

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees
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 June 14, 2002, when it issued the Claimant, Mr. R. T. Begay, a 30-day Record Book Suspension for allegedly violating Rule 1.1.4 of the Maintenance of Way Operating Rules, and Rule S-16.2 of the Maintenance of Way Safety Rules, when he improperly use [sic] a defective tool, resulting in a personal injury.
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 any time lost." [Carrier File No. 14-02-0132. Organization File No. 240-1313-025.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. R. T. Begay, was hired by the Carrier on November 13, 1995. He was working as a Trackman and Truck Driver in the Carrier's Maintenance of Way Department on April 5, 2002, when he suffered a personal injury. The injury was described by the Claimant and Roadmaster Ronnie Anderson:

Mr. Begay: "I was drilling a hole with a drill and it hung on something or ties and just got stuck and twisted, turned my hand and twisted my arm." (Transcript page 10).

Mr. Anderson: "He was using this hydraulic tie drill. When he inserted the drill into the tie this drill bit caught the tie and twisted and torqued, applied the torque to his hand. He had both hands on the drill, but the torque pulled it loose from his hands or at least one hand. And as he had a hold of it with one hand, he sus-

tained a torque injury, a fracture, stress fracture to his right hand.” (Transcript page 4).

On April 12, 2002, the Claimant was instructed to report for a formal investigation on May 3, 2002,

“[T]o develop the facts and place responsibility, if any, in connection with possible violation of Rule 1.1.4 of the Maintenance of Way Operating Rules, . . . and Rule S-16.2 of the Maintenance of Way Safety Rules . . . concerning your alleged use of a defective tool on April 5, 2002, resulting in injury to yourself.”

By mutual agreement of the Parties, the investigation was postponed to and held on May 17, 2002. A transcript of testimony and evidence presented at the investigation is in the record before this Board.

The testimony and evidence, in large part, concerns the condition of the drill used by the Claimant on April 5. A reproduction of pages from the manufacturer’s catalog illustrating the drill was entered as an exhibit.

Following the investigation, General Manager Greg A. White advised the Claimant he was being assessed a Level S 30-day record suspension for violation of Maintenance of Way Operating Rule (MWOR) 1.1.4 and Maintenance of Way Safety Rule (MWSR) S-16.2, for his use of a defective tool, resulting in injury to himself. He was also assigned a probation period of one year.

MWOR 1.1.4 and MWSR S-16.2 read as follows:

[MWOR 1.1.4]. “Employees must check the condition of equipment and tools they use to perform their duties. Employees must not use defective equipment or tools until they are safe to use. Employees must report any defects to the proper authority.”

[MWSR S-16.2]. “Inspect tools and equipment for defects before and during use, repairing or removing from service those that fail inspection. Promptly tag and report to your supervisor or person in charge any defect. If necessary, guard the hazard.”

The Organization promptly appealed the Carrier’s disciplinary decision to its General Director - Labor Relations, who denied the claim. It therefore comes before this Board for review and a final decision.

It is the Organization's position that the tool was issued to the Claimant by the Carrier, but when he suffered an injury, in an attempt to limit its liability, the Carrier now says the tool was defective because of a missing handle. But, it is argued, there is no evidence that this drill was ever equipped with a handle. A tie drill of the same model was found on an adjoining maintenance section, also without a handle. The Organization suggests that this model drill has a design flaw. It also points out that such drills have been safely used in the past.

The Carrier answers that the Claimant admitted that if the missing handle had been on the drill, he would not have been injured. He further admitted that he had not inspected the drill before using it, and did not discover the handle was missing until after he had suffered the injury. The subject rules require inspection before a tool is used and appropriate action if a defect is found.

The Board notes that the manufacturer's catalog, in its description of the drill, indicates that an "assist handle" is supplied with "selected models." The transcript of testimony given by the Carrier's witness, Roadmaster Anderson, contained the following questions and answers:

"Do you know in fact if this drill ever had the handle with it?"
"No."

"So you couldn't tell me if a handle was even ordered when this drill was ordered?"
"That's correct." [Transcript page 6]

"Do you know in fact that this handle was ever with this tool or purchased with this tool?"
"I do not know in fact." [Transcript page 8].

"I understand there is an adjoining Section with a similar type drill. Is that correct?"
"That is correct."

"Did it have a handle on it?"
"It does not have a handle on it nor does it have an insert for a handle."

