

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 414 – Award No. 414 – Claimant: Adams

Carrier File No. 14-10-0239

Organization File No. 10-13N1-1069.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing October 20, 2010 when Claimant, Robert Adams (6426118), was issued a Level S 30-day Record Suspension with a 1 year review period, concerning his failure to use Proper Tool and his Carelessness and/or Negligence when removing an anchor resulting in a personal injury to himself on July 20, 2010. The Carrier alleged violation of MOWOR 1.6 Conduct, MOWSR 7.7 Correct Tool Use and MOWSR 7.8.1 Spike Maul.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline 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, Robert Adams, was hired by the Carrier in 1972. On July 23, 2010, the Carrier notified Claimant to attend an investigation for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with his alleged failure, on July 20, 2010 at MP 40.2, while assigned as a Track Inspector in Eola, Illinois, to use the proper tool and carelessness and/or negligence when removing an anchor. Following the investigation, the Carrier found Claimant guilty of the misconduct alleged, in violation of Maintenance of Way Operating Rule 1.6 Conduct and Maintenance of Way Safety Rules

7.7 Correct Tool Use and 7.8.1 Spike Maul. Taking into consideration Claimant's personal record and the Carrier's Policy for Employee Performance and Accountability (PEPA), the Carrier assessed him a Level S 30-day record suspension with a one-year review period.

The applicable Carrier rules provide, in relevant part:

Maintenance of Way Operating Rules

1.6 Conduct

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent

Maintenance of Way Safety Rules

S-7.7 Correct Tool Use

Use tools only for what they are designed to do. If unsure about a tool's correct use, ask your supervisor.

S-7.8 Track Tools

S-7.8.1 Spike Maul

Do not use a spike maul to remove or replace anchors or drive wedges, or for other purposes.

James Robinson, Carrier Roadmaster at Eola, Illinois, is the direct supervisor of Claimant and his co-worker Ruben Valencia. He testified at the investigation that at the time of the incident Claimant and Mr. Valencia were straight railing a switch and removing the rail anchors and switch point stock rail in order to install a straight piece of rail at the location. Mr. Valencia sustained an injury, and Mr. Robinson said that in the ensuing investigation he learned that the employees had been removing an anchor with a spike maul and a sledgehammer. He explained that this was the reason Claimant was not named on the original notice of investigation.

According to Mr. Robinson, the sledgehammer struck the spike maul and a piece of steel came off, injuring Mr. Valencia's leg. Mr. Robinson maintained that the proper tool for removing rail anchors is a "Monday maul" or compact sledgehammer, not a spike maul. He explained that a spike maul is an elongated tool used to drive spikes, which has a six to eight inch head with a thick area and then on the opposite end a six or eight inch head with a slightly thinner area. It is specifically used to drive spikes, and is essentially an elongated sledgehammer.

Mr. Robinson added that the spike maul and sledgehammer are striking tools, and are not intended to be struck by another striking tool. He stated that tools intended to be struck have a rhino lining, rubber coating or rubber cap on the striking end to retain any broken pieces, a protectant to keep an injury like this one from occurring.

Mr. Robinson maintained that the two employees were initially using a spike maul to knock off the anchors, and he told Mr. Valencia in passing, to use the proper tool. He stated that Mr. Valencia went back to the truck to get the Monday maul, and Mr. Robinson walked away. He added that he walked away when Mr. Valencia went back to the truck to get a different tool. Mr. Robinson acknowledged, however, that he was present in the area when the injury to Mr. Valencia occurred.

Mr. Robinson stated that Claimant was holding the spike maul for Mr. Valencia to strike. Mr. Robinson explained that between the switch point stock rail there was a space where the spike maul or the sledgehammer could not knock off the anchor, so the employees used the spike maul to gain additional access to that point.

Mr. Robinson explained that in cases of a clearance issue or tight location the proper procedure is to use the Monday maul or to find an alternate way to do the work without removing the anchors or to use a punch to strike and remove the anchors. He stated that the rail could have been taken out with the anchors on it. Mr. Robinson stated that he did not recall and did not know why he did not stop the employees from removing the anchors and instruct them to perform the job in this manner. He stressed that it is not common practice to strike a spike maul with a sledgehammer, and to use the tools as the employees did violated Carrier rules.

Mr. Robinson also prepared a written statement concerning the relevant events. In it, he stated that he had been watching the men perform the work at issue, but gave no further account of the incident itself, just the subsequent events dealing with Mr. Valencia's injury. He maintained at the investigation that the statement was meant to only address the handling of the injury after it occurred. At the hearing, he maintained that when he returned to the jobsite he saw that Mr. Valencia again had an improper tool, but could not react quickly enough to stop him before he was injured. Mr. Robinson stated that the anchor that resulted in the injury was the first one he observed being removed in this manner. Mr. Robinson stated, in response to a leading question, that he told Mr. Valencia not to use the spike maul to remove the anchors. He reiterated that the written statement was more of a timeline for how the injury was handled after it occurred, not an investigation of the injury happened.

