

PUBLIC LAW BOARD NO. 5850

**Award No. 212
Case No. 212**

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Burlington Northern Santa Fe Railroad (Former
(ATSF Railway Company)

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement on March 11, 2002, when it issued the Claimant, Mr. E. Boyd, a 6-month suspension for allegedly violating Rules 1.1, 1.1.1, 1.1.2, 1.13, 1.20, 6.3, and 8.3.2 of the Maintenance of Way Operating Rules, Rule S-17.2.4 of the Maintenance of Way Safety Rules, and Rules 1.1.1 and 1.1.6B of the BNSF Engineering Instructions; for allegedly leaving his machine unprotected in a switching yard where it was struck by a railcar causing equipment damage and injury to himself.
2. As a consequence of the violation referred to in part (1) the Carrier shall remove any mention of the incident from the Claimant's personal record, and make him whole for any wages lost per the Agreement.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

On August 29, 2001, the Carrier advised Claimant and employee Hannah jointly that it was convening an investigation to:

"...determine all facts and circumstances surrounding ballast regulator being struck by empty articulated autoveyor car which resulted in injury to Machine Operator E. Boyd on August 23, 2001, at approximately 1430

hours at Richmond, CA, west end Richmond yard track 9123, 9124; so as to place responsibility, if any, involving possible 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); 1.20 (Alert to Train Movement); 6.3 (Occupying or Fouling Track); 6.3.2 (Protection on Other Than Main Track) of the Maintenance of Way Operating Rules in effect January 31, 1999, including revisions up to April 2, 2000; Rule S-17.2.4 (Fouling Track) of the Maintenance of Way Safety Rules in effect January 31, 1999, including revisions up to October 10, 1999; and 1.1.1 (Fouling the Track); and 1.1.6B (Responsibilities of Individual Roadway Workers) of BNSF Engineering Instructions Field Manual revised March 1, 2001."

Due to the injury of Claimant Boyd, the investigation regarding Claimant was held separately on February 14, 2002.

Of all the Rules cited, the most important to this investigation are Rules 1.1.1 and 1.1.6B. Rule 1.1.1 reads in pertinent part:

"Each roadway worker is responsible for determining that on-track safety is provided before fouling any track or assuming a position from which he or she could potentially foul a track while performing his or her duties...."

And Rule 1.1.6B reads, in part:

"Determine that on track safety is being provided before fouling a track."

Claimant was operating a ballast regulator working in a yard on Tracks 22 and 23. Leading to Tracks 22 and 23 is the switch leading to Track 19. To get to Track 19 through 24, the switch to 19 has to be opened, then open the switch to Track 23 and Track 24 switch is off Track 23 lead.

Claimant's machine was struck by two autoveyor cars coupled together and he was thrown off his machine and injured.

The switch leading to Track 23 was not locked, nor spiked, nor tagged as is required by the Rules. Had it been, the incident would not have occurred. Claimant's Foreman was Mr. Leroy Hannah and he was responsible for securing protection for Claimant's operation.

Claimant did not personally check to see if the switch was tagged, spiked and locked as it should have been, but he did ask his Foreman, on more than one occasion, if he was protected and the response was affirmative.

Because Claimant did not personally check to see if he was indeed protected as assured by his Foreman, he has been suspended for six months and disqualified as a Machine Operator for two years.

This is a catch 22 situation. If every Machine Operator and/or crew member could not rely on the word of his Foreman or any one else, but was required to see for himself if he was properly protected when fouling a track, obviously production would be greatly hampered, yet that is the way the Rule reads, and those Rules were violated by Claimant.

Claimant hired out November, 1989. Including this incident, he has had four occasions to partake in the disciplinary process. Two unrelated incidents in 1997, but one related incident in April, 2001.

Progressive discipline is intended to impress someone with the need to work by the Rules, but to assess a five day deferred suspension, and then for a second similar incident assess a six months suspension and a two year suspension of his Machine Operator's rights is unduly harsh.

Claimant's machine operating rights are restored with this Award. The six month suspension is reduced to 60 days actual. He is to be paid for all time lost in excess of 60 days as provided for in the Agreement.

AWARD


Claim sustained as provided in the Findings.

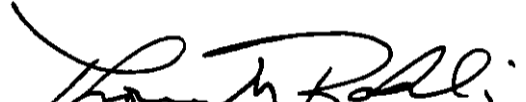
ORDER

This Board, after consideration of the dispute identified above, hereby orders that

an award favorable to the Claimant(s) be made. The Carrier is ordered to make the award effective on or before 30 days following the date the award is adopted.


Robert L. Hicks, Chairman & Neutral Member


Rick B. Wehrli, Labor Member


Thomas M. Rohling, Carrier Member

Dated: December 16, 2002