

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated July 6, 2009, J. G. Taylor ("the Claimant") was charged with possible violation of Safe Way Rules ES-15 e and GS-3 and Operating Rules 700 and 727 in connection with an incident that occurred on June 18, 2009, on the Rivanna Subdivision at Maiden, Virginia, and directed to attend a formal Investigation to be held on July 17, 2009, in Huntington, West Virginia. As a result of various postponements jointly agreed to by the parties, the hearing in the Investigation was not held until October 22, 2009.

FINDINGS:

Public Law Board No. 7120, upon the whole record and all the evidence, finds that:

The carrier or carriers 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.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant began his service with the Carrier on June 19, 2000. At the time of the incident he held the position of Equipment Operator and had been in that job