

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees
and
BNSF 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 8, 2004, when it issued the Claimant, K. W. Cason, a Non-serious 20-day record book suspension and 1-year probation for stopping his machine unexpectedly, allegedly causing a collision, in violation of Rule 1.1 of the Maintenance of Way Operating Rules, and Rule 1.1.9 of the Engineering Instructions.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately remove any mention of this incident from Claimant's personal record, and make him whole for all time lost account of this incident.
[Carrier File No. 14-04-0132. Organization File No. 90-13C2-0413.APP].

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 W. Cason, entered the Carrier's service in 1972, in its Maintenance of Way Department. He was working as a Machine Operator at Rome, Texas, on July 20, 2004, when the ballast regulator he was operating was struck by another track machine, resulting in damage estimated from \$200.00 to \$1000.00. No personal injuries were suffered by anyone. Consequently, on July 26, 2004, the Claimant and Mr. Mark O. Lindley, who was operating the other machine, were notified of an investigation on August 4, 2004,

[T]o ascertain the facts and determine your responsibility, if any, in connection with alleged collision of Tamper 5400203 and Ballast Regulator 0600386 at approximately 1140 hours on July 20, 2004, at or about MP 24.95 on the Wichita Falls Subdivision.

The investigation was postponed by agreement of the Parties until August 18, 2004. A transcript of testimony and evidence taken therein is in the record before this Board.

The collision which was the subject of the investigation was described in the testimony of the two principals, the Claimant and Machine Operator Lindley. Surfacing Gang Foreman Doug K. Bennett was in charge of the employees operating the machines, and was present when the collision occurred, but did not view it, because he was otherwise occupied at the time. He offered the following testimony about the collision:

Okay approximately, that morning we was, you know, working on the machines, we couldn't get any track and time. We had a couple of mechanics there, they was doing PM [preventive maintenance] work and some minor maintenance to the machines. We was all involved with that. We finally got track and time approximately 1140. We stared [sic] coming out of the hole at, well, out of the backtrack there. And I come down the road that's right down beside the track, through the derail and the switch, you know, for the machines to come out. And I was standing beside the machine, Mr. Cason was headed eastward first out of the hole and watched him by. Mr. Lindley and the tamper was coming out behind him. My knowledge of exactly what happened, my back was to them. I was throwing the switch when Mr. Lindley come out of the hole. I was throwing the switch. I heard the collision and turned around and looked and Mr. Cason was coming off the machine on from the ladder. And like I say, I'd already thrown the switch and lined the long pit at this time. [Answer No. 40]

Mr. Bennett said his first reaction was to determine whether anyone was injured. All involved employees said they were not hurt. He then tried to determine why the collision occurred. His testimony continued:

Well to my knowledge, that when Kenneth [the Claimant] did stop the machine, and in our discussion, it was why he stopped the machine. It was, I figured it at some periods of time Kenneth does have problems with a slipping out gear, at this time it wasn't one of them. He was going to turn the machine around to head in the opposite direction. And I don't really, you know, most of the time Kenneth is pointing towards Mo [Mr. Lindley]. In other words, his plow is to the back of Mo's machine. So, and he was right the opposite at this time. So, he was going to turn the machine around and, and be in working order. So, anyway, the machine was turned the opposite direction. He was going to stop, turn it around, because the track was, you know, level track (inaudible). And when this was discussed, you know, why he was wanting to turn the machine there, and we, that, that was briefly. But, that really didn't to into a lot of detail. Like I say, the first thing was make sure nobody wasn't hurt. . . . [Answer No. 48]

The record indicates that at some time previously, the ballast regulator operated by the Claimant had its body reversed. It is equipped with its own turntable, which may be used while on rails to elevate the body and turn it from one direction to the other.

Mr. Lindley testified that he did not know that the Claimant intended to stop after entering the main track. He gave this account of the events under investigation:

Well after stopped, after we stopped at the derail for [Mr. Bennett] to line the derail, line us out, and we proceeded out, I let Mr. Cason, he was more than 50 feet in front of me. And we were working our way over the switch there. As I come on to the spring frog at the switch, he was X'd in [exiting?] the switch point. As I watched the machine safely through the switch and was aware where the foreman was standing, keeping an eye on him, make sure nothing didn't happen to him, as I come across the switch and saw that I was going to clear the switch points, taking the safe course of action through the switch, I looked up and Mr. Cason was dismounting his machine. By that time I set the brakes, it was too late. I didn't have time to honk the horn. [Answer No. 111]

The Claimant presented a closing statement beginning at Transcript page 28, which best summarizes his view of the events:

