

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employes
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on October 16, 2001, when it issued the Claimant, Mr. L. Hannah, a 6-month suspension for allegedly violating Maintenance of Way Operating Rules 1.1 - **Safety**, 1.1.1 - **Maintaining a Safe Course**, 1.20 - **Alert to Train Movement**, 6.3 - **Occupying or Fouling Track**, 6.3.2 - **Protection on Other Than Main Track**, and BNSF Engineering Instructions ~~1.1.1 - Fouling the Track~~, and ~~1.1.6B - Responsibilities of Individual Roadway Workers~~; when he failed to protect an on track machine leading to the serious injury of another employee.

2. As a result of the violation referred to in part (1), the Carrier shall remove the discipline mark from the Claimant's personnel record and make him whole for all time lost." [Carrier File No. 14-01-0250. Organization File No. 190-1313-0120.CLM.]

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Leroy Hannah, II, was hired by the Carrier in 1991. On August 23, 2001, he was working as Track Foreman in the Carrier's Maintenance of Way Department at Richmond, California. As Foreman, he was in charge of several on-track machines working on yard tracks within the Richmond Yard, and it was therefore his responsibility to provide protection for this equipment to prevent a collision with a train, locomotive, cars, or other on-track equipment. At approximately 2:30 p.m. on August 23, an empty articulated autoveyor car¹ was kicked into the track occupied by one of the track machines in the Claimant's gang, a ballast

¹The articulated autoveyor car is not further described in the record. From a diagram appended as an exhibit, the Arbitrator deduces that the autoveyor, which may be a patented trade name, consists of two rail cars for transporting automobiles, semi-permanently coupled together, perhaps sharing a common truck where coupled together.

regulator, resulting in a collision, which allegedly caused the operator of the ballast regulator, Mr. Elvis Boyd, to fall from the machine, thereby suffering a personal injury. There was some damage to the autoveyor and the ballast regulator, according to testimony in the record. The Claimant was taken out of service, pending result of an investigation of the accident.

Consequently, on August 29, 2001, the Claimant and the injured employee, Mr. Boyd, were notified to attend an investigation in Stockton, California, on September 7, 2001, "to determine all facts and circumstances" surrounding the accident, and to place responsibility involving multiple alleged rule violations. Numerous Maintenance of Way Operating Rules (MWOR), Maintenance of Way Safety Rules, and BNSF Engineering Instructions were listed thereunder, summarized below:

MWOR 1.1 - Safety and obedience to the rules are of first importance.

MWOR 1.1.1 - In case of doubt or uncertainty, take the safe course.

MWOR 1.1.2 - Care to prevent injury; be alert and attentive.

MWOR 1.13 - Reporting to managers and complying with instructions.

MWOR 1.20 - Expect movement of trains, etc., at any time, on any track, in either direction.

MWOR 6.3 - Directions for occupying or fouling any track.

MWOR 6.3.2 - Protection of equipment and employees on other than main tracks.

Safety Rule S-17.2.4 - Providing protection for equipment before fouling a track.

BNSF Engineering Instruction 1.1.1 - Individual employee responsibility to ensure safety of movement.

BNSF Engineering Instruction 1.1.6B - Individual employee responsibility to ensure rule compliance.

On September 4, 2001, the Organization's General Chairman, Mr. Mark Hemphill, requested that the investigation be cancelled with respect to Mr. Boyd, due to his injuries and his inability to attend on September 7, 2001, but indicated agreement to proceed with the investigation for the Claimant on September 7. On the same date, apparently as the consequence of a telephone conversation, the Carrier postponed the investigation until September 20, 2001.

On September 17, 2001, Mr. Hemphill further requested a postponement of the investigation due to Mr. Boyd's inability to travel. (Mr. Boyd was confined to his residence in Dennehotso, Arizona, due to his injury in the accident on August 23, 2001). On the same date, September 17, Mr. Hemphill proposed that the investigation be held at Flagstaff, Arizona, because of Mr. Boyd's inability to travel, provided the Carrier would pay for the Claimant's travel expenses. In the alternative, Mr. Hemphill suggested that the investigation be postponed until Mr. Boyd could travel to Stockton, if the Claimant were reinstated to a non-safety-sensitive position until such time as the result of the investigation became known.

On September 18, 2001, the Carrier responded by postponing Mr. Boyd's investigation until October 18, 2001, but proceeding with the Claimant's investigation on September 20, 2001, in order to meet the Discipline Rule's requirement that the investigation be held within 30 days of the date of an employee's suspension. The investigation was held in Stockton on September 20, 2001, and a transcript of evidence taken thereat was prepared by a Certified Shorthand Reporter employed by the Delta Deposition Reporting firm.