"Did you, have you taken exception to it being used without a handle on it?"
"Yes, it has been removed from service."

"So you've replaced these drills?"
"Yes."

"And what's the difference in the drills you replaced and the difference in this drill?"

"The drills that I, that I have ordered are quite a bit more ergonomic, ergonomically sound. They're wider. They've got wider handles and they also have, they do have the handles for the inserts for these drills. And, the drills that we replaced are quite a bit smaller in the area where they place their hands." [Transcript page 7].

"And the new drills that you ordered are even better design than the one that Mr. Begay was using had it had a handle?"

"That is correct." [Transcript page 9]

The Claimant gave the following testimony in the record:

"With the drill, did you ever see the handle on the truck or anything?"

"Well, they said it's on the truck and I looked for it and I didn't find it."

"Okay, but you never found a handle on the truck?"

"No, I didn't find it."

"And, you've never seen a handle with this drill?"

"No."

"Once again, in the past have you used hand drills and impact wrenches and not all of them have handles?"

"Some of them do."

"Some had handles and some did not?"

"Some don't."

"And the ones without handles you didn't take exception to and nobody else took exception to?"

"No."

"And so you felt you could safely operate this piece of equipment without that extra handle on it?"

"Yes."

"That's the first time you had used it?"

"The first time." [Transcript page 12].

Based on the manufacturer's catalog and its text, and the above testimony by Mr. Anderson and the Claimant, the Board concludes that the Carrier has not proved that the Claimant reasonably could or should have known that the drill was defective, since this was the Claimant's first occasion to use this drill. It may have never had the assist handle which would have made it easier and safer to use. The handle may not have even been ordered. The Roadmaster's frank statement allows for that possibility, especially since the manufacturer's catalog indicates the assist handle comes with selected models — possibly meaning it is an optional accessory.

The Organization also argues that the Carrier did not prove the charges, but even if it had, the discipline assessed is excessive in proportion to the allegations and the Claimant's employment record.

The Carrier rebuts the above arguments by pointing to a six-month record suspension assessed the Claimant in 2000, and states the instant rule infractions occurred within the probationary review period of that previous case. The Carrier also argues that the Claimant admitted that he did not inspect the drill before he used it in contravention of the rules cited in the record.

The Board agrees that the Claimant's disciplinary record is not flawless. The Claimant had about 5½ years of service on the date he was injured. His record shows one previous disciplinary entry, a six-month deferred suspension in February, 2000, for failure to properly perform his duties. (Additionally, there is his dismissal for failure to report the injury which is the subject of this case, *q. v.*; this Board's Award No. 272).

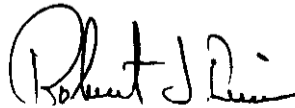
The Claimant's admissions in the record clearly establish that he failed to inspect the drill before working with it. He also admitted that he would probably not have been injured when the drill bit seized if the drill had been equipped with longer handles. (At Transcript page 8, Roadmaster Anderson stated that the drill was not entirely without handles; it appears to have very short handles which place the operator's hands quite close together, according to Mr. Anderson's statement.) The Board deduces that this places the operator at a mechanically leveraged disadvantage.

While a 30-day record suspension and a one-year probationary period is not unreasonably severe for the Claimant's rules infractions, the Board is disposed to reduce even this seemingly light penalty, because the Board is persuaded that the Carrier shares the responsibility for supplying a tool which is not optimally safe. According to Mr. Anderson's forthright testimony, the assist handle may never have been supplied for this drill. It is conjectural whether the Claimant would have detected the absence of the drill's assist handle if he had inspected it, but the fact remains that he admittedly did not do the inspection.

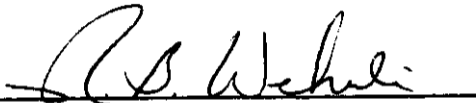
The Board orders that the suspension be reduced to a letter of reprimand, but the one-year probationary period will stand.

AWARD

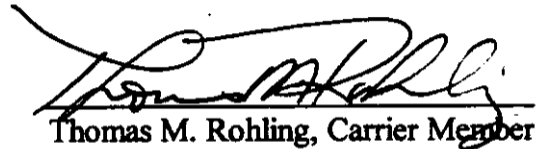
Claim sustained in accordance with the Opinion.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

January 10, 2013
Date