

PUBLIC LAW BOARD NO. 6621

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION – IBT RAIL CONFERENCE**

And

UNION PACIFIC RAILROAD COMPANY

Case No. 51

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The Level II assessed Truck Driver A.A. Ozuna for his alleged responsibility in connection with the foot injury he sustained on October 13, 2003, was without just and sufficient cause and based on unproven charges (Carrier's File 1397158 D).
2. Truck Driver A.A. Ozuna shall now have: '...the Level 2 be expunged from the Claimant's personal record, that he and his witnesses be compensated for all wages lost for their attendance at the formal investigation, including all expenses related to travel, meals, and lodging for himself and his witnesses.'

Background:

Claimant Abel A. Ozuna is a truck driver with seniority as of March 26, 1979.

On October 13, 2003, Claimant was assigned to a gang that was replacing rail on a section of track. Claimant worked at the south end of the project, along with Ray Langston (foreman) and Johnny Herrera (laborer), using tools from Claimant's truck to break joint bars. Gary Lopez (assistant foreman), Al Partida (speed swing operator), and Ray Ozuna (laborer, and Claimant's brother), began at the north end of the project, wedging spikes beneath rails preparatory to removing them from the track.

Claimant's truck was parked parallel to, and approximately five or six feet away from, the track. Two loose rails lay on the ground between the track and Claimant's

truck, two or three feet from the truck. It had been agreed that the north group would hold off its work until the south group finished breaking a joint bar, got in the clear, and gave the north group an okay. Claimant and Herrera used an impact wrench to break a joint bar, then Claimant put the impact wrench back into the truck. He then gave the north group an "all clear" signal, and joined Langston and Herrera behind the truck for a water break. Claimant could not see the speed swing from behind the truck, and the north group could not see Claimant or the others standing behind the truck.

Partida maneuvered the speed swing toward the track at a crosswise angle, and used the speed swing's boom to push the track rails so that Ray Ozuna could wedge spikes underneath. Lopez was standing to the north of the speed swing. As the speed swing operation moved south along the track, it reached a point at which the loose rails lying on the ground would be crossed in the process of pushing the track rails. Partida did not sound the horn before crossing the loose rails. Neither Partida nor Lopez radioed the south group to inform them that the speed swing was about to cross the loose rails. The speed swing's movement caused one of the loose rails to kick over. Claimant was standing near the truck's left bumper, facing west, and the loose rail fell onto his foot, injuring him.

Claimant was instructed by the Carrier by letter dated November 13 to report on November 20 for a formal hearing:

to develop the facts and place responsibility, if any, on charges in connection with a rail that allegedly rolled over onto your right foot on October 13, 2003 at Los Nietos, California, while working as System Boom Truck Driver, causing injury to yourself.

Your alleged actions indicate a possible violation of the current Union Pacific rules 70.1, 70.4, 70.5, and 1.1.2....

The Hearing was postponed and held on January 13, 2004. By letter dated February 24, 2004, the Carrier found Claimant guilty of the charges, and assessed him UPGRADE Level 2 discipline. The Organization objected to the discipline by letter dated March 18, 2004, arguing that the charges against the Claimant had not been proved at the hearing. The Carrier upheld the assessment by letter dated May 6, 2004. The parties exchanged additional letters and discussed the matter in conference. The matter not being resolved, it was presented to this Board for final decision.

Carrier's Position:

The Carrier contends that Claimant was afforded a full and fair hearing with notice of the charges, the opportunity to defend, and representation. The Carrier presented substantial evidence proving that Claimant violated Rules 70.1, 70.4, 70.5, and 1.1.2. Rule 70.1 establishes employee responsibility for complying with safe practices and preventing injury to oneself and others. Rule 70.4 mandates being aware of the work and movement of others as well as equipment when working in a group. Rule 70.5 requires employees to not place any body part in a position in which it may be "struck, caught, pinched or crushed." Rule 1.1.2 requires employees to be alert and attentive while performing their duties so as to avoid injury.

According to the Carrier, Claimant admitted to conduct in violation of these rules. A red zone is any area that could cause death or serious injury, and extends four feet from the hazard. Langston, Claimant's supervisor, testified that when equipment is moving in the area, a loose rail is a red zone. Claimant knew the speed swing was being operated in the area of the loose rails. Claimant nevertheless parked his truck within three feet of the loose rails, and stood within the four-foot red zone. Moreover, he failed to be attentive

and aware of the movement of equipment and other group members, because—as he admitted—he could not see what the speed swing was doing from his position behind the truck. Claimant was responsible for his own safety, and had his actions been different, the accident would have been prevented. The Level 2 discipline assessed was warranted by Claimant’s misconduct, and was neither arbitrary nor capricious. Regardless of Claimant’s prior record of working safe, his failure to work safe in this instance was a serious violation of Carrier rules.¹

Organization’s Position:

