

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 November 21, 2002, Mr. K. Wartz was issued a Level S 6-month actual suspension and 3-year probation for allegedly violating Rules 1.1, 1.1.1, 1.1.2, 1.1.3 and 6.51 of the Maintenance of Way Operating Rules, Rule S-14.1 of the Maintenance of Way Safety Rules and Rules 1.1.6B, 1.1.8 and 1.1.9 of the BNSF Engineering Field Manual in conjunction not maintaining a safe braking distance on anchor knocker and coming into contact with spike reclaimer.
2. As a consequence of the Carrier's violation referred to in part (1) above, Mr. Wartz's record be cleared and he be reinstated with seniority, vacation, all rights unimpaired and pay for all wage loss. [Carrier File No. 14-02-0300.. Organization File No. 240-1313-0124W.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. Kenneth Wartz, entered the Carrier's service on June 19, 1991. He was working as a Machine Operator in Gang RP16 on November 2, 2001, when the anchor knocker machine he was operating, one of a group of six machines in traveling mode, collided with the machine preceding his, a spike reclaimer being operated by Mr. Gary Rockbridge. The collision resulted in injury to Mr. Rockbridge which precluded him from working for at least a year, except for light duty performed immediately after the accident. The Claimant jumped from his machine immediately before the collision. The record does not indicate whether he suffered any injury.

An investigation into the facts and circumstances of the collision was originally set for November 15, 2001, but following several postponements due to Mr. Rockbridge's injury, was not held until October 24, 2002. A transcript of evidence and testimony taken in the investigation

is in the record. Thereafter, on November 21, 2002, the Claimant was notified of the Carrier's disciplinary decision in a letter which reads, in part, as follows:

This letter will confirm that as a result of formal investigation held on October 24, 2002, concerning anchor knocker BNSF X0100402, operated by you, did not maintain a safe braking distance and came into contact with spike reclaimer BNSF X8400045, operated by Gary Rockbridge, on November 2, 2001, at approximately 1200 hours at approximately MP 1188.1 on Port Subdivision, which resulted in injury to Machine Operator Gary Rockbridge; you are issued a Level S suspension of six (6) months for violation of Rules 1.1 (Safety); 1.1.1 (Maintaining a Safe Course); 1.1.2 (Alert and Attentive); 1.13 (Reporting and Complying with Instructions); and 6.51 (Maintaining a Safe Braking Distance) of the Maintenance of Way Operating Rules in effect January 31, 1999, including revisions up to April 2, 2000; Rule S-14.1 (Riding on Machines) of the Maintenance of Way Safety Rules in effect January 31, 1999, including revisions up to October 10, 1999; and 1.1.6B (Responsibilities of Individual Roadway Workers); 1.1.8 (Spacing of On-Track Equipment); and 1.1.9 (Traveling On-Track Equipment) of BNSF Engineering Instructions Field Manual revised March 1, 2001. Additionally, you have been assigned a probation period of three (3) years. If you commit another serious rule violation during the tenure of this probation period, you will be subject to dismissal.

...

For two years (until November 21, 2004) you will not be permitted to work as a machine operator. After that period of time, if you have passed all required tests, you will be given the opportunity to bid on a machine operator position.

The Rules cited in this letter 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 1.1.1

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

MWOR 1.1.2

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

MWOR 1.13

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

MWOR 6.51

On-track equipment operators are responsible for maintaining a safe braking distance between their on-track equipment and other on-track equipment, trains and engines.

For purposes of this rule:

Working mode will apply to on-track equipment stopped or moving slowly in the performance of maintenance activities.

Traveling mode will apply to on-track equipment moving to and from a work location or performing inspection activities.

On-track equipment operators must:

- Insure that on-track equipment remains at least 300 feet behind a train or engine while in working or traveling mode, except when it has been determined by a job briefing that the train or engine is stopped and will not move.

