

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY
(Former ATSF Railway)

Case No. 407 – Award No. 407 (Alanis)
Carrier File No. 14-10-0037
Organization File No. 190-13S2-101.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing February 2, 2010, when Claimant, F.J. Alanis (6525182) was allegedly improperly disciplined by Disqualification as an Automatic Spiker Operator.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this disqualification and reinstate his seniority as an Automatic Spiker Operator and he be compensated for his lost time and expense and otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, F.J. Alanis, has been employed by the Carrier since 1978. On February 1, 2010, Carrier Assistant Roadmaster Thomas Julik issued Claimant a letter stating that on January 27, 2010 he had been observed operating Automatic Spiker X4400363 at a rate of 243 seconds per 10 ties, which did not meet the nominal rate of 133 seconds per 10 ties. The letter continued that Claimant's observed production rate was not in accordance with the manufacturer's or Engineering Instructions' performance rates for

the machine, and he would be timed again in the near future. On February 2, 2010, Mr. Julik issued Claimant another letter, stating that Claimant had been observed on that date operating the same machine at a rate of 2.5 ties per minute, which did not meet the nominal rate of 4.5 ties per minute. The letter continued that Claimant's observed production rate was not in accordance with the manufacturer's or Engineering Instructions' performance rates for the machine, and therefore Claimant was immediately disqualified from the Automatic Spiker.

On February 8, 2010, the Carrier notified Claimant to attend an investigation in connection with his alleged unjust treatment by the Carrier's disqualification. Following the investigation, on March 12, 2010, the Carrier issued Claimant a letter stating that it had been determined that he had been justly disqualified, based on his inability to produce at the nominal production rate for the Automatic Spiker X4400363 as set by the manufacturer and Engineering Instructions 23.7.1, Performance Rates for Machinery Assigned to Tie and Rail Gangs and Bottleneck Management.

Carrier Engineering Instructions, 23.7.1, Performance Rates for Machinery Assigned to Tie and Rail Gangs and Bottleneck Management, provides, in relevant part:

Table 23-1 and Table 23-2 list peak and average minimum production rates for machines assigned to tie and rail gang respectively. After being given a reasonable opportunity to become proficient on their assigned machine, most operators will regularly achieve optimum production rates. All operators must maintain nominal production rates, provided things beyond their control do not hinder production.

Jimmy Capps, Carrier Assistant Director of Maintenance Production for the California Division, testified at the investigation that he oversees all production gangs in California. He stated that on or about February 1, 2010, the Gang Roadmaster informed him that he had run cycle times on Claimant, he did not meet expectations for the machine on which he was working, and the Roadmaster planned to give Claimant a letter. Mr. Capps further testified that at this point Claimant had been on the machine 20 or 21 days, and Assistant Foreman Frankie Tso had told him several times that something needed to be done about Claimant because he was not doing what he should for cycle times per minute and his spiker was getting behind.

Mr. Capps stated that he personally observed Claimant a few times, and Claimant had trouble spiking the ties to the 4½ ties per minute standard. He stated that Claimant was bending the spikes, had to get out of the machine several times to pull spikes with the claw bar and then had to back up and re-spike. Mr. Capps explained that he regularly observes the spiker operators' performance, and Claimant's performance was very poor in comparison to that of the other employees.

Mr. Capps explained that Claimant was operating the #4 Anchor Spiker, the last machine in the consist. He stated that Claimant did not have a helper loading spikes in the chute for him, so he did that on his own. Mr. Capps explained that only the #1 and #3

spikers had spike feeders, because the #1 does all the line spikes and #3 tries to get as many of the anchor spikes as he can. He stated that the operator can put 60 or 70 spikes in the chute and do 60 or 70 ties before he has to re-load the machine.

Mr. Capps added that if there was a problem with bent spikes, Claimant would have to get off the machine and pull them himself. Mr. Capps stated that Carrier policy is that if an operator bends a spike it is his responsibility to pull it out and spike it again.

Thomas Julik, Carrier Assistant Roadmaster with Tie Gang TP-02, explained at the investigation that he looks out for places where there are large gaps between machines performing work, which is a quick visual way to identify machines operating at a slower production rate than the machines ahead of them. He stated that during the time Claimant was operating the spiker, he timed his production during several different cycle times. He explained that Table 23-1, the performance rate from Carrier's Engineering Instructions, sets forth specifically the nominal - or bare minimum - and the optimal production rates for the particular machine.

