

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 10-14-0158
Organization File No. C-14-D040-7

Claimant — Robert W. Crouse

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement on February 14, 2014, when it issued a Level S 30 Day Combined Suspension to Claimant, Robert W. Crouse for violation of MWOR 1.6 Conduct, MWOR 1.12 Alert and Attentive, and MWOR 6.51 Maintaining a Safe Braking Distance, in connection with Claimant's failure to maintain a safe braking distance resulting in a machine collision, at approximately 1445 on Thursday, January 23, 2014 at or near MP 1035.9 on the El Paso Subdivision .**
- 2. As a consequence of the violation referred to in part (1), Claimant's record should be cleared of the discipline and any mention of the investigation and shall be made whole for any losses.**

BACKGROUND:

The Claimant entered service with the Carrier on April 16, 2012.

The facts of what occurred are not in serious dispute. On January 23, 2014, System Gang TP03 was working on new wood cross-tie installation between MP 1038.5 and MP 1036.1 on the El Paso Subdivision of the Southwest Division. At about 1440 hours, several of the large machines "ramped down," including Spike Puller #1,

Spike Puller #2 and a Kicker Tie Extractor. Spike Puller #1 pulled ahead to do some work with a flagger. The operator of the Kicker Tie Extractor, David Moreno, radioed the subgroup coordinator to advise that he would be locked out and tagged out for routine maintenance. However, he did not follow the protocol for locking out and tagging out, which required him to advise the machines on either side of his of his location and that he was locking out and tagging out. The Claimant was operating Spike Puller #2, behind Spike Puller #1 and in front of the Kicker Tie Extractor, getting ready to prepare for the next day's work.

At the investigatory hearing, the Claimant explained what happened next:

I was up ahead of the gang pulling rails spikes for the next day's work. Spike Puller #1 had traveled on for flag movement for the Foreman. I stopped at a certain point because the ties had stopped being marked. Spike Puller #1 was coming back from what he was doing so I moved back to give him room to come back in case he had to prep as well. When I was reversing, I had the tie kicker in my mirror. I'd seen him there.... As I was backing up there was a box of spray cans, tie marking paint, in the tracks. I reached for my radio to let Spike Puller #1 know that it was there. I said, "Spike Puller two to Spike Puller one," I looked in my mirror, I was too closer [sic], I hit my brake and it was too late. I struck his machine [the tie kicker].

Claimant estimated that he was reversing slowly, at "slightly more than walking speed." By way of explanation, he stated, "I allowed myself to become distracted." Fortunately, no one was hurt and there was no damage to either machine. In cases of accidents involving operating equipment, it is the Carrier's standard operating procedure to remove the operator(s) and withhold them from service pending investigation. Per the practice, both the Claimant and Moreno were removed from service.

The Carrier sent Claimant a Notice of Investigation dated January 27, 2014, indicating that an investigation would be held "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged negligence and carelessness of your safety and others when you allegedly failed to maintain a safe braking distance between your spike puller and a tie kicker resulting in a machine collision, while working as Machine Operator on TTPX0003 at approximately 1445 on Thursday, January 23, 2014 at or near mp 1035.9 on the El Paso Subdivision ." The hearing was held February 1, 2014. Claimant testified as set forth above, and expressed his sincere remorse for the accident. The operator of the tie kicker, Mr. Moreno, testified that he had stopped his machine and was standing by the

side of his machine, greasing the wheels, when he heard a reverse back-up alarm and looked up to see Puller Two “feet from the front end of the kicker,” which then ran into the kicker. Moreno stated that he was startled but did not feel that he was in any danger:

It was just no big deal. I wasn’t in any danger at all. I just, you know, just heard some noise, looked back and seen the machine and I just got out of the way basically then. So, no one was in any danger. It was probably less than five miles an hour.

Moreno confirmed that no one was hurt and there was no damage to either machine.

MOWR 1.6, Conduct, states, in relevant part:

Employees must not be:

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

Any act of ... willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.

MOWR 1.1.2, Alert and Attentive states:

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

MOWR 6.51, Maintaining a Safe Braking Distance, states, in relevant part:

On-track equipment operators are responsible for maintaining a safe braking distance between their on-track equipment and other on-track equipment, trains and engines.