. . . That morning we discussed where we were going to work. There was some discussion. Mr. Gaunt [the supervising Roadmaster] had told us that he wanted all of the ballast plowed through his whole territory, so there was discussion about that and about the location that we were going to tamp. As we came out of the hole I, or as we were approaching the switch, I thought before Mr. Bennett got there to throw the switch, I called him on the radio and I asked him, I said, "Mr. Bennett, do you want me to go on back and do the plowing at MP 21 or do you want me to follow back with Mo and work behind the tamper?" And at that point he said, "Well, let's it's a time factor, let's just go ahead and work with, with the tamper." And I said okay on the radio. And the previous day I had taken a floating day and my machine had been turned around backwards. And that morning early I told Mr. Bennett, I said, "When we get on the mainline I want to turn my machine." I didn't mention that to Mr. Lindley at all. When I came out of the hole we lined out. And the reason I asked Mr. Bennett about the locations, if I was not going to be working behind the tamper, I wasn't going to turn the machine at that time cause I'd just go back and plow and broom. I came out of the hole, I stopped just short of the signal stand there that is just east of the switch at Rome. And when I stopped, well I turned around and I looked and Mr. Lindley was stopped approximately at the frog area. And I took off my head phones, put on my gloves, got up, opened the door, and as I stepped out the door Mr. Lindley

was coming across the switch points. And I said okay no big deal. And I stepped down out on the next step, and I looked up and Mo looked at me, we caught eye contact direct, Mo reached around hit his service brake. And I took the next step down, and I looked at the machine and I noticed that the wheels were still rolling. And I took the next step down and I realized the machine was not going to stop. And so I, I didn't know what was behind me. I did not want to just bail off, so I stood on the bottom step, held on as tight as I could, and Mr. Lindley's machine struck mine. Mr. Lindley was not traveling at an unsafe speed. The, the impact was minimal, . . .

In the Transcript, the Board notices, objection was initially entered by Mr. Lindley's representative, contending that the notice of charges was "so general and vague as to preclude the charged employees and their Representatives from adequately being able to prepare a defense." During the course of the investigation, a further objection was entered, when the Conducting Officer first began questioning the Principals with respect to Maintenance of Way Operating Rules and the Carrier's Engineering Instructions. All such objections were noted in the transcript, and the investigation continued.

On September 8, 2004, the Carrier communicated its decision on the investigation's findings to the Claimant, reading in pertinent part as follows:

Based on evidence and information provided in the investigation you are issued a ***Non-Serious 20-day Record Suspension*** for violation of Maintenance of Way Operating Rule 1.1 and Engineering Instruction 1.1.9, Paragraph B. The review period will be 12 months. [Bold face and italics in letter]

The Rule and Engineering Instruction cited in the above letter read as follows:

Maintenance of Way Operating Rule 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.

Engineering Instruction 1.1.9, Paragraph B

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 Carrier's disciplinary penalty was promptly appealed to its Labor Relations Department. The Organization argues that the Claimant was not charged with any offense, and questions the fairness of charging rule violations in the hearing which were not originally cited. It also questions the fairness in the multiple roles occupied by the Conducting Officer. It states that he issued the notice of investigation, conducted the investigation, acted as prosecutor, presented testimony to support the alleged charges, sat in judgment on his own testimony, and imposed the discipline.

The Organization further argues that the Claimant had informed Mr. Lindley, prior to beginning their movement, that he would stop at the first level segment of main track to turn his machine, and Mr. Lindley acknowledged his understanding. Before starting to dismount preparatory to turning the ballast regulator, the Claimant observed the following tamper stopped. Although it began moving again, the Organization believes that a mechanical malfunction of the brakes resulted in Mr. Lindley's inability to stop his machine before striking the Claimant's machine. It contends that the accident was caused by events beyond the Claimant's control, and even if the charges were proven — which it denies — the discipline is excessive.

The Organization also points out that Mr. Lindley, whose machine actually struck that of the Claimant, was only assessed a Non-Serious ten-day record suspension.

The Carrier rejoins that the Claimant was afforded a fair and impartial hearing and none of his due process rights were violated. It states that the Agreement's Discipline Rule does not require that rules be listed in the notice of charges.

The Carrier argues that it developed substantial evidence that the Claimant failed to inform Mr. Lindley that he would be stopping to turn his machine immediately after entering the main track. Had he informed him of his intentions, as required to do, the collision could have been avoided.

The Carrier also argues that there is no disparate discipline in this case. It believes the Claimant bears a greater responsibility for the collision, because his stopping on the main track was a change of plans, about which he informed no one.