Mr. Julik stated that he informed Claimant that he was required that he meet the nominal production rates so that he could keep up with the gang and not burden his co-workers with having to do more than their share. He pointed out that the table provided X44, Nordco, Automatic Spiker, CX, at Optimum Production Rate ties/minute 7, nominal production rate ties/minute 4.5, optimum per 10 ties second 86, nominal per 10 ties second, for two operators/one feeder, and Claimant would fall into this two-operator category.

Mr. Julik further testified that he discussed with Claimant the reasons for performing cycle times with him, and Claimant responded that Mr. Julik was focusing too much on the numbers and that was not what really counted with respect to production. He explained that Claimant told him that, with his focus on numbers, Mr. Julik did not care about the quality of the work. Mr. Julik informed Claimant that the other Spiker Operators were able to achieve a much higher production level while maintaining high level quality. He stated that Claimant had mentioned that there were a few mechanical issues with his machine, but they had all been corrected by the last time he cycle timed him.

Mr. Julik further explained that at the relevant times Claimant did not have a feeder with him, but with-feeder cycle times ensure that the time it takes to reload the spiker is not counted. Mr. Julik further explained that although the Engineering Instruction rates are for one or two operators/one feeder, the machine is designed so that the chute can hold a substantial amount of spikes. He stated that only when the chute is exhausted would a feeder have any effect on the production. Therefore, he added, provided Claimant did not run out of spikes during the period of cycle-timing, the fact that he had no feeder would not affect his achieved production rate. He stated that when he timed Claimant he ensured that he had a full rack of spikes so that his production rate would not be hindered. He stated that every time Claimant was cycle-timed he made sure Claimant did not have to actually stop and perform feeder work.

Mr. Julik stated that on January 27 he took an average of several time periods during which Claimant was operating the machine. He explained that on February 1 he gave Claimant the letter specifically describing the standard rates and Claimant's performance, and the next time he timed Claimant he made sure Claimant was aware he was going to do so, although he did not tell him exactly when he would start the cycle times.

Mr. Julik further testified that Claimant had three weeks on the machine, 21 calendar days, and during that time he did not see any marked improvement in his production rates. He added that after the second timing, he presented him with a disqualification letter. He stated that during his observation of Claimant he noted that he seemed to have a difficult time aligning the spikes with the spike hole, and would often try to grab the spike and hit the plate and have to start over. Mr. Julik stated that he had several discussions with Claimant concerning expectations for his performance. He testified that Claimant did not make any request for a feeder, or a different machine, or anything to help him become proficient. Rather, he stated, Claimant simply asked for additional time.

Mr. Julik added that he did not take an isolated look at Claimant's work performance, but rather observed him spiking 45 ties, which took him 43 minutes, far below the nominal rate. He stated that Claimant's performance was well below that of the other spikers, and his lack of performance caused the other operators to have to fill in the extra that Claimant should have been performing. He added that of his eight spikers four have a feeder and four do not, but the production rates for the spikers who do not have feeders far exceed Claimant's. Mr. Julik acknowledged that Claimant had been pulled off the machine to act as a feeder but stated that he spent far more time operating the spiker than feeding for anyone else. He did state that Claimant had informed the mechanics that there was a problem with the nipper on his machine, but the spikes he was driving were already spiked to the rail when he arrived at the ties, and nipped up tight, so the nipper would not have much of an impact. He also stated that the spikers who were operating ahead of Claimant were not using their nippers and were able to function well and perform at a much higher rate.

Mr. Julik acknowledged that he gave Claimant the first letter concerning his performance on February 1 and the second one on February 2. However, he stated, the Assistant Foreman told him he gave Claimant the cycle-time information on the Wednesday on which he was first timed, and Claimant was not disqualified until the following Tuesday.

Michael Putt, Carrier Manager of Special Projects, testified at the investigation that it is his responsibility to audit Production Gangs, and he observed Mr. Julik performing cycle times on Claimant, and Claimant's performance was less than desirable. He explained that not all spikers have a feeder with them, because of manpower allocation on the gang. He added that the lack of a feeder would not cause an operator to

fail to meet nominal production rates because there are so many spikes in the tray and he operator is only timed for a 60-second period of activity. He explained that although the lack of a feeder might affect an employee's overall production, he would not affect a one-minute cycle time because the employee would have sufficient spikes. He stated that it was his practice to give an employee every opportunity to demonstrate his ability to meet minimum standards so he would observe an employee several times, perhaps give him another opportunity if, for example, a spike became bent.

