

PUBLIC LAW BOARD NO. 5850

**Award No.
Case No. 276**

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 April 13, 2005, when it issued Claimants, Messrs. C. Dixon and J. D. Garcia, Level S 30-day record suspension for allegedly violating Maintenance of Way Operating Rules 1.1.1, 1.1.2, 6.50 and 6.51 for Claimants failure to maintain a safe course, failure to be alert and attentive, and failure to follow rules governing traveling a track slewer machine resulting in the machine's derailment and injury to Claimant Dixon.**
- 2. As a consequence of the violation referred to in part (1), the Carrier shall immediately remove any mention of this incident from Claimants' personal records, and make them whole for any wages lost account of this incident.**

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.

Claimant Garcia ran or operated a TKO (tie knockout) machine, self-powered by a diesel engine of approximately 60 HP. Claimant Dixon operated a much smaller machine, a track slewer, self-powered by a 20 HP Briggs & Stratton engine similar to that used in a riding lawn mower. The TKO is much faster, larger and more powerful than the track slewer.

The machines were to be secured in a siding, referred to as a "hole." Claimant

Dixon's machine, being much slower, was apparently hindering the movement of the equipment to the hole. The TKO then commenced pushing the track slewer. It derailed at a crossing plank, throwing Claimant Dixon to the ground who did sustain an injury.

As is the custom, several track Supervisors were sent to the scene to determine the cause.

The three Supervisors testified at the investigation and it was their collective belief that each Claimant violated a number of Rules. This resulted in each Claimant being assessed a 30-day record suspension with a three year probationary period.

It is not a violation to push or tow machine units, but each machine must have a tow bar attached. Apparently, the tow bars are attached only when there is need for towing or pushing.

Claimant Garcia testified he attached the tow bar to his machine and Claimant Dixon was to do the same. The purpose of the attachment of the tow bar was to enable the TKO to push the track slewer (a much slower machine) along quicker so that they could be shuttled safely to the siding.

When the Track Supervisors were investigating the incident, each Claimant was to write a short note advising what occurred.

Claimant Dixon was not at the investigation although the Carrier followed the Rule in attempting to notify him of the investigation. Claimant Dixon wrote in his note that "Foreman said turn machine." The Board is not sure of what Claimant Dixon meant by the aforementioned, but Claimant Garcia testified the Foreman instructed him to push the track slewer to the siding, as it is a much slower machine.

Claimant Garcia stated he attached the tow bar and Claimant Dixon was to do the

same. Whether or not there was a tow bar attached to the track slewer was never established. The track slewer has a turntable and to move the machine over the track the turntable had to be in the up position to clear. Testimony was that the turntable was not up as it should have been. It snagged on the crossing plank throwing Claimant to the ground. This was determined by the Carrier witness from the marks found on the crossing plank and the turntable itself.

It is noted that the Foreman was not called to the investigation, and as stated, Claimant Dixon elected not to be there. Without their testimony, the Board assumes that the Foreman instructed the Claimants to have the TKO push the track slewer. It is also assumed as fact as there is no testimony to counter the evidence that the turntable was not being raised sufficiently.

Claimant Dixon clearly was in violation of Rule 6.50.3.

Although the Foreman may have instructed Claimant Garcia to push Claimant Dixon's machine to reach the siding quicker, but it is also fact no Supervisor has the right to order any of the employees to violate any of the Rules.

The fact that Claimant Garcia carries a tow bar that can be used to tow or to push other equipment convinces this Board that the TKO does tow or push as found necessary. Claimant Garcia also testified that his speed while pushing was only three to five miles per hour, but the Carrier witness testified that the slewer would have stopped movement when it hit the crossing plank if it was not being pushed as it would not be powerful enough on its own to override the plank.

Regarding the discipline assessed, Claimant Garcia was hired on May 4, 1998, and Claimant Dixon on March 12, 1984. Claimant Dixon's record contains a Rule 1.5 violation

and no other marks. Claimant Garcia had only one prior on his record, a formal reprimand for not wearing his seat belt.

Claimant Garcia has to accept some responsibility for not noticing a tow bar on Claimant's machine, but a 30-day record suspension with a three-year probationary period will be reduced to a formal reprimand.

Regarding Claimant Dixon, his failure to raise the turntable sufficiently to clear the tracks was the primary cause of the accident leading to his injuries. The 30-day record suspension is appropriate. His choice to not attend the investigation was at his peril.


AWARD

Claim partially sustained for Claimant Garcia but denied for Claimant Dixon.

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


William L. Yeck, Carrier Member

Dated:

9/29/09