- Insure that on-track equipment remains at least 300 feet behind other on-track equipment while in traveling mode. *Exception:* On-track equipment may be “bunched” to make movements over short segments of track such as crossings at grade, moveable structures and control points. A job briefing must establish the procedure with all involved employees. Machines must be at least 50 feet apart during such movements. If machines will be “bunched” when stopped, all employees must remain clear of the track until the entire movement has stopped, unless otherwise instructed by the employee in charge. After stopping, the lead machine operator must do the following:
 - Dismount the machine.
 - Assume a position that is visible to a following machine operator and anyone who could step into the path of the next approaching machine.
 - Spot the following machine using hand signals.Each successive operator must follow this procedure to spot the next machine.
- Use radio or hand signals to notify the operator of the following machine when slowing or stopping on-track equipment during traveling mode. If the following machine operator does not acknowledge the radio or hand signal, stop, dismount the on-track equipment and proceed, clear of the track, toward the following machine giving stop signals.
- Maintain at least 50 feet between on-track equipment while in working mode unless job briefing establishes a shorter distance due to existing working conditions. While in working mode, it is the responsibility of all machine operators to maintain a safe distance between their machine and other men and on-track equipment.
- Ascertain that a back-up alarm is activated and/or the appropriate whistle signal has been sounded and that the distance to be traveled is clear of workers and machines before making a back-up move.

BNSF Engineering Instruction (E.I.) 1.1.6B

Individual roadway workers must:

- Follow BNSF’s on-track safety rules and procedures.
- Avoid fouling a track except when necessary to perform their duties.
- Wear high-visibility orange workwear when on or near the track. At night, the workwear must be retro-reflective. (See MWSR Rule S-21.1, “Personal Protective Equipment Requirements.”)

- Determine that on-track safety is being provided before fouling a track.
- Refuse any directive to violate an on-track safety rule.
- Notify the employee in charge when making a good faith determination that on-track safety procedures to be applied at the work location do not comply with the MWOR.

E.I. 1.1.8

When on-track equipment is being used, workers and machine operators must follow the guidelines below for maintaining safe distances to prevent machines from contacting other machines and workers.

When machines must be spaced closer than guidelines require because of work or travel conditions, the machine operators and the employee in charge must have a thorough understanding of:

- The specific task
- The conditions under which the task will be done
- How the task will proceed

A. Work Zones Around Machines

Roadway workers must not enter a machine's work zone without first communicating with the operator to establish safe work procedures.

Note: Unless a different understanding is established through a job briefing, this work zone extends from a point 15 feet in front of the machine to a point 15 feet behind the machine. The work zone limits on each side of the machine will be designated in the job briefing.

If a machine is approaching workers who are foul of the track, the operator must communicate with the workers before getting closer than 15 feet to them.

B. Safe Working Distance Between Machines

The minimum distance between machines while working is 50 feet, unless a job briefing establishes a different distance.

C. Back-Up Movements by Machines

Before making a back-up move, the machine operator must:

- Verify that a backup alarm is activated and/or the appropriate horn or whistle signal is sounded on machines so equipped.
- Observe that the track is clear of workers and machines.

E.I. 1.1.9**A. Maintaining Safe Traveling Distance Between Machines**

On-track equipment must remain at least 300 feet behind other on-track equipment while traveling to or from a work location. When a job briefing establishes otherwise, machines may be "bunched" to make movements over short segments such as crossings at grade, movable structures, and control points. The job briefing must establish the procedure with all involved. Machines must be at least 50 feet apart during such movements.

B. Slowing or Stopping Machines

When slowing or stopping on-track equipment during travel, the operator must use a radio or hand signals to signal the operator of the following machine.

- If using a radio, the lead operator must ensure that the following operator has received and understood the message transmitted.
- If using hand signals, the lead operator must give a continuous signal until the following operator has acknowledged that the signal was observed and understood.

If machines will be "bunched" when stopped, all employees must remain clear of the track until the entire movement has stopped, unless otherwise instructed by the employee in charge. After stopping, the lead machine operator must do the following:

1. Dismount the machine.
2. Assume a position that is visible to a following machine operator and anyone who could step into the path of the next approaching machine.
3. Spot the following machine using hand signals.

Each successive operator in the consist must follow this procedure to spot the next machine.

The Organization promptly appealed the Carrier's disciplinary decision to its Assistant Director - Labor Relations.

The Organization argues that the Claimant was denied a fair and impartial hearing because the Conducting Officer permitted written statements and hearsay evidence to be entered into the record. The written statements were from Carrier employees, and the Carrier should have had them available for cross examination, the Organization contends.

The Organization also argues that the record shows that the machine being operated by the Claimant was heavily loaded, and had traveled over some flange lubricators, causing grease to be deposited on the wheels and brake shoes of this machine. These circumstances resulted in the Claimant's inability to stop his machine short of the preceding machine, although he shut its throttle down and put its brakes into emergency application.