Claimant acknowledged at the investigation that he used a spike maul on the anchor they were attempting to remove while Mr. Valencia was striking it with a Monday maul. He stated that he was not aware of a proper tool, but the procedure the employees used had been common for years to use a spike maul in tight locations. He stated that he did not believe they could have used a punch in the area.

Claimant testified that Mr. Robinson was present and observed the manner in which he and Mr. Valencia were knocking off the anchor, and did not tell them not to use that tool. He stated that the head of a sledgehammer is about 4 ½ inches wide, and the narrowness behind the heel blocks is about four inches. In other words, he explained, the sledgehammer, apparently the Monday maul, is the proper tool to remove anchors

physically, but it would not fit in this situation because the anchors were too close together. Claimant added that he was not swinging the spike maul but was simply using it as an extension. He stated that Mr. Robinson took no exception to their work even though he observed them knock off four or five anchors in this manner.

Mr. Valencia gave a written statement at the time of the incident, which was read into the investigation record. Mr. Valencia testified at the investigation that at the time of the incident he and Claimant were engaging in their normal procedure for removing anchors. He also maintained that Mr. Robinson never told the employees to utilize the proper tool. He stated that he was removing the anchors by himself until he got into a tight spot where the sledgehammer did not fit in between the rails and he could not swing because there was no way to knock off the anchors using the usual procedure. He stated that in these situations they use a spike maul in tight areas. He added that Claimant just voluntarily helped him with the task. He also stated that he was familiar with the rubber attachment on tools intended to be struck to keep them from splintering.

Mr. Valencia acknowledged that he had seen rubber striking protectant on a drift pin, a spike lifter and a punch but had never seen one on a spike maul. He stated that the protectant was there because each tool is the proper one for certain jobs.

The record indicates that Mr. Valencia filled out two different copies of an injury report following the incident. Mr. Robinson explained at the investigation that although Mr. Valencia checked a box indicating that the injury could have been prevented, he did not complete the follow-up question asking what could have been done. Mr. Robinson stated that Mr. Valencia was subsequently asked to complete the answer, and added "not doing the job that way" and initialed the form. He maintained that Mr. Valencia wrote all of the words that were added to the injury report.

Mr. Valencia testified that he did not recall leaving the answer to the question blank. He stated that he did write "not doing the job" but the rest of the answer, "that way," was added by Mr. Robinson and he felt "in a way" forced or intimidated to initial the addition.

The Carrier's PEPA provides that an employee involved in a serious incident, as enumerated in the policy's Appendix B, will receive a 30-day record suspension and may be offered training to correct the underlying behavior. Appendix B lists as serious violations numerous safety infractions as well as "other serious violations" of Carrier rules. Claimant's personal record shows, prior to this incident, a 30-day record suspension with a 12-month review period issued January 3, 2005 for failure to be alert/attentive and have control of a vehicle, resulting in a collision.

The Carrier asserts that this case is not complicated, as the testimony of Roadmaster Robinson demonstrates that he instructed Claimant and Mr. Valencia to get the proper tool before they began to remove an anchor so that they could complete switch and track repair work. The Carrier notes that it is undisputed the employees used a spike maul and a sledgehammer, also known as a Monday maul, to remove the anchor.

Instead, the Carrier contends, they should have used a tool with a protective plastic coating which does not allow splinters to break off while the tool is in use. The Carrier points out that Claimant admitted he used a spike maul, which the Carrier asserts was the incorrect tool. This admission, the Carrier urges, is sufficient to satisfy its burden of proving that Claimant violated the applicable Carrier rules.

The Carrier states that the Organization's only defense is that the Personal Injury Report submitted by Mr. Valencia was altered between the time he first filled it and when it was submitted into evidence at the investigation. Mr. Valencia's testimony, the Carrier notes, explained that he failed to complete a question when he first filled out the form, and completed and initialed it later. Both forms, the Carrier points out, were submitted into evidence so nothing fraudulent occurred. In any event, the Carrier states, the Personal Injury Report has no direct relationship to the fact that Claimant used the wrong tool and injured his co-worker. The Carrier concludes that it has proven the charges against Claimant and there is no reason to disturb the penalty assessed. The Carrier urges that the claim be denied.

The Organization raises procedural and substantive challenges to the discipline assessed against Claimant. First, the Organization points out that the charges were originally filed against Mr. Valencia because of his injury, and the Carrier added Claimant later in an attempt to hide its intimidation of the employees for filing an injury report. The Organization disputes the Carrier's assertion that it filed the charges against Claimant at first notice, as the Roadmaster was present when the injury occurred and was aware of any involvement by Claimant from the beginning. Moreover, the Organization states, the Carrier clearly prejudged Claimant's guilt, as he was never asked about what happened, nor was he requested to provide a written statement.

