operation is the responsibility of the entire train crew. The engineer shall receive train movement instructions only from a member of the train crew except in cases of emergency.

When the Maintenance of Way, Signal, Structures, mechanical or other work groups are involved in the activity of the work train, a coordinator from such group must be designated. The train crew will communicate with the designated coordinator concerning all train movements and work activities.

An initial job briefing will be conducted before commencing work and additional job briefings must be held at intervals not to exceed four hours until the end of the tour of duty. . . . The conductor is responsible to ensure that no work activity begins until the required job briefings are complete.

Job briefings must include applicable operating rules, safety rules, special instructions and any other work - specific information. The designated coordinator is responsible for communicating impending train movements to the work groups under his control. (Underlining supplied).

When the work train was directed to clear the track, Morris and the conductor discussed several options for placement of the work train in the clear at Plevna. The first option was to park the train at the far east end of the storage track; the second option involved placement of the train between the west crossing and west switch; and the third choice was to park the train east of the west crossing. There is no evidence of any discussion during the final job briefing of the train crew making a cut in the seven car train, including cutting the train if it was parked east of the west crossing. However, claimant Morris did not believe the train would fit between the west and middle crossings.

The train crew elected to shove the train into the siding between the west and middle crossing. The conductor described the key section of this move as follows:

. . . We shoved down to the middle crossing. It looked like it was going to be real close clearance or wouldn't fit. I said, well, we can shove down over and shove some cars over the crossing, cut it and pull back and tie up right there. And that would leave the engine close to the west crossing.

When I cut away from the cars, told the engineer to take them ahead, the rear three cars big-holed, and as we pulled ahead I hear noise and kind of looked up and saw the tractor being pulled off the top of the gondola that we were pulling west with. I must have said something on the radio or whatever, but we saw what was happening and stopped the train right away.

The tractor came down between the two cars into the middle of the crossing. The cable was still attached at the -- onto the car east of the crossing. The claw on the front end of the thing kind of bounced down the side of the car and rested on the knuckle. We stopped, kind of looked at the situation, everything looked okay.
(Tr. 81-82).

The evidence of record clearly establishes that the Hertzog machine operator had secured the body of the machine to one car, but had left the machine's cable connected to

another car. Both claimants were charged with failing ". . . to properly job brief all concerned on the work activities and train movements to be performed which resulted in Hertzog Backhoe being pulled from top of ATSF 74975 on September 16, 1996 . . . ," in violation of Operating Rules 1.1, 1.1.1., 1.3.1, 1.4 and 1.6; Safety Rule 50.1; Special Instruction No. 26 - System Work Train Policy; and Chief Engineer's Instructions, Sections 81, 81.22 and 81.24.2.

The Board takes into account several key points. First, it is evident to the Board that track supervisor Morris acted in the capacity of work train coordinator at the close of the work day on September 16, 1996. Morris was the MOW employee who communicated and coordinated with the train crew the train movements and work activities, and who also outlined the options for parking the work train for the train crew. Second, at the time the cut of cars was made which directly caused the fall of the top unloader, the train crew was in control and performing their standard function of switching cars and putting the train away. Thus, the cutting of the last three cars was a natural part of the train crew's function, and one which neither of the two claimants discussed with the train crew.

The crux of this dispute is the failure of the inexperienced Hertzog operator to remove the top unloader's cable from the adjoining car. The transcript indicates the operator was aware of the danger presented by allowing the top unloader to rest on one car and maintain a cable connection to an adjoining car. The operator rode on the engine during the return to Plevna, but failed to mention that he had secured the unloader with the cable in such

a position. There was no question but that the operator was afforded more than ample time to place the unloader as deep within the car as possible prior to the movement to Plevna.

The record indicates some confusion concerning the meaning of Chief Engineer's Instruction 81.22(4). Roadmaster Jones testified that he reviewed this instruction with both crews and the Hertzog operator in attendance at the initial job briefing. He further opined that the instruction is concerned with the tractor itself bridging two cars, such as the wheels on one car and the bucket on another. While an accessory to the Hertzog machine, the cable is not covered by the prohibition against bridging. No evidence was presented to show that leaving the cable hooked to other cars was a common practice of Hertzog operators.

The Board has little difficulty in concluding that the independent contractor was careless in the manner by which he secured the top unloader for the final move. The Board further finds insufficient evidence that foreman Bright filled the position of work train coordinator subsequent to the arrival of track supervisor Morris, or that the job briefing prior to the final train movement fell to Bright. The suspension assessed against Bright cannot stand.

In his capacity as work train coordinator, Morris was responsible for a job briefing prior to the departure from the work site. Claimant Morris and the train crew were cognizant of the need for adequate clearance while operating the work train with the top unloader affixed to one of the cars. However, it remained his responsibility to see that the contractor complied with the Chief Engineer's instructions, and Rule 50.1 requires that such

contractors be included in the job safety briefing. While there is some ambiguity as evidenced by the testimony at the investigation as to whether the presence of the cable across two cars is commonly considered a bridge between two cars within the meaning of Section 81.22(4), the Board concludes the cable is a part of the machinery associated with the top unloader.

Both the conductor and Morris were aware that the cable had been utilized across the cars, and this fact should have been addressed with the contractor via a job safety briefing prior to departure from the work site. While Morris did not anticipate for the train to be cut upon its return to Plevna,² and that decision resided with the conductor, it is not reasonable for the unsafe condition presented by the top unloader to be assumed entirely by the train crew as its responsibility.

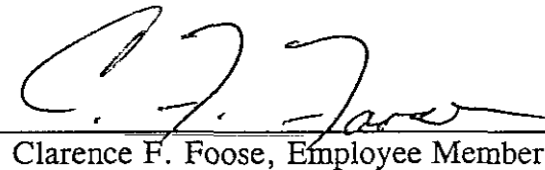
Based upon these particular facts and circumstances, including evidence suggesting the contractor/operator had a similar incident occur when he secured a Hertzog machine's cable across cars; the roadmaster's initial safety briefing which covered this topic; the lack of clarity in the application of Instruction 81.22(4) to these facts; the safety briefing which did occur to discuss and avoid clearance problems; the absence of the claimants when it was decided to cut the cars; and the shared responsibility with the conductor to make sure a job briefing is completed, the Board determines that the suspension of Track Supervisor Morris should be reduced to five days.

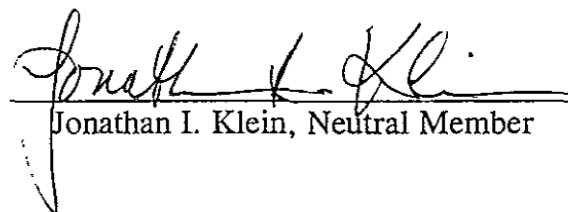
2. The claimants exited the train near the west crossing, and were not nearby when the accident occurred.

AWARD

The claim of Foreman J. W. Bright is sustained. The claim of Track Supervisor D. W. Morris is sustained, in part, and his suspension shall be reduced to five (5) days. The Carrier will compensate the claimants for the net wage loss resulting from the respective periods of suspension not upheld by decision of this Board within thirty (30) days of this Award.


Greg Griffin, Carrier Member


Clarence F. Foose, Employee Member


Jonathan I. Klein, Neutral Member

This Award issued the 23rd day of July, 1997.