The Organization further argues that the Claimant had a clear record up to this point, and the Carrier has not borne its burden of proof. But even if it done so, the discipline applied in this case is "extreme, unwarranted and unjustified."

The Carrier rejoins that although the Traveling Mechanics who inspected the Claimant's machine were not present for questioning, the inspection form was also signed by District Roadmaster Christopher Wang, who did appear as a witness at the investigation, and who was cross examined by the Claimant's representative. But, the Carrier points out, Mr. Wang was not questioned about the issues in the report which he had signed, along with the Mechanics, as a participant in the post-accident inspection.

The Carrier further addressed the Organization's contention with respect to the effect of the flange lubricators. The Carrier states that this is an affirmative defense, and the Organization has failed to carry the shifting burden of proof. It points out that the other machines in this group traveling together did not experience braking problems.

The Carrier also points out that the Claimant testified that the brakes on his machine worked satisfactorily both before and following the collision. Although it was alleged during the course of the investigation that new brake shoes were mounted on the Claimant's machine between Friday, when the collision occurred, and Monday, the next work day, the Organization did not provide any work report, picture, or other supporting evidence. The Carrier suggests that even if this unsupported assertion is correct, it does not mean that the brakes on this machine were not working properly when the collision occurred. The Carrier denied the relief sought by the Organization on the Claimant's behalf.

The Board has studied the lengthy transcript of testimony and evidence in this case, and considered the arguments presented by the Parties.

The Claimant was not inexperienced. He testified that he had been working as a Machine Operator for six years. He had been running this particular machine for some time, and was familiar with it. He said he was traveling more than the minimum required 300 feet behind Mr. Rockbridge's machine. He was towing a heavily loaded push car behind his machine, and said that as he entered an ascending grade, it was necessary to throttle up his machine to maintain speed. When he topped the grade and it turned into a descending grade, he throttled down but his speed increased. He observed Mr. Rockbridge slowing ahead of him and giving a stop signal. He shut the throttle down completely, which automatically applied the brakes. When he perceived that he would not be able to stop before colliding with the preceding machine, he released his seat belt and jumped off his machine. He estimated it was running about 13 m.p.h. when it struck Mr. Rockbridge's machine.

This is the first disciplinary entry involving a matter of safety in the Claimant's personal record. He did have two reprimands and a deferred suspension for unauthorized absences, but the last entry was in 1997.

The Board is persuaded that the Carrier has the better position in this case. While the allegation that the brake shoes were changed out over the weekend following the collision is a circumstance which could indicate that the shoes on the machine when the accident occurred were overly worn, the fact remains that the Claimant testified that the brakes worked satisfactorily both before and after the collision. The Organization did not request a recess to obtain the presence of one or both Traveling Mechanics. If it was felt that their presence was essential, such a recess should have been demanded. A refusal by the Carrier might have been at its own peril. Nevertheless, Mr. Wang was present, and he could have been examined on the brake shoe matter.

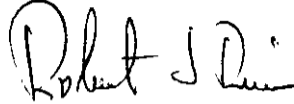
The Board also notices that a flange lubricator does not present an unforeseeable element. A fallen tree, a trespasser, livestock, a stalled automobile, are not to be expected. That cannot be said of a fixed part of the track structure, such as a flange lubricator. The Board further notices that no other track machine in this group reported any loss of stopping ability because of the presence of a flange lubricator. But this argument is a two-edged sword. If the machine's stopping distance was adversely affected by the presence of the flange lubricator, that condition would have dictated more than ordinary caution on the Claimant's part.

Although the Claimant's suspension for six months is a heavy penalty, the Board observes that under the Carrier's Policy for Employee Performance Accountability, he might have been dismissed, but for his relatively good record. A rule violation that results in a serious collision or a serious injury, is defined therein is one of the dismissible offenses.

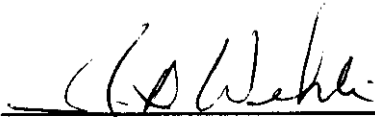
The Claimant was competently represented in the investigation and the subsequent appeal process, but in view of the evidence and the gravity of this matter, the Board cannot sustain the Organization's claim on his behalf.

AWARD

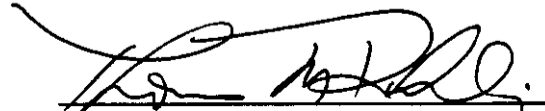
The claim is denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member


Thomas M. Rohling, Carrier Member

June 25, 2013
Date