

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 September 22, 2003, when it issued the Claimant, Mr. L. G. Hannah, a 30-day record book suspension for allegedly not being alert and attentive and failing to use back preservation training leading to a personal injury, in violation of Maintenance of Way Operating Rule 1.1.2, and Maintenance of Way Safety Rules S-1.4.7, and S-27.2.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately remove any mention of this incident from the Claimant's personal record and make him whole for any wages lost account of this alleged violation. [Carrier File No. 14-03-0263. Organization File No. 20-1313-038.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. Larry G. Hannah, suffered an on-duty personal injury on September 22, 2003. As of that date, he was 56 years old, and had been in the Carrier's employ 34 years. His personal record was clear of any disciplinary entries, and shows only one personal injury, a bruise or contusion to his foot, with the loss of three days' work in 1980.

In an employee personal injury report filled out on September 23, 2003, he described his injury on September 22 in the following terms:

Climbed up on section truck to retrieve a spike puller which was behind spike kegs; had to move to side of kegs and lift up on spike puller and twist to right when pain in lower back occurred. Was standing on angle bars.

In a part of the injury report which asks, "Was there anything wrong with the equipment, work procedures, or work area which led to this accident/injury?" the Claimant wrote,

Spike puller was in congested area causing lift and twist to side over other materials.

His injury was diagnosed as lumbar ligamentous strain and lumbar myositis, according to the injury report. He was withheld from work by his physician for at least one week.

On September 29, 2003, the Carrier's Division Engineer wrote the Claimant, directing him to attend an investigation on October 6, 2003,

[F]or the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to be alert and attentive, your alleged failure to recognize footing hazard, and your alleged failure to implement back preservation training when you allegedly lifted spike puller and twisted, which caused alleged personal injury to your back, on Monday, September 22, 2003, at approximately 0930, MP 284.3, Rutledge, Missouri, while assigned as Trackman.

The investigation was postponed to October 17, 2003, by agreement of the Parties. The Claimant was represented by the Organization's Assistant General Chairman. A transcript of testimony and evidence was prepared, and appears in the record before this Board.

The Claimant testified that the spike puller, a tool which weighs about 49 pounds, was stored in its usual place on the section gang's truck. He had retrieved it from this site many times over the years. He described the movements necessary to retrieve the tool:

129. Q. I think the hearing officer's already asked you where the spike puller was. Do you want to go by, go through that again for us, please?
- A. You get up on the back of the truck, climb around over the tool and the angle bars and then you go back in the corner there and they got some more angle bars back there. And there's a little box sets back there it's made for the crane holder, for an attachment for the crane, and that's where you got your hydraulic tools. And you get out whatever tool you need or all of them.
130. Q. And this seems like the most practical place to keep these tools at the present time?
- A. At the present time.

131. Q. And you had made some statements about the other things in the back of the truck. Can you describe the overall condition of the back of the truck in regard to other tools and material?
A. Just normal working conditions.
132. Q. And what type of objects were in the back of the truck?
A. Angel [*sic* - "angle"] bars, spikes, plugs, or hand tools.
133. Q. Is some of this stuff contained in some type of containers?
A. Kegs. Yeah, they're in kegs.
134. Q. And how do you generally unload this tool, this spike puller?
A. Get a hold of it and lift it by hand and unload it.
135. Q. And how many times have you done this?
A. No idea.
136. Q. Many?
A. Many. However long they've had these tools.
137. Q. Is it common to have to walk on or around other tools and material in order to perform this function?
A. Oh, yes.
138. Q. Was it necessary to walk or stand on track material to retrieve this spike puller?
A. Yes.
139. Q. How do you, how did you lift this tool, with one hand, both hands?
A. Both hands.
140. Q. Would it have involved an equal or greater risk of injury to yourself or others if you had to unload the back of the truck to get to this spike puller?
A. You can get hurt lifting them angle bars out.
141. Q. Was there room in the back of the truck for enough freedom of movement when you made the lift of the spike puller?
A. No, it was a little congested.

142. Q. I believe in the back preservation training they instruct employees to lift with their legs, is that correct?
A. Yes.
143. Q. Was there room to, to lift with your legs in the back of the truck at this time?
A. Not really.
144. Q. This is because of the congestion of the other track materials?
A. Yes.
145. Q. Was there room for anybody else to get up there and help you?
A. Not really.
146. Q. Was there room to move your feet to keep from twisting your back?
A. Yes.
147. Q. Did you, now describe to us how you actually made this movement. You picked the spike puller up. Did you twist your body, leave your feet in place, or did you move your feet?
A. Picked it up, moved my feet, set it down to, so you could move around to get a hold of it again to move it on out the back of the truck.
148. Q. You, you did not leave your feet stationary and then just twist your body?
A. No.
149. Q. Okay. Is there an alternative method of lifting this tool other than doing it by hand?
A. Not the way we got it set up right now.
150. Q. Was there an attachment point on the spike puller for lifting with the truck's boom?
A. No, you put a strap on there and lift it with that.
151. Q. If you were to put a lifting sling around this tool, would that require you to lift the tool by hand in order to attach the sling?
A. Sometimes, not all the time.