The Board has carefully considered the transcript of testimony and evidence in this case, and the Parties' respective arguments. We shall first address the procedural issues raised by the Organization.

The stated purpose of the investigation was to "ascertain the facts and determine responsibility . . . in connection with alleged collision . . ." This notice identified the machines by type and company number, and named a date, time, and place of the collision. Rule 13(c) of the Parties Agreement sets forth the agreed-upon notice requirements:

13(c) - Notice of Investigation. Prior to the investigation, the employee alleged to be at fault shall be apprised, in writing, of the circumstance or matter to be investigated, sufficiently in advance of the time set for investigation to allow reasonable opportunity to secure the presence of necessary witnesses and representative(s).

This rule does not require that a specific rule infraction be stated in the notice and, indeed, if the notice stated something specific, such as, "You failed to conduct a job safety briefing in accordance with Maintenance of Way Operating Rule 1.1," it might be argued that the Claimant's responsibility had been prejudged.

Third Division Award 18620 addressed a case in which the sufficiency of the investigation notice was questioned. This Award states,

We are mindful of the many cases decided by this Board which hold similarly to Award 12255 (Seff), "We have held that if a notice reasonably apprises an employee of the set of facts or circumstances under inquiry to provide an opportunity to prepare a defense and prevent surprises it is sufficient," and Award 12898 (Hall), "The formation of a charge and the giving notice thereof need not be in the technical language of a criminal complaint. It is sufficient that the one charged understood he was being investigated for the dereliction of duty set forth in the notice."

The claim in the above-cited case was sustained because the notice contained no date of the alleged offense, and the claimant was on a medical leave of absence when the offense occurred. In the instant case, however, those deficiencies are not present.

The representatives for the Claimant and Mr. Lindley objected when these Operating Rules were entered into the record. The Board believes the objection is not well taken. As this Board observed in its Award No. 268, "Employees are deemed to have knowledge of the Rules which govern their employment. If unrelated Rules are raised for the first time during the course of the investigation, there might be merit to the objection, but not in this case." A similar issue was discussed in this Board's Award No. 323.

The Organization further charges that the Conducting Officer in the investigation occupied multiple roles, in that he issued the notice of charges, conducted the investigation, acted as a prosecutor, presented testimony, sat in judgment of his own testimony, and imposed the discipline. The transcript shows the Conducting Officer's title as "Acting Division Engineer," but the notice was issued in the name of the Division Engineer. It's reasonable to suppose that the Conducting Officer actually issued the notice, but that has often been done in other cases heard by the Board. This and other boards have held that certain multiple roles do not constitute reversible error. An officer may not present testimony as a witness, and then continue as Conducting Officer, nor may he sit in judgment on his own testimony. The Organization suggests that is exactly what occurred here. The manner in which this supposedly occurred involved a series of questions by the Conducting Officer:

98. Q. Mr. Lindley, when Mr. Cason stopped his ballast regulator did he notify you that he, prior to his stopping did he notify you that he was going to stop?
- A. No, sir.
99. Q. Mr. Lindley, was, was your machine functioning properly as far as the braking procedure?
- A. At that time I thought everything had been repaired, and everything seemed to be working normal.
100. Q. Okay. Mr. Lindley, did, was there a job briefing conducted between you and Mr. Cason as far as the movement that was going to be made?
- A. The only job briefing as far as movement is we were coming out of the track which is fairly long, probably about 2500 feet long, we had on the radio job briefing that we were going to go to MP 21 and work on a slow order.
101. Q. Okay. Mr. Lindley, are you familiar with Maintenance of Way Operating Rules dated January 31, 1999 and revised?
- A. Yes, sir.

At that point, the Conducting Officer began reading Rules and Engineering Instructions into the record, and inquiring whether Mr. Lindley was familiar with them. An objection was entered by the Claimant's representative, who suggested that the Conducting Officer was formulating a charge based on evidence already presented, thereby naming those Rules related to the acquired evidence. The Conducting Officer responded, "These are some rules that I think pertain to this hearing after determining the facts here at this hearing. Yes, sir." [Transcript page 20.] The representative then charged that the Conducting Officer was acting as a witness for the Carrier, and he was asked to disqualify himself as Conducting Officer. The same objections were renewed when the Claimant was called upon to present testimony.

The line is a fine one. The Conducting Officer would have demonstrated a greater degree of perceived impartiality had he used a Carrier witness, the Roadmaster for example, to bring these rules into the investigation record. However, many cases which have been reviewed by this Board have had the Carrier's rules introduced by the Conducting Officer or by a witness, and the result is the same, regardless how it gets into the record. The error is not so grievous that it would change the outcome, but those conducting investigations should avoid the very appearance of partiality and bias.