The transcript is 148 pages long, and consists of the testimony of the Claimant and five witnesses. There is some conflicting testimony, and some questions are left unanswered, but the accident occurred from a combination of errors, more fully discussed below.

At the west end of the yard at Richmond, there is a ladder track, called the "working lead" in the record. Yard tracks diverge eastward from this lead. At one location, there is a so-called "bull switch" which diverges to another lead track which we shall designate as the "19-24 lead," for purposes of discussion. From this 19-24 lead there diverges, at switch #23, another ladder track leading to tracks 22 through 19. A straight movement at switch #23 leads to track 23. Farther eastward on track 23 is located switch #24, which diverges northward to track 24. Farther northward on the working lead are other switches leading to diverging tracks 25, 26, 27, etc.

The Claimant had permission from the Trainmaster to work with his men and on-track machines in tracks 19 through 24. He stated that his work was principally performed up until the time of the collision in tracks 22 and 23. To protect his equipment and men, and to permit train and locomotive movements within the yard, he lined, spiked, and/or locked switch #23 for movements to track 19. He applied a Maintenance of Way lock to the switch. The rules preclude anyone other than the person applying the lock from unlocking and removing it. Yard and train crews should not, according to the Carrier's rules, have a key to Maintenance of Way locks.

The Claimant stated that he did not lock the bull switch away from his equipment because he would not be occupying the 19-24 lead west of switch #23. (Transcript page 128). At some time during the day, the ballast regulator was moved from track 22 to track 23. The protection for that move was not described, but that movement was not under investigation, in any event.

Thereafter, a locomotive consist movement was made from track 19 to the working lead, and the record indicates the bull switch was left lined for movement from the working lead to the 19-24 lead. Thereafter, another movement of light locomotives was made, from track 34 westward down the working lead. The crew on that movement had to stop at the bull switch and line it for their movement down the working lead, thereafter leaving the bull switch lined for the straight track or the working lead, and away from the 19-24 lead. The record indicates that the bull switch is a rigid, or hand-thrown, switch. It is not a power switch, not a spring switch, and not a variable switch, which is defined in the Carrier's MWOR's Glossary, at page GL-4, as:

"A switch identified by a 'V' or a bowl painted yellow. When trailed through, the switch points remain lined in the position they were forced."

After the collision, the bull switch was examined, found lined to the 19-24 lead, and no damage was detected by its being run through, for example, while lined against a trailing movement, nor the points picked by a facing point movement.

A yard crew working in Richmond Yard was instructed to switch out the autoveyor in track 10 and place it in track 26, after which they were to pull some cars of ballast from track 16, and assist the Claimant's crew in unloading the ballast at points designated by him.

The yard crew's foreman, Mr. Jorge Gonzalez, stated that they had to wait until the other locomotive movements described above were completed before they could switch the autoveyor from train 10 to track 26. Mr. Gonzalez observed that the movement from track 19 to the working lead left the bull switch lined for the 19-24 lead, but when the light locomotives came from track 34 down the working lead, that crew stopped and lined the bull switch back to the working lead, for a straight movement, as he described it. But that movement caused the switch to track 26 to be lined for a straight movement also. Mr. Gonzalez stated that he walked to switch #26 and lined it for movement into track 26, and at that time he observed the bull switch lined for a straight movement, i.e., against movement into the 19-24 lead. Mr. Gonzalez said that he then called his engineer and helper and told them the switches were lined for the autoveyor to be moved from track 10 to track 26, after the last light locomotive movement passed the switch crew's location in track 10.

Mr. Gonzalez then walked to the Claimant's location, between tracks 23 and 24, and discussed with him what ballast cars he wanted, where they were located, and where they were to be unloaded. Mr. Gonzalez said he would be in contact with the Claimant again after they finished their first task, moving the autoveyor from track 10 to track 26.

Mr. Gonzalez continued walking to track 16, where he became engaged in releasing hand brakes and coupling air hoses on the ballast cars to be switched out. While thus engaged, he

heard the sound of the collision, observed that the autoveyor had struck the ballast regulator, and then he went to the collision scene to lend assistance to the injured employee.