The Organization further contends that the Carrier submitted an altered injury report into evidence at the investigation. The Organization points out that in the original injury report Mr. Valencia answered the question "Could you have prevented your injury?" in the affirmative, but the follow-up question, "If so, how?" was not answered. The altered copy, the Organization notes, had the question answered, "Not do the job that way RMV." The Organization points to Mr. Valencia's testimony that he wrote only, "Not do the job," and "that way" was added by Mr. Robinson. The Organization further notes Mr. Valencia's testimony that Mr. Robinson then required him to initial the last two words. These alterations, the Organization argues, show that the investigation was not conducted in a fair and impartial manor.

On the merits, the Organization disputes the Carrier's conclusion that Claimant used an incorrect tool. The Organization asserts that Mr. Robinson testified that there was an area of the switch that could not be reached with a sledgehammer, which is the reason Claimant and his co-worker used the spike maul as an extension to gain access to that area. The Organization asserts that Mr. Robinson's suggestion that the employees could have used a punch would have put them in harm's way because they would have had to hold the punch in place. In comparison, the Organization states, using the spike maul as an extension allowed the employees to hold the tool at the end of the wooden

handle, which would not place them in harm's way. Further, the Organization states, it is not unusual for a spike maul or hammer to chip when striking an object, which is why employees are instructed to inspect their tools daily to find any possible defects. The Organization also asserts that while MOWSR 7.8.1 states that the spike maul is not to be used to as a driving force, to remove or replace anchors or drive wedges, nothing in the rule prohibits the tool from being used as an extension.

The Organization further notes that while Mr. Robinson testified that he had instructed the employees to use the proper tools, he was present during the incident and did not take any exception to the tools used until after Mr. Valencia was injured. The Organization stresses that in his written statement, which was entered into evidence, he never mentioned that he told the employees not to use the spike maul, but he contradicted that statement in his live testimony. The Organization notes the employees' testimony that it is common to use the spike maul as they did here, and Mr. Robinson could point to no rules or instructions prohibiting the practice, nor did he have any experience actually performing the tasks at issue. The Organization concludes that it is very questionable whether Claimant violated any rules. Moreover, the Organization asserts, even if the charges had been proven, the discipline assessed in excessive in proportion to the offense. For all of these reasons, the Organization urges that the claim be sustained.

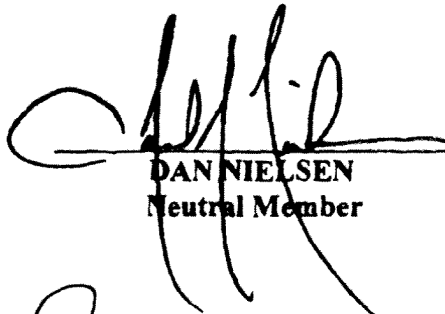
We have carefully reviewed the record in its entirety. First, we find no evidence of any procedural irregularity which denied Claimant his right to a fair and impartial investigation. While we agree with the Organization that it appears that the Carrier was aware of Claimant's involvement in this incident from its occurrence, Claimant was charged within three days and the Organization has pointed to nothing in the Agreement which prohibits the Carrier's actions. We find further that whether Mr. Valencia altered, or was required to alter, his injury report has no particular relevance to the question of whether Claimant used an improper tool for the job, resulting in an injury, in violation of the Carrier rules.

On the merits, we first conclude that Mr. Robinson did instruct the employees to use the proper tool for the job. Although they denied this, the Hearing Officer credited Mr. Robinson, and credibility is an issue for the Hearing Officer. While Mr. Robinson instructed the employees to use the "proper tool," it is unclear whether he actually instructed them as to what that tool was. What is clear, however, is that the employees did not use the proper tool. First, we cannot accept the Organization's argument that Mr. Robinson essentially condoned their conduct, as he explained that he only observed them when it was too late to intervene to prevent the injury. Second, while the applicable Carrier rule is not entirely clear as to the tasks for which the spike maul is to be used, it is clear that it is not to be used to remove anchors, as the employees were doing here. While they contended that they were simply using it as an extension and not a tool to be struck, the difference is entirely a matter of semantics. In order to be used as an extension, it had to be struck. The employees' testimony, along with the injury caused by a piece of the tool flying off, illustrates why calling it an "extension" makes no substantive difference. The injury to Mr. Valencia demonstrates exactly why the tool was not to be used in this manner. Claimant's guilt has been proven by substantial

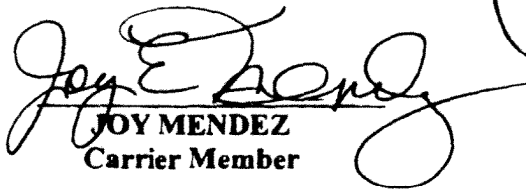
evidence, and we cannot say that the penalty assessed represents an unfair, arbitrary or discriminatory exercise of the Carrier's discretion to determine penalties.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID TANNER
Organization Member

Dated this 21st day of May, 2013.