For purposes of this rule:

Working mode will apply to on-track equipment stopped or moving slowly in the performance of maintenance activities. Traveling mode will apply to on-track equipment moving to and from a work location or performing inspection activities.

On-track equipment operators must:

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On-track equipment may be “bunched” when stopping. When equipment is being bunched, all employees must remain clear of the track until the entire movement has stopped unless otherwise instructed by the employee in charge....

- Maintain at least 50 feet between on-track equipment during working mode unless a job briefing establishes a shorter distance... While in working mode, it is the responsibility of all on-track equipment operators to maintain a safe distance between their equipment and other men and equipment.

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By letter dated February 14, 2014, Claimant was notified that he had been found in violation of MWOR 1.6 Conduct, MWOR 1.1.2 Alert and Attentive, and MWOR 6.51 Maintaining a Safe Braking Distance. The discipline assessed was a Level S Combined Suspension and a three-year review period. The combined suspension was 25 days actual suspension from January 24, 2014, through February 17, 2014, and 5 days Record Suspension. The Organization filed a timely appeal. The parties having been unable to resolve the matter through the grievance process submitted it to the Board for a final and binding decision.

FINDINGS AND OPINION:

Public Law Board 7602, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Board has jurisdiction over the dispute involved herein.

Before addressing the substance of the claim, the Board must first address a threshold procedural issue raised by the Organization, that the Notice was untimely, which requires that the matter be dismissed. Pursuant to Rule 40, employees and the Organization are entitled to five days' notice prior to any investigation being held. The original notice was dated January 27, 2014, for a hearing on January 31, 2014, only four days later. The Organization protested, and the date was changed, to February 1, 2014. In addition, when the Organization raised the objection again at the hearing, the Hearing Officer offered in no uncertain terms to recess the hearing to give the Claimant and the Organization whatever time they needed to prepare:

I'm going to ask you one more time if you need to take a recess right now for a day or a week or however much time you want to allow yourself and Mr. Crouse to prepare whatever type of defense you want for Mr. Crouse. Do you want to do that now?

After consulting with the Claimant, the Organization declined the offer. Whatever the initial problems with the timing of the notice, the Carrier cured them, first by changing the date of the hearing and then by offering the Claimant and the

Organization an unqualified opportunity to recess the hearing in order to give them time to prepare. The Organization's procedural objection is denied.

Turning to the merits of the claim, there is no dispute that the Claimant backed Spike Puller #2 into the Tie Kicker that had been operated by David Moreno. Nor is there any dispute that the Claimant was the cause of the accident: the Tie Kicker was stopped at the time the Spike Puller made contact with it. Mr. Moreno had not contacted the Claimant to inform him of the Tie Kicker's location, as required by the lock out and tag out protocol, but the Claimant was aware that the Tie Kicker was behind him—he acknowledged that he had seen it in his rear view mirror as he was backing up. The accident occurred when he attempted to radio Spike Puller #1 to warn the operator of a box of paint cans fouling the track. It appears that in doing so, he momentarily lost sight of the Tie Kicker, both literally and figuratively, and when his attention was once again on the reverse move he was making, it was too late to avoid making contact with the Tie Kicker.

The evidence establishes that the Claimant was in violation of MWOR 1.6, Conduct, in that he was negligent in backing into the Tie Kicker; he was in violation of MWOR 1.1.2 in that he failed to be sufficiently alert and attentive to avoid running in the Tie Kicker that he had already seen behind him; and he was in violation of MWOR 6.51, Maintaining a Safe Braking Distance, which requires on-track equipment operators "to maintain a safe distance between their equipment and other men and equipment." Had Claimant maintained that safe distance, he would not have run into the Tie Kicker.

The real issue before the Board is the level of discipline imposed on the Claimant, a 30-day Level S combined suspension composed of 25 days actual suspension and 5 days record suspension. Immediately following the accident, the Carrier removed the Claimant from service, and the actual suspension coincided with the time he had been held off work. The Board has previously held that removing employees involved in accidents from service pending investigation does not constitute prejudgment and does not violate the Agreement. (Public Law Board 3460, Award 11.)

