

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 when on August 26, 2002, Mr. E. W. Whittie was dismissed from service for allegedly violating Rules 1.1 and 1.19 of the Maintenance of Way Operating Rules and Rules S-1.2.1 and S-1.2.3 of the Maintenance of Way Safety Rules and Rule 1.6.4 of the Track Welding Manual in conjunction with causing damage to Carrier welding equipment.
- “2. As a consequence of the Carrier’s violation referred to in part (1) above, Mr. Whittie shall be reinstated with seniority, vacation, all rights unimpaired and paid for all wages lost in accordance with the Agreement and his record cleared.
- “3. The Carrier violated the Agreement when on August 26, 2002, Mr. C. E. Barlow was issued a (30) thirty day actual Suspension for allegedly violating Rules 1.1 and 1.19 of the Maintenance of Way Operating Rules and Rules S-1.2.1 and S-1.2.3 of the Maintenance of Way Safety Rules and Rule 1.6.4 of the Track Welding Manual in conjunction with causing damage to Carrier welding equipment.
- “2. As a consequence of the Carrier’s violation referred to in part (1) above, Mr. Barlow shall be reinstated with seniority, vacation, all rights unimpaired and paid for all wages lost in accordance with the Agreement and his record cleared.” [Carrier File No. 14-02-0198. Organization File No. 110-13C2- 028.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 first Claimant, Mr. Eric W. Whittie, employed since 1993, was working as a Lead Welder near Houston, Texas, on June 18, 2002. He and another welder, Mr. Cedric Barlow, the second Claimant, were engaged in building up frogs, utilizing a truck equipped for movement on the rails, as well as off-track use. Their welding and associated equipment, including their materials, were loaded onto their truck, or an integral part thereof.

It became necessary for them to clear the track for a train movement. They loaded the equipment and materials they were using onto the hydraulic tailgate of their truck, and made a movement described as approximately one-half mile to a road crossing where they could dismount the track. They stopped to check a frog they later intended to work on while en route to the crossing. At that point, their equipment was still intact. When they reached the crossing, they discovered the equipment missing from the tailgate. Making a back-up movement, they found it in the middle of the track, where a welding lead had apparently become dislodged and fallen to the track structure, thereby snagging on a spike head and pulling the rest of the equipment off the tailgate. They recovered the equipment, now badly damaged or destroyed, and reported the accident. Losses from this accident totaled more than \$6,000.00.

An investigation of this event was scheduled for July 5, 2002, twice postponed at the request of the Organization's General Chairman, and finally held on August 6, 2002. The charges against the Claimants were as follows:

“[F]or the purpose of ascertaining the facts and determining your responsibility, if any, with the alleged violation of Maintenance of Way Operating Rules 1.1–Safety, 1.19–Care of Property, Maintenance of Way Safety Rules S-1.2.1–Sufficient Time, S-1.2.3–Alert and Attentive, and from the Track Welding Manual 1.6.4 - Equipment Care. The alleged rule violations occurred on June 18, 2002, on the Houston Sub while you were working in restricted limits near Casey yard and resulted in damage to BNSF welding equipment.”

Welding Supervisor Don Hiatt appeared as the Carrier's sole witness at the investigation. He presented documentary evidence of the repair and/or replacement costs for the damaged and destroyed equipment. Additionally, since the welding equipment is truck-mounted, the truck was out of service for about 2½ days while undergoing repair and replacement of equipment. It was his opinion that the Claimants should have properly stored their equipment when making the move to the road crossing, rather than risk it falling from the tailgate.

Claimant Whittie testified that he had seen and made similar movements of such short distances with the equipment temporarily placed on a tailgate, without accident or incident, during his career. He estimated that it would have required something like 20 minutes to reel up their hoses and store all the equipment away, and it was their purpose to resume work again after the

train passed. They also intended to take a lunch break while clear of the track. He admitted in the record that the equipment was not stored properly when they made this move.

Claimant Barlow's testimony was similar to that of Mr. Whittie in most respects. He, however, said he did not realize they would be moving as far as they did; he said he thought they were traveling only about 100 yards to the next switch where they would resume work. As it happened, the equipment was still in place when they got to that switch. He said that they usually store all the equipment away but, ordinarily, that is when finished with the day's work. This was the first time they had had two frogs to work on the same day, and those in close proximity. He indicated that he was apprehensive about the longer move to the road crossing, but Mr. Whittie assured him the equipment would ride alright, because he'd seen it done many times before.