152. Q. Okay. Since your injury, have there been any modifications to the tool or the truck so the spike puller or your hydraulic tools don't have to be unloaded by hand?
- A. They're supposed to have it in the shop right now getting something done to it.
153. Q. Then could you describe something done to it?
- A. Well they're, they're talking about getting some way of, where you can walk up there and either open this gate up and lift a tool, or drag a tool out that way, or lift it off altogether, all the tools together. That's what I've been told. I haven't seen anything.
154. Q. By, by lifting it all together, you're referring to using the lifting part of the truck's boom?
- A. Right.
155. Q. This investigation notice says that this injury happened on approximately 0930 on September 22, 2003. At approximately 0930 September 22, 2003, do you feel that you were alert and attentive?
- A. Yes.
156. Q. Were you fully aware of your footing?
- A. Yes.
157. Q. It's common practice to stand on these same angle bars every time you make this move?
- A. Yes.
158. Q. And you were certain that these angle bars would not shift?
- A. Yes.
159. Q. Did you perform this lifting maneuver as safely as you could given the cramped workspace in which you had to work?
- A. Yes.

The Claimant was questioned about whether he had ever reported the congested work area, which he had described in the injury report as leading to the injury. He gave these responses:

97. Q. And it was in a congested area?
- A. Yes.

98. Q. But you never told anybody about that it was in a congested area?
A. No.

99. Q. Was put...
A. Cause foreman gets it out of there too.

Roadmaster Terry D. Smutzer presented testimony and evidence with respect to his investigation of the injury and the surrounding circumstances. It was his opinion that the truck was rather congested, more than it should have been, and the spike puller should have been lifted with the truck's boom:

44. Q. Is it common practice for workers to have to climb over or stand on tools or material, or reach over tools or material to unload or life other tools and material from the back of a truck?

A. It shouldn't be, no, Mr. Davis.

45. Q. With these tools and material in the back of the truck, is it always possible for workers to have the freedom of movement necessary to safely lift heavy tools or objects?

A. The employees have been instructed if they cannot lift the tool properly or safely, they should ask for assistance or seek a different means to remove the tool from the truck.

46. Q. Okay. Is the normal method of retrieving this spike puller simply to climb up into the back of the truck and pick it up and then set it down at the back of the truck?

A. No, not the usual procedure. It might be the way Mr. Hannah does it; but, other sections do not.

47. Q. How do they do theirs?

A. Other sections will use a strap around the tool and pick it up wiuth a boom, lift it to the ground.

He further stated that modifications to the truck were underway at the time of the investigation:

51. Q. Since Mr. Hannah's injury, have there been changes in the work practices involving removing heavy tools or materials from the back of the truck?

A. We had a discussion with Mr. Chowning, the foreman, and we are at the process right now of trying to make a type of rack where we can pick up the spike puller and a tamper to remove it from a

vehicle. In fact, that truck is in the shop right now for being fitted with that.

52. Q. Oh good.

A. That way we can take all of our hydraulic tools out at one time and put them on the ground and directly move them that, that way.

Following the investigation, on November 5, 2003, the Claimant was advised that he was being assessed a Level S, 30-day record suspension for violation of Maintenance of Way Operating Rule (MWOR) 1.1.2, and Maintenance of Way Safety Rules (MWSR) S-1.4.7 and S-27.2. These Rules read as follows:

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.

MWSR S-1.4.7

Employees must only use BNSF approved stretches when stretching at the beginning of the shift, before physical exertion, after rest breaks, and after a long period of sitting or maintaining the same posture. Employees are to stretch without exceeding personal capabilities, but must participate to the extent of their ability or as directed by a physician. Stretches following rest breaks may consist of a subset of the approved stretches.

Always use safe lifting practices when lifting, carrying or performing other tasks that might cause back pain, injury or property damage. Do not use excessive force to accomplish tasks. If one person cannot manually handle a load safely, then use mechanical assistance. Where mechanical assistance is not readily available, request assistance or stop and obtain the mechanical means necessary to complete the task.

MWSR S-27.2

The back conservation program fosters a healthy lifestyle for BNSF people around the clock. The program's training component promotes an understanding of how the back works and of how nutrition, rest, activity, and conditioning contribute to a pain-free back. The program's quality improvement component continually

seeks, studies, and acts upon recommendations for modifications of work practices and equipment.

The Organization promptly appealed the Carrier's disciplinary decision to its Labor Relations Department. The Organization points out that the Claimant has 34 years of service with only one previous injury. He was characterized by Roadmaster Smutzer as a "good worker . . . who you could always depend on to perform whatever task he was asked to do." The Organization believes he suffered an injury unloading the 49-pound piece of equipment in the way this task has always been done. He was not twisting his body, and the congested condition of the truck was its normal state. The Claimant had no reason to believe that his task was hazardous, since it had been performed in the same manner many times before.

The Organization further argues that the changes being undertaken by the Carrier is recognition that its previous work practices were flawed. It denies that the Claimant violated any of the cited Rules, and asks that the Claimant's record be cleared of this disciplinary entry and he be made whole for any lost wages.