The Carrier contends that it assessed Claimant's discipline consistent with the PEPA. The PEPA defines three levels of violations of the Carrier's rules, policies and procedures: Standard, Serious, and Stand Alone Dismissible Violations. This accident was properly categorized as a Serious level violation (#1): as an accident, it was too serious to be a Standard violation, but it was not sufficiently serious to be considered a

Stand Alone Dismissible violation. Appendix B of the PEPA sets forth Stand Alone Dismissible violations, #6 of which reads: “Conscious or reckless indifference to the safety of themselves, others or the public; indifference to duty; intentional destruction of company property; malicious rule violation; insubordination.” As accidents go, this one was minor: no one was injured, neither machine suffered any damage, and it was generally agreed that no one was in any danger. Claimant’s conduct was not the sort of “reckless indifference to the safety of others” contemplated in Appendix B, #6. In fact, it appears that the accident occurred when the Claimant was radioing another operator to warn him of a hazard on the tracks they were traversing. That is hardly the conduct of someone who is indifferent to the safety of others. Claimant’s conduct more properly falls under the list of Serious Violations found in Appendix, specifically #1: “Violation of any work procedure that is designed to protect employees, the public and/or others from potentially serious injury(ies) and fatality(ies)....” The PEPA also specifies the disciplinary progression for each level of violation. Regarding Serious Violations, Paragraph A, Progression, reads in part:

The first Serious violation will result in a 30-day record suspension and a review period of 36 months. Exception: Employees qualify for a reduced review period of 12 months if they demonstrate a good work record, defined as having at least 5 years of service and having been both reportable injury-free and discipline-free during the five years preceding the date of the violation in question. (Emphasis added.)

The Claimant’s work record indicates that this was his first disciplinary incident. Accordingly, per the progression set forth by the Carrier in the PEPA, he should have been assessed a 30-day record suspension only, not 25 days of actual suspension and 5 days of record suspension. The language of the PEPA does not say a first Serious violation “may result” in a 30-day record suspension or worse; it says that a first Serious violation “will result” in a 30-day record suspension. The Carrier has not offered any explanation for deviating from its published standards for progression. Nor does it appear from the record that there is one: the accident was a minor one, certainly warranting discipline, but not—at least on the basis of the record before the Board—discipline substantially harsher than that set forth by the Carrier as the standard penalty for a first Serious violation. In the absence of a compelling reason for treating the Claimant more harshly than the PEPA indicates for a first Serious violation, the Board finds that the imposition of a 25-day actual suspension and a 5-day record suspension was excessive and unduly harsh. The discipline shall be reduced to a 30-day Level S Record Suspension, as set forth in the PEPA, and the Claimant made whole for any monies and/or benefits lost as a result of the actual suspension. The Organization also argued that the 3-year review period was too long. A review

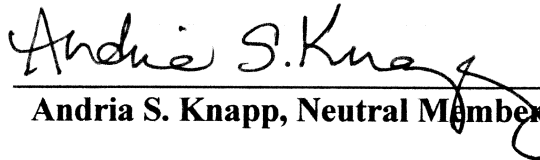
period of 36 months is what the PEPA sets forth as part of the progression for a first level S violation. The only exception is for employees with five years or more of service who have otherwise clean records. At the time of the accident, the Claimant had not been employed with the Carrier for the requisite five years, so the exception was not available to him, and the Board upholds the three-year review period.

AWARD

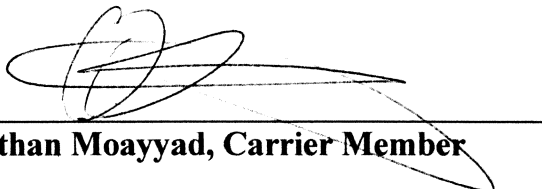
Claim sustained in accordance with the findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made in accordance with the findings of the Board. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



Andria S. Knapp, Neutral Member



Nathan Moayyad, Carrier Member



Zachary Voegel, Organization Member



Date