On August 26, 2002, as the consequence of the investigation, Claimant Whittie was notified that he was dismissed from the Carrier's employment, and Claimant Barlow was assessed a 30-day actual suspension for violation of the same rules with which they had been charged. These read as follows:

Maintenance of Way Operating Rule (MWOR) 1.1

"Safety

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continued employment.

"Empowerment

All employees are empowered and required to refuse to violate any rule within these rules. They must inform the employee in charge if they believe that a rule will be violated. This must be done before the work begins.

"Job Safety Briefing

Conduct a job safety briefing with individuals involved:

- Before beginning work
- Before performing new tasks
- When working conditions change

The job safety briefing must include the type of authority or protection in effect."

MWOR 1.19

"Employees are responsible for properly using and caring for railroad property. Employees must return the property when the proper authority requests them to do so. Employees must not use railroad property for their personal use."

Maintenance of Way Safety Rule (MWSR) S-1.2.1

“Take sufficient time to perform job tasks safely.”

MWSR S-1.2.3

“Assure that you are alert and attentive before performing duties.”

Track Welding Manual 1.6.4 (in part)

“a. Welding crews shall take good care of all equipment assigned to them. Keep equipment in good working condition and clean with approved solvents.

...

“e. Do not leave equipment, tools, and material that can be easily moved, unattended along the right-of-way. After each day’s work store equipment, tools, and materials securely in a truck, tool car, or tool house.

“f. Lock and secure equipment and supplies properly to prevent damage during transport, shipment, storage, and use.”

The Organization’s General Chairman, promptly appealed these disciplinary decisions to the Carrier’s Assistant Director - Labor Relations.

The Organization argues that the Claimants were denied a fair and impartial hearing because pertinent information was omitted from the transcript. It is alleged that the Conducting Officer denied the Claimants and their Representative the right to have a question and answer inserted on cross examination. The Organization also points out that there are 128 instances in which responses are denoted “unintelligible” in the transcript.

The Organization also argues that the disciplinary penalties assessed the Claimants are harsh and drastic for a minor offense. It notes that their personal records were not entered into evidence so they might present defenses thereto. In a subsequent conference on this dispute, the Organization asserted that the disciplinary penalty imposed upon Claimant Whittie was not even in compliance with the Carrier’s own discipline policy.

The Organization points out that one piece of damaged equipment, valued at \$1,950.00, simply disappeared after it was hauled away from the Carrier’s property with the truck, thereby removing it from evidence and the ability to determine the degree of its actual damage.

It is further argued that the record shows similar moves had been made before, and the damage was simply the result of an accident arising from common practices, which had negative consequences in this instance. But even if the charges were proven, the discipline assessed is excessive in proportion to the evidence.

The Carrier responds that the alleged errors in the transcript are not fatal. The record shows that Claimant Whittie admitted that his and Mr. Barlow's negligence caused the damage to the equipment. As for the quantum of discipline, the Carrier pointed out that this is the fourth disciplinary assessment against Claimant Whittie in less than one year. Two of these assessments were for "Serious Rule Violations" as defined in the Carrier's Policy for Employee Performance Accountability (PEPA). Under this PEPA, although a single "Serious Rule Violation" may not result in dismissal, a second one within 36 months will subject the employee to dismissal. The following disciplinary assessments in Claimant Whittie's record were noted:

| | | |
|----------|----------------------------------|---|
| 9/26/01 | Level-S 30-Day Record Suspension | Not wearing required personal protective equipment. |
| 11/15/01 | 10-Day Record Suspension | Failure to Comply with Instructions. |
| 11/19/01 | 20-Day Record Suspension | Improper Backing -- Damaged Truck |
| 6/28/02 | Dismissed | Damaged Welder |

Therefore, the Carrier argues, Claimant Whittie's record is such that he cannot be allowed to continue in its employment, lest he hurt himself or someone else. Claimant Barlow's 30-day suspension is neither harsh nor unfair, in consideration of his negligence in causing several thousand dollars worth of equipment damage. The Carrier did not address directly the other points in the Organization's appeal, except by a blanket rejection or denial.