The Claimant testified that when he discussed the intended unloading of the ballast cars with Mr. Gonzalez, he was unaware of the switch crew's plan to kick the autoveyor into track 26. He expected their next move would be with the ballast cars. In anticipation of that movement, he moved the ballast regulator westward from track 23 far enough to line switch #24 to allow its movement into track 24.² This caused the ballast regulator to enter or foul the 19-24 lead track (Mr. Gonzalez stated that the ballast regulator was beyond switch #23 on the 19-24 lead when he and the Claimant discussed their plans for unloading ballast. Transcript page 67). The Claimant then experienced trouble in lining switch #24. A section crew had arrived to unload ballast, and he enlisted their assistance in trying to get switch #24 lined for track 24. While they were dealing with that problem, the autoveyor unexpectedly struck the ballast regulator. The point of impact was described by the Claimant as three or four feet east of switch #23, at which point the west end of the ballast regulator would have fouled the 19-24 lead. Assistant Roadmaster Phil Heusler said the point of impact was between the switch points and the frog of switch #23. The ballast regulator was driven about 95 to 100 feet eastward by the impact, he testified.

At no point in the record is found any explanation how the bull switch became lined for the 19-24 lead. Both the Claimant and Mr. Gonzalez observed the light locomotive movement from track 34 stop and line the switch for their straight movement. Mr. Gonzalez said that he observed the switch points lined for the straight track after he lined the switch for track 26 for the expected autoveyor movement. After the accident, the bull switch was examined and no defect nor damage was noted. A surveillance video tape submitted into evidence by Division Engineer Rick Mason either failed to show how the switch was lined, or the switch was not within its view.

It is clear that the collision occurred because the bull switch was lined for the 19-24 lead when the autoveyor was kicked down the working lead toward an intended path into track 26. It was diverted into the 19-24 lead before reaching the switch to track 26. Operating Rule 7.7 has application to such movements:

"Kicking or dropping cars is permitted only when it will not endanger employees, equipment, or contents of cars."

²In its appeal of the disciplinary decision, the Organization's General Chairman states the ballast regulator was being moved from track 22 to track 23 when the collision occurred. The Board believes the record indicates the intended movement was from track 23 to track 24. However, in either case, the same rules would have been applicable, and the steps necessary to protect the movement, if any, would have been the same.

MWOR 6.3.2 defines the protection that must be provided for on-track equipment when working on other than main tracks:

“Except as provided for below in Minor Work and Routine Inspection, to establish protection on a track other than a main track, controlled siding or any track where a block signal system is in effect, use one or a combination of the following:

- All switches that provide direct access to the track must be:
 - Lined against movement.
 - Properly tagged.
 - Effectively spiked, clamped or locked with an effective locking device.
- A red flag or light must be placed as outlined in Rule 5.4.7 (Display of Red Flag or Light). A derail capable of restricting access to the track where work will occur must be locked in derailing position near the red flag or light with an effective locking device. The red flag or light must be placed at least 150 feet from the work location when the track speed is greater than 5 MPH and at least 50 feet from the work location when the track speed is 5 MPH or less.
- When remote control switches, including those in a hump yard, are operated by a control operator or other designated employee, employees must establish protection as outlined in Rule 7.13 (Protection of Employees in Bowl Tracks).

When establishing protection, the employee in charge must ensure that equipment and employees do not occupy or foul the track until protection is established. The employee assigned the responsibility of yard movements must be notified of the work to be done.”

Following the investigation, on October 16, 2001, Mr. M. W. Lee, the Carrier's Terminal Manager, advised the Claimant that he was being issued a Level S suspension of six months for violation of each of the ten rules summarized on page 2, above. Additionally he was placed on probation for three years, and would not be permitted to work as foreman or assistant foreman for two years. Mr. Lee's letter also states that consideration was given to the Claimant's personal record in assessing this discipline.

The disciplinary penalty was appealed by the Organization's General Chairman, and the appeal was denied by the Carrier's highest designated officer, General Director - Labor Relations Dennis Merrell. The claim thus comes before this Board for review and decision.

It is the Organization's position that the Carrier failed to show by substantial evidence that the Claimant violated the ten cited rules, but to the contrary, the actions of the Claimant were within the provisions of those rules. The Organization argues that the movement of the ballast regulator was in compliance with MWOR 6.28, reading as follows:

"Except when moving on a main track or on a track where a block system is in effect, trains, engines and on-track equipment must move at a speed that allows them to stop within half the range of vision short of:

- Train.
- Engine.
- Railroad car.
- Men or equipment fouling the track.
- Stop signal,
- or
- Derail or switch lined improperly."

The Organization further argues that the Yard Foreman on the switch crew failed to ensure that the bull switch was properly lined to the straight track before kicking the autoveyor down the lead, thereby violating Operating Rule 7.7. (See Rule 7.7 above, on page 5).

