

**PUBLIC LAW BOARD NO. 5850**

**Award No.  
Case No. 336**

**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 commencing February 28, 2008 when Claimant, E. J. Charley (6594220) was issued a Level S Record Suspension of 30-days with a probation period of one year for allegedly failing to lock out a machine prior to performing work on it at mile post 442.8 on Main 2 on February 6, 2008 at approximately 1520 hours violating Maintenance of Way Safety Rule S-3.1.6 and Engineering Instructions 1.10.2, and;**
- 2. As a consequence of the violation referred to in part 1 the Carrier should reinstate the Claimant with all seniority, vacation, rights unimpaired and pay for all wage loss commencing April 4, 2008, and remove any mention of discipline from their records.**

**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.**

**The Carrier wrote Claimant on February 23, 2008, advising an investigation was being convened:**

**"...to develop the facts and place responsibility, if any, in connection with possible violation of Rules S-3.1.6 of the Maintenance of Way Safety Rules, in effect October 30, 2005, as supplemented or amended, and Engineering Instructions 1.10.2 in effect August 1, 2006, as supplemented or amended, concerning your alleged failure to lock out a machine prior to performing**

work on it, at MP 442.8 on Main 2, on February 7, 2008 at approximately 1520 hours MST, while employed as a machine operator on RP17 working on the Seligman Subdivision."

The investigation was held on March 13, 2008, and on April 4, 2008, the Carrier notified Claimant he was being assessed a 30-day record suspension with a one year probationary period.

The Rule alleged violated was the tagout/lockout instructions which cover several pages. Those parts of the tagout/lockout instructions germane to this incident, read as follows:

"Tagout. A written warning tag used in conjunction with lockout hardware and attached to energy isolating devices. The tagout informs co-workers not to operate any switch, lever, or valve that has the potential to release energy or set a machine in motion. Tagout acts only as a warning device; it does not replace a lockout device.

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1. Normal equipment operation requires lockout/tagout when:

- A guard or safety device is removed or by-passed.
- Any part of an employee's body is placed in a point-of-operation.
- Any part of an employee's body is placed in an associated danger zone during a machine operating cycle."

Three employees, the Claimant and two Machinists, were working on a gauge spiker doing some welding on the top right side of the spiker.

Two Supervisors were checking to see if the steel gang employees were working safely.

When they saw the three employees working on the spiker, they checked the tag and locks and found only two locks and tags. There was no lock or tag for Claimant who

was the Machine Operator.

The two Mechanics were on the machine performing repair work with Claimant standing along the side handing welding rods to the one Machinist sitting on top of the machine.

One of the Machinists had been working as an instructor of the tagout/lockout procedure. He testified that at no time was Claimant placed in a point of operation, nor was any part of Claimant's body placed in an associated danger zone, nor did either of the Supervisors who were safety checking testify that they saw Claimant in a position of danger.

The Interrogating officer queried the Machinist with a number of "what if" questions, all hypothetical.

The Machinist instructor working on the spiker denied all the "what if" questions. He fully believed Claimant was in no danger and that it was not required of him to place a lock and tag on the spiker.

As required in all discipline cases, the Carrier must furnish sufficient evidence of a Rules violation. The two Supervisors simply saw three employees on or near the spiker. Neither testified that they witnessed Claimant place his body in a position of danger. If they had witnessed such action by Claimant and could so testify, it would not have been necessary for the Interrogating officer asking all the "what if" questions.

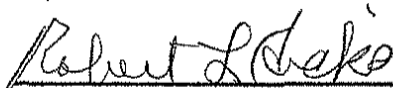
The Carrier failed to furnish sufficient evidence of a Rules violation. This has not been accomplished in this investigation.

**AWARD**

Claim sustained.

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



David D. Tanner, For the Employees



Samantha Rogers, For the Carrier

Dated: 12/5/08