The Carrier rejoins that substantial evidence was developed, including the Claimant's own testimony, that he did not follow safe lifting techniques while picking up the spike puller. It points to his own statement on the injury report:

[H]ad to move to side of kegs and lift up on spike puller and twist to right when pain in lower back occurred." [Underscoring supplied.]

The Carrier also points to an exchange of questions and answers by the conducting officer and the Claimant:

108. Q. So lets back up, Mr. Hannah. You did not recognize it as a, as a, as a hazardous condition?

A. Right.

109. Q. Was it a hazardous condition?

A. Turned out that way didn't it?

The Carrier argues that a continuing problem affecting employee safety is the fact that individuals develop bad habits. When an employee does something that is unsafe, but does not get hurt, he may falsely assume that there's no inherent danger in his actions. It suggests that the Claimant in this case had been violating basic safety rules for unloading tools for so long that he failed to see the danger. Just because he had never been injured before does not mean that his methods were inherently safe.

The Carrier further contends that the Claimant admitted that the spike puller could have been unloaded by the truck's boom. By failing to use an alternative to physically lifting it, he violated MWSR S-1.4.7. The Carrier also states that the new method of lifting material out of the truck which was pointed out by the Organization might have been developed at an earlier date had the Claimant reported the congestion on the truck before he was injured, thereby saving him from the injury which he suffered. The Carrier asserts that he was proven guilty of the cited Rules, and a 30-day record suspension is not harsh nor excessive.

Resolution of this dispute is problematical because both Parties have presented persuasive arguments. The Organization is rightfully offended because a long-time employee with an excellent record, and only one prior personal injury, has been "harassed and intimidated" (the Organization's words) by charging him with multiple offenses, when he has already suffered the trauma of injury. He was only carrying out his assigned task in the way he has always done so, with the full knowledge of his Foreman.

Furthermore, the Organization believes that the Carrier recognizes that the work practices as carried out by the Claimant were flawed. The proof is in the fact that the section truck (and other vehicles) are being modified so that employees need not perform their lifting tasks in the manner which resulted in the Claimant's injury.

On the other hand, it cannot be disputed that the Carrier scored a persuasive point in its argument that when an employee does something that is unsafe, but does not get hurt, he may falsely assume that there's no inherent danger in the action.

There is merit in the arguments of both Parties. Unquestionably the Claimant is a very good worker. He has many years of experience and hard physical labor behind him, and heavy lifting is characteristic of the work that Trackmen do on a daily basis. He admitted, however, on his injury report, that he twisted while maneuvering the 49-pound spike puller in a congested area on the truck. Twisting the spine while it is burdened with a weight of this magnitude, even on good footing, is conducive to lower back injury. Although moving the tool by hand was perhaps the most expedient way, in the brilliant light of hindsight, it was not the safest way.

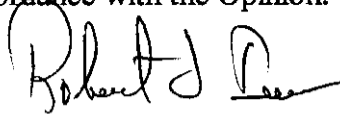
The Carrier shares in the responsibility, to a degree. The truck modifications it has initiated as the result of this injury is indeed suggestive, as the Organization argues, that its work practices were flawed. Apparently, the Claimant was never warned that his work practices were potentially hazardous. The Board does not believe that his work was not done in secret, so that no one of higher rank, including his Foreman, were aware of what he was doing. This is not to say, however, that an employee who knows of a hazard may gamble that he can ignore the hazard and then say, "That's the way we always did it." Employees must always be on guard for their own safety, particularly so in a work environment that has the potential for personal injury. Such an environment is that of employees in the Carrier's Maintenance of Way Department. Further,

the record indicates that the section truck used by the Claimant's gang has been maintained in a "congested" way for a long period of time, and no one of greater rank than the Claimant has taken the initiative to rectify the conditions. Asked how long the angle bars had been in their place on the truck, the Claimant said, "a 100 years." The Board takes it that this ambiguous response suggests an extended period of time beyond precise measurement.

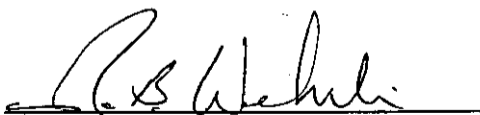
The Carrier has conclusively shown how the Claimant violated MWOR 1.1.2 and MWSR S-1.4.7. As for MWSR S-27.2, this Rule, as read into the transcript, appears more informative that admonitory. As for severity of the discipline, the Board believes that even a 30-day record suspension, as light as it is, is excessive for an employee with no previous disciplinary entries, and only one relatively minor injury in 34 years of labor as a Trackman. This is particularly true when the Claimant acted in a way which has neither been criticized, nor resulted in injury. The discipline will be reduced to a ten (10) day record suspension. There is no showing in the record of any loss of wages by the Claimant. One might ask what difference does it make, a 30-day suspension as opposed to a 10-day suspension. In the Carrier's employment of the doctrine of progressive discipline, it might make a significant difference if the Claimant were to be found guilty of some other offense in the future.

AWARD

The claim is sustained in accordance with the Opinion.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member

July 9 2004
Date