The Organization also argues that by reason of the Carrier's failure to hold the investigation at a location where the other charged employee, Machine Operator Elvis Boyd, could attend (he could not travel because of his injury), the Carrier failed to bring forward all the facts pertaining to his injury. It is argued that the Carrier relied on speculation concerning the cause of his injury.

The Organization directed attention to the holding of First Division Award 20094 with regard to the development of evidence and testimony, wherein that Division wrote: "[The Carrier] is not permitted to cull or select data for presentation which only tends to demonstrate or prove the fault or wrongdoing of the employee being tried."

The Organization concludes by stating that even if the Carrier had produced evidence to support its charges, without conceding that it had done so, the discipline is excessive.

The Carrier rebuts the Organization's arguments by pointing out that substantial evidence was developed to prove the Claimant violated the ten rules listed in the notice of charges and the notice of discipline. He was afforded due process rights, was properly notified, was represented by the Organization, and had the opportunity to call witnesses and to cross examine all witnesses. The Carrier states that the six-month suspension is neither harsh, excessive, nor capricious, in light of the serious nature of the incident.

It is the Carrier's position that the Claimant failed to protect the on-track machines by taking the necessary step of locking the bull switch against movements into the 19-24 lead when he moved the on-track machines west of the point where they were protected at switch #23. The Carrier suggests that the Claimant's attention was diverted from protection of the on-track equipment by his struggle with the inoperative switch.

The Carrier concedes that the switch crew bears part of the responsibility for the collision, by kicking the autoveyor into a track occupied by the ballast regulator. But, the Carrier also points to the redundancy built into its rules, to the end that when one party fails to comply with a rule, another party will still protect himself by compliance with the rule applicable to himself.

The Carrier states that its Policy for Employee Performance Accountability affixes an automatic six-month suspension penalty for employees who commit Signal and Track Authority Violations, and that ~~failure to provide protection for men and equipment working in a yard track constitutes such a violation.~~

The Carrier further rebuts that its failure to have Mr. Boyd present at the investigation did not prejudice the Claimant in any way. It states that the Claimant's culpability is independent of anything that Mr. Boyd did or did not do. Further, it argues, the Organization has failed to show that any testimony or evidence Mr. Boyd could have provided would have absolved the Claimant. On these bases, the Carrier denied the Organization's claim.

The Board cannot sustain the claim in its entirety for the following reasons. Put in the simplest terms possible, the Claimant failed to comply with MWOR 6.3.2, which outlines the steps necessary to protect men and equipment on other than a main track. There appears to be a fine line drawn between the application of MWOR 6.3.2 and MWOR 6.28, on which the Organization placed its reliance in defense of the Claimant. The Carrier seems to agree with the Organization that if the ballast regulator had been moving at the time the autoveyor was kicked into the 19-24 lead, the fault would be placed solely at the feet of the switch crew. By contrast, however, the Carrier posits that once the ballast regulator came to a stop, then it became incumbent on the Claimant to provide the protection described in MWOR 6.3.2. This Arbitrator sees that fine distinction as a petty quibble, but it does not lessen the Claimant's culpability, for the following reason.

When on-track equipment, such as the ballast regulator, is traveling, i.e., being moved from one point to another, as defined in MWOR 6.28, it would be impracticable to require the protection prescribed in MWOR 6.3.2. The clear intent of MWOR 6.28, which is applicable to trains and locomotives also, in accordance with the Operating Rules governing their movements on other than main tracks, is to prevent collisions by requiring all such movements to be able to stop within half their range of vision. But in the instant case, it is the opinion of the Board's majority that the movement of the ballast regulator westward from track 23 to clear switch #24

for the purpose of moving back eastward into track 24 was not for the purpose of traveling from one point to another, but was merely incidental to the work this crew was authorized to perform in tracks 19 through 24. Therefore, whether moving at the time, or whether stopped, the protection prescribed by MWOR 6.3.2 should have been afforded.

There is evidence in the record indicating that the ballast regulator had been working on or fouling the 19-24 lead before the collision. A written statement by the conductor on the locomotives which came through track 19 stated they had to slow down to allow the track machines to clear the lead to track 19. The surveillance video tape, according to the testimony of Division Engineer Mason, showed the machines backing into the clear to permit these locomotives to enter the 19-24 lead, and coming right back out to work behind the locomotives.

The preponderance of the evidence indicates that the Claimant's gang was authorized to work in tracks 19 through 24, and had entered the 19-24 lead either to perform work on the track or in switching from track 23 to track 24. Therefore, protection could and should have been provided by locking, clamping, and/or spiking the bull switch for straight movements down the working lead, to preclude entry into the 19-24 lead by any train, locomotive, cars, or other equipment. While it seems quite apparent the switch crew probably violated Operating Rule 7.7 when they kicked the autoveyor through the open switch into the 19-24 lead, the Claimant's failure to protect against just such an eventuality resulted in the collision. The negligence of one party does not relieve another from the obligation to comply with applicable rules.