The Organization argues that the Claimant informed Mr. Lindley of his intention to stop after entering the main track, and Mr. Lindley acknowledged his understanding. The record does not support that argument, but rather indicates a failure to communicate the Claimant's intentions to Mr. Lindley. On Transcript pages 28-29, the Claimant made the following statement: "[T]hat morning early I told Mr. Bennett, I said, 'When we get on the mainline I want to turn my machine.' I didn't mention that to Mr. Lindley at all." [Underscoring supplied.] See, also, Question and Answer No. 98, quoted above, wherein Mr. Lindley stated that he was not notified the Claimant was going to stop his machine.

Foreman Bennett testified that there was no job briefing conducted to cover the movement of the machines from the siding, nor spacing of the machines while traveling to the site of their work. (Questions and Answers Nos. 43 and 44.)

The question of whether a brake malfunction resulted in the collision was thoroughly addressed during the course of the investigation. Mr. Bennett said that as far as he knew, the brakes were working properly. (Q. & A. No. 80.) He further stated that Mr. Lindley did not mention the brakes were not working properly. (Q. & A. No. 90.)

Mr. Lindley stated, "[E]verything seemed to be working normal." (Q. & A. No. 99.) But on cross examination, he said that he had had some brake trouble "a week or so before," and added,

"I didn't realize there was any problem until I needed to make an emergency stop, and then I realized I had a problem." [Answer No. 122.]

He further testified that when they moved the machines back into the siding at Rome, he replaced two brake shoes and a leaking brake cylinder. (Answer No. 124.)

Although the discipline assessed Mr. Lindley is not the subject of review by this Board, his culpability is relevant to the Claimant's case. He was disciplined for violation of Maintenance of Way Operating Rules 1.1 and 6.50, and Engineering Instruction 14.3.3A. Rule 6.50 requires that on-track equipment must move at a speed that will allow stopping in one-half the range of vision. Engineering Instruction 14.4.3A requires that on-track equipment be spaced 50 feet apart while working and 300 feet apart while traveling.

The Board concludes that the Claimant violated Rule 1.1 by his admitted failure to hold a job safety briefing for the purpose of apprising Mr. Lindley, the operator of the following machine, that he would stop on the main track for the purpose of turning his machine. He also violated Engineering Instruction 1.1.9 when he failed to use a radio or hand signals to signal the operator of the following machine when he stopped. The Board is not persuaded by the Claimant's argument that his machine was in neither the working mode nor the traveling mode when he stopped to turn

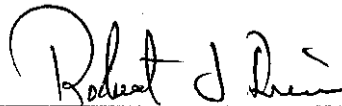
it. While proceeding from the siding at Rome to the site of their work, the machines were traveling.

Clearly, this Board cannot make a final and binding determination as to Mr. Lindley's responsibility for the collision, insofar as his appeal rights are concerned, and the findings in the instant case must not be cited in any case which Mr. Lindley may have before any other Board. Having said that, however, this Board is persuaded that Mr. Lindley shares responsibility for the collision in his failure to hold a job safety briefing, his failure to move at a speed that would have permitted him to stop within one-half his range of vision, and to maintain an interval of 300 feet while traveling. The Board is not unmindful that Mr. Lindley alleges that his brakes didn't function as he expected them to, but a safer interval would have easily allowed him to stop before striking the ballast regulator, despite the alleged brake problem. He said, himself, "If I'd had four more feet I probably would of stopped." (Answer No. 124.)


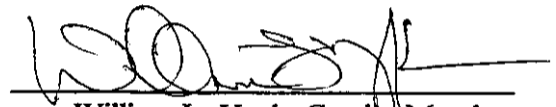
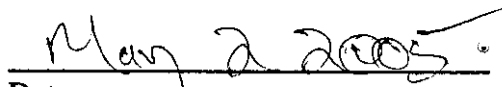
These responsibilities on Mr. Lindley's part, while beyond the scope of this Board's jurisdiction, are quite relevant to the Claimant's case, because the Organization asserts that the discipline assessed the two Principals was disparate. The Board agrees. In view of their shared responsibilities for the collision, the Board can see no reason for assessing differing degrees of discipline. The collision was preventable had either or both complied strictly with the several Rules applicable to their movements. Although the Claimant is not without responsibility for the collision, and the Carrier has borne its burden of proof, the 20-day record suspension will be reduced to a ten-day record suspension.

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
Date