The Board has carefully studied the record in this case and weighed the arguments of the Parties. The determinative issues in this case will be addressed below.

The record in this case is deplorably transcribed. There are so many unintelligible responses, according to the transcriber, that whole segments are, indeed, "unintelligible." Other parts are crystal clear, however, and there is no question that the Claimants admitted that this loss resulted from failure to store the equipment so that it could not have fallen or been pulled off the truck.

With no better direction, the Board is unable to determine just what question and answer were omitted from the transcript. In light of the numerous admissions, either outright or implied, it is difficult to see how some unspecified answer would have resulted in the Claimants' exoneration, or any degree of mitigation or extenuation.

The omission of the Claimants' personal records from the transcript, or even from the investigation, is not a fatal error. Indeed, when one looks at Claimant Whittie's record, if it were disclosed during the investigation, it could be argued that it was prejudicial to the outcome. It is a general arbitral rule that an employee's past record may not be used to determine his guilt in a current case, but may be considered to determine the quantum of discipline, only if he is found to have violated the rules with which he is charged. It seems that is just what was done in this case.

The Board concurs in the Carrier's argument with respect to the provisions of the PEPA. The list of "Serious Rule Violations" in the PEPA is expressly noted as being "a non-exhaustive list." While the particular item named by the Carrier seems to be more a personal safety issue as distinguished from a property damage issue, property damage is nevertheless listed therein, and can certainly be implied.

The Board notices the Organization's comments about the piece of equipment which disappeared. Mr. Hiatt testified that it was on the Claimants' assigned truck when it was removed from the Carrier's property by its contractor, Wheeling Equipment Company. Wheeling told Mr. Hiatt it was damaged beyond repair, but when he went to their site to look at it, it had disappeared. It therefore had to be replaced with a new one. While this disappearance is a puzzling circumstance, that does not change the entire picture. It does not even diminish the overall cost of the event, because if there had not been the accident which resulted in the removal of the vehicle for repair and replacement of the damaged and destroyed equipment, this particular piece of equipment would not have disappeared. Its disappearance is not directly chargeable to the Claimants, of course, but there is little reason to doubt the assessment that it was a loss, in view of the losses suffered by the rest of the equipment. Even if this particular item were removed from the whole event, its value was less than one-third of the total equipment loss.

The fact that similar movements had been safely made before is of no consequence, in the Board's opinion. There are countless traffic violations on the nation's highways every day, hour, and minute. The vast majority do not result in casualties, by God's grace and skillful avoidance techniques. Yet, when the inevitable accident does result in a casualty, their very prevalence does not diminish the terrible result, nor accountability.

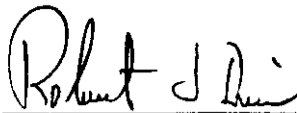
Even if the record indicated that Claimant Whittie was disarmed by the existence of a practice of hauling equipment as was done in this instance, his personal record precludes the Board from affording him the relief sought.

As for Claimant Barlow, who has more than 20 years' service with the Carrier, the Board notices that this is his first disciplinary offense on more than eleven years. He testified that he was initially uneasy about transporting the welding equipment on the truck's tailgate, but was assured by Mr. Whittie, the Lead Welder, that it had been done safely many times before. In light of this assurance, and this Claimant's very good record, the Board believes the 30-day actual suspension

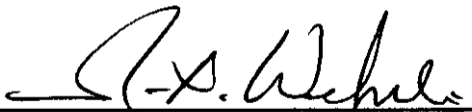
is excessive, and orders that it be reduced to a ten (10) day actual suspension. He shall be paid for all time lost in excess of ten (10) days.

AWARD

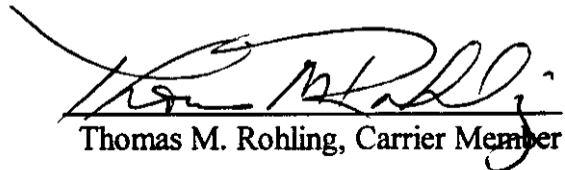
The claim on behalf of Claimant Whittie is denied. The claim on behalf of Claimant Barlow is sustained in accordance with the Opinion. He shall be paid for time lost in excess of ten (10) days within sixty (60) days from the date of this Award.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



Thomas M. Rohling, Carrier Member

June 13, 2003

Date