The evidence and testimony in the record indicate that the Claimant became distracted by the recalcitrant switch, and perhaps he relied on what he believed to be the alignment of the bull switch to the straight track. The Claimant states that neither he nor any member of his gang examined the bull switch to determine how it was lined. The record does not disclose how the bull switch came to be lined for the 19-24 lead. But what is clear is the failure of the switch crew to know the route was properly lined for the autoveyor to be kicked into track 26, and the Claimant's failure to know that the ballast regulator was protected by locking, clamping, and/or spiking the bull switch against movements into the 19-24 lead. There was substantial discussion in the investigation transcript whether red flags and/or portable derails should have been employed to protect the ballast regulator. The Board observes that MWOR 6.3.2 permits the use of "one or a combination" of the prescribed protective measures. Division Engineer Mason conceded, at Transcript Page 125, that neither flags nor portable derails need be employed if the switch providing entry to the work zone is secured against movement into the work zone.

With respect to the Organization's argument that the failure to hold the investigation at a location where Mr. Boyd could be present, the Board, after consideration of the entire record in this case, believes that the Organization has not shown how any evidence or testimony provided by Mr. Boyd could have any exculpatory value to the Claimant. We are left without first-hand proof of exactly what Mr. Boyd was doing at the time of the collision, whether he was knocked

off his machine or jumped off, or even whether he fell from unrelated causes before the collision occurred. But even without any such information, the fact remains that the collision happened, and whether or not Mr. Boyd's injury was the consequence, the joint responsibility of the switch crew and the Claimant remains the same. The Board purposely gave no consideration to the injury report prepared by Assistant Roadmaster Heusler on behalf of the hospitalized injured employee, Mr. Boyd, since Mr. Boyd could not be present for cross examination and his credibility could not be tested.

The Organization argues that the discipline assessed the Claimant is excessive. The Board notes that the discipline consisted of three parts, which we shall address separately.

First, the Claimant was assessed a six-month suspension. The Carrier points out that an actual suspension of this degree is affixed for a track authority violation, in accordance with its Policy for Employee Performance Accountability. ~~In view of the damage to both the autoveyor and the ballast regulator, the circumstantial evidence that Mr. Boyd's injury was the consequence of the collision, and the potential for injury to others, the six-month suspension is not excessive.~~

Second, the Claimant was assigned a probation period of three years, during which another serious rule violation might result in dismissal. In view of the Claimant's personal record, the subject of comment below, this three-year probation period seems a redundancy, and will remain undisturbed.

Third, the Claimant would not be permitted to work as foreman or assistant foreman for a period of two years (until August 24, 2003). The Board believes this restriction has served its purpose and its protraction becomes more punitive than corrective. If the Claimant does not understand his grave responsibility to provide certain protection for men and equipment working on the track by this time, he will not understand it by August, 2003. The Board therefore directs that the closing date of this restriction be shortened to January 15, 2003.

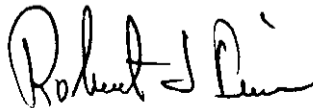
The Board has taken note of the Claimant's personal record of disciplinary penalties. While employed as a conductor between 1991 and 1997, he was disciplined four times for unauthorized absences and once for a safety violation. He also received two Performance Commendations during that period. After entry into the Maintenance of Way Department in 1997, he was disciplined once in 1997 for failure to provide protection for men and machines in a yard track. Thus, the instant disciplinary penalty is the first in almost four years.

This is not a case in which a long-term employee has few, if any, previous offenses. Although he does have more than 10 years with the Carrier, the Claimant's record is not spotless. This record leaves the Board little incentive to further reduce the severity of the assessed discipline. It is the Board's sincere hope that this experience will leave the Claimant with a better

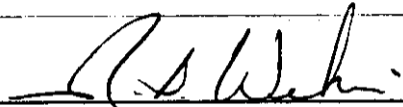
understanding of the need to anticipate dangerous conditions and situations, and guard against the unexpected.

AWARD

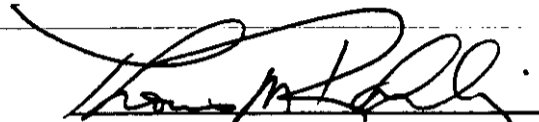
Claim sustained in accordance with the Opinion.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

December 16, 2002
Date