The Organization contends that the Carrier has not proved its charges against Claimant. When the Claimant parked his truck within three feet of the loose rails, he was more than four feet from the only red zone of which he was aware, the track on which the work was being performed. When Claimant gave the north group the all-clear signal, his concern was the track as the pertinent red zone. The members of the south group stood behind the truck as the designated safe place to stand with reference to the track red zone. The loose rails were not a red zone when the work started. They became a red zone only when the speed swing crossed over. In the job briefings held on October 13, 2003, the gang specifically discussed that the speed swing operator would sound the horn if he was going to cross the rails. Partida did not sound his horn. Nor did Lopez, the north group’s employee-in-charge and lookout, warn the south group by radio, despite being admittedly unable to see where the south group was standing behind the truck. Claimant did not

¹ In its submission to the Board, the Carrier also argues that Claimant had a previous discipline status of Level 1 for failing “to protect a back-up move” (Car. Subm. at 17), so that Level 2 discipline had to be assessed for the misconduct at issue here, in accordance with the Carrier’s UPGRADE policy. A review of the record, however, turns up no evidence of the alleged previous discipline status. In fact, the October 28, 2003, Waiver/Hearing Offer form (Car. Exh. B at 182) shows no previous disciplinary action and a discipline status of Level 0.

expect the speed swing to cross the loose rails while working on the track. As Langston testified, Partida's method of tilting the track rails by approaching the track crosswise was not the usual manner in which a speed swing was operated.

The Organization also argues that the Carrier violated Rules 1 and 48 of the parties' Collective Bargaining Agreement in holding the formal investigation, and in assessing Level 2 discipline "without benefit of impartial and unbiased consideration being give to the testimonies of the transcript record." (Org. Exh. A-2 at 12.)

Findings:

Having carefully considered the record in the instant case, the Board finds that all required due process was provided Claimant. He was afforded a full and fair hearing, with timely notice of the charges, time to prepare a defense, and the opportunity to produce and examine witnesses and evidence. Turning to the merits of the instant case, the Board concludes that while some discipline was clearly warranted for Claimant's unsafe conduct on October 13, 2003, Claimant's actions were not the sole cause of the accident and the injury to his foot. The Board finds that in such circumstances, the Level 2 discipline assessed against Claimant—an employee of long tenure, with a previous discipline status of Level 0—was excessively harsh, and should be reduced to Level 1.

Claimant admittedly parked his truck within two or three feet of the loose rails, and at the time of the accident was standing behind the truck's left bumper, to the left of the tire, facing west. The key question in the instant case is whether Claimant should have recognized the loose rails as a red zone requiring him to be at least four feet away. Claimant asserts that he did not know that the speed swing was going to cross the loose rails. Both Partida and Ray Ozuna testified that the speed swing had performed the same

maneuver—approaching the track at a crosswise angle—that resulted in the accident with the loose rail three times prior to the accident, as the north group worked south along the track. Carrier Rule 70.4 specifically requires Claimant to be aware of the movements of equipment when working in a group. Therefore, Claimant should have known in what manner Partida was operating the speed swing. Claimant compounded his unsafe conduct by standing in a place from which he could not see what the speed swing was doing. Claimant knew the loose rails extended some distance north, and could easily have predicted that at some point, the speed swing was going to cross the loose rails. Under these circumstances, the Board finds that Claimant should have recognized the loose rails as a red zone, and placed himself at least four feet away. Whether the rail simply tipped over, as Lopez testified, or kicked out and swung a foot or two, as Langston and Ray Ozuna asserted, had Claimant been at least four feet away, the rail would not have landed on his foot.

While Claimant was at fault in his conduct, however, his actions were not the sole cause of the accident. Every witness to the accident, other than Partida, testified that at the day's job briefings, the gang specifically discussed that if Partida was going to cross over rails with the speed swing, he should sound the horn. All of the witnesses agree that no horn was sounded prior to the speed swing movement that resulted in the accident. Lopez alleged that Partida did not sound the horn because the south group was out of the red zone. The Board finds this explanation to be unpersuasive. The south group was clear of the track, but not the loose rails. The north group was aware of the close proximity of the truck to the loose rails, and that the south group was standing behind the truck. Lopez admitted that the north group could not see the south group as it stood

behind the truck. The north group therefore should have been aware that members of the south group might be standing within four feet of the loose rails Partida was about to cross in the speed swing. Someone in the north group should have made sure that the south group was aware of what was about to happen. Either Partida should have blown his horn, or Lopez should have radioed Langston. Had either of those two things happened, Claimant could have moved away from the loose rails and the accident would not have occurred. Therefore, Claimant did not bring his injury entirely upon himself, and should have been able to rely on his fellow gang members to also work safely. Fairness requires that the discipline assessed against Claimant take the fault of the other gang members into consideration. Especially in light of Claimant's tenure and history of work safety, the Board finds that the Level 2 discipline assessed against Claimant was excessively harsh.

Award:

The claim is granted in part. The discipline assessed against Claimant shall be reduced to UPGRADE Level 1.



JOAN PARKER, Neutral Member



CARRIER MEMBER

DATED: 2-13-06



ORGANIZATION MEMBER

DATED: 2-13-06