Mr. Putt stated that he considered approximately 30 days a reasonable time for an employee to become proficient on the machine. However, he stated, at the time he observed Claimant he had been on the machine for 21 days, and was not meeting cycle time expectations. Indeed, he stated, Claimant's average was 2.5 per minute, and nominal is 4.5.

Franklin Tso, Assistant Foreman, testified at the investigation that he had talked to Claimant two to three times concerning his performance on the Spiker. He stated that he was not aware of any circumstances that should have kept him from operating the machine properly, although he acknowledged that at one point Claimant told him that the machine needed to have a few minor parts replaced. Mr. Tso stated that this would not have affected Claimant's performance. He added that did not believe that the lack of a feeder impeded Claimant's performance, as an employee can operate the spiker by feeding it himself and can keep going. He also stated that he had pulled Claimant off the machine for three or four days to act as feeder for another employee.

Curt Wolke, Travel Mechanic, testified at the investigation that during the time period at issue Claimant said he needed a mechanic, so Mr. Wolke went over and looked at Claimant's machine. He stated that he ran the machine for about 10 minutes, and it ran well with no problems. He explained that the nipper had been out of service, as Claimant had asserted, but that would not affect the operator's ability to insert spikes properly or cause spikes to bend. He stated that he could not recall that Claimant had any other complaints about the machine.

Claimant testified at the investigation that he had never run the Spiker before, and was doing the best he could. He acknowledged that he told the foreman and members of the gang that he was slow and up in age, but would do his best, but was not that fast. He added that he was supposed to have another operator with him, but that employee was moved to help out elsewhere and he was by himself on the machine at the relevant times. He stated that he ran it a fair amount, a little bit for a few days.

Claimant maintained that when he first started no one explained to him the production rates for the machine. He stated that it was first explained to him when Mr. Tso told him he would be cycled timed, and wanted him to sign and initial a sheet of paper showing his cycle times, which he refused to do.

Claimant also maintained that he and Mr. Julik did not discuss his cycle times until Mr. Julik gave him the first write-up on the end of shift Monday, February 1, telling

Claimant his times and the expectations. He stated that the next day, between 11 a.m. and 1 p.m., he heard Mr. Tso on the radio asking Mr. Julik if he had typed up the paperwork, and Mr. Julik replied that he was working on it. Mr. Julik testified that he did not recall that any such conversation took place. At the end of that day's shift, Claimant stated, he received the disqualification notice.

Claimant stated that he had requested a feeder, and the gang members all got together and asked for feeders. Claimant did not identify whether he had made that request to any Carrier officers. Claimant also stated that the fact that the nipper was not working on his machine added to his production problems, because it caused the tie to move and bounce when he drove it. He added that when he first got on the machine there was a problem with the guns, the mechanisms that actually drive the spikes, as the spike would not kick properly and he had to put the gun down and shake it. He also stated that he was not on the machine the entire 21 days he was assigned to it, as he was pulled off and only operated the machine about eight to 10 days.

The Organization asserts that the disqualification of Claimant, a 61 year old employee with 33 years of total service and 25 years as a Machine Operator, cannot be justified. The Organization points out that Claimant was assigned to the machine at issue on January 11, 2010, and although there are usually two operators and a feeder on each Spiker Machine, Claimant was required to operate the machine alone. Therefore, the Organization states, he had to both operate and feed his own spiker, compounding his duties.

Moreover, the Organization points out, Claimant was only allowed to operate the Spiker eight to 10 actual work days of the 21 calendar days he was assigned to the position. The Organization notes that Claimant was audited and observed on January 26, 2010, and at the close of the shift on February 1 he was issued a letter stating that he needed to improve. The Organization states that the very next day, between 11 a.m. and 1 p.m., he was disqualified. Certainly, the Organization urges, four hours' work time is not enough to determine whether an employee can improve his performance enough to maintain his position. In particular, the Organization points out, the Carrier's Manager of Special Projects admitted at the investigation that it takes a minimum of 30 days to become qualified to operate a piece of equipment. Claimant, the Organization stresses, had only 21 days at best, and did not operate the machine on all of those days.

Further, the Organization contends, the record demonstrates that Claimant's machine experienced mechanical problems. The Organization states that the nippers, the clamps which grab the tie, pull it tight against the rail and keep it from turning or moving, were not working. Moving and rolling, the Organization explains, is the reason spikes become bent and will not drive properly or quickly enough. The Organization notes that one of the major complaints against Claimant was that he had issues with bent spikes.

The Organization asserts that the one of the guns, the device that actually drives the spikes into the ties, was also malfunctioning. This situation, the Organization states, can also cause a spike to not drive properly or quickly enough, impairing the employee's

production rate. All of these mechanical problems, the Organization contends, were repaired after Claimant was removed from the machine.

The Organization concludes that given these mechanical problems, insufficient break-in time, and the minimal period Claimant was given in which to improve, the discipline issued is extreme, unwarranted, unjustified and not supported by any flagrant abuse of Carrier rules. Even if the allegations had been proven, the Organization urges, the discipline issued is excessive.

The Carrier first points out that this is not a discipline case; rather, it disqualified Claimant. The Carrier asserts that the burden is on the Organization to demonstrate that Claimant has sufficient qualifications to run the Automatic Spiker X4400363 in a manner that avoids a potentially serious incident on the rails and possible injury to employees or the public.

On the merits, the Carrier points to the testimony of several Carrier witnesses that Claimant did not meet expectations as a spiker operator, as he was operating below the speeds of the other operators and could not keep up. The record shows, the Carrier notes, that Claimant's machine was in good working order, and Claimant was given ample time to qualify on the Spiker but just could not keep up.

Further, the Carrier states, Roadmasters observed Claimant on several occasions, following which they discussed with him the fact that he was not meeting production requirements. Moreover, the Carrier points out, Claimant admitted, during the investigation, that he was slow on the machine. This statement, the Carrier asserts, is sufficient proof of its assertion that Claimant was properly disqualified. The Carrier urges that the claim be denied.

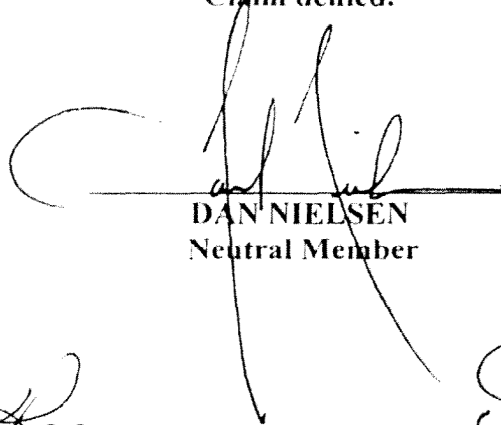
We have carefully reviewed the record in its entirety. It is well settled that the Carrier has the right to determine employee qualifications, and such determinations should not be disturbed by the Board unless they were made in an arbitrary manner. There is no such showing here. The record demonstrates that Claimant, after a substantial period of time on the machine, was operating at approximately half of the minimum production rate, and the Engineering Instructions required that after a reasonable time an employee regular achieve optimum production. Although it is true that he received the warning and disqualification letters on two consecutive days, the record also reflects that Carrier officials communicated to him, through his time on the machine, the need to increase his production rate, and he offered no indication that he would do so. Instead he conceded that he was slow, and argued that the Carrier's focus on production numbers was incorrect, and that they should instead focus on quality. Yet there is nothing to show that his quality of work was in any way superior to that of all of the other Automatic Spiker Operators who were working twice as fast as he was, and in any event it is not up to the individual employees to define production standards for their jobs. His other explanations for slow performance were successfully rebutted by the Carrier. The claim that his machine was defective is contradicted by Mr. Wolke, the

mechanic he called over to examine it. Mr. Wolke credibly testified that he operated the machine for ten minutes and found nothing wrong with it, other than the nippers.

The Carrier determined that Claimant did not, and was not likely to, possess the ability to meet its standards, and communicated its specific reasons for that conclusion to the Claimant. The Organization has not successfully rebutted the Carrier's rationale for Claimant's disqualification.

AWARD

Claim denied.

A large, stylized handwritten signature in black ink, appearing to read 'Dan Nielsen', is written over the printed name and title.

DAN NIELSEN
Neutral Member

A handwritten signature in black ink, appearing to read 'Samantha K. Rogers', is written over the printed name and title.

SAMANTHA K. ROGERS
Carrier Member

A handwritten signature in black ink, appearing to read 'David Tanner', is written over the printed name and title.

DAVID TANNER
Organization Member

Dated this *28* day of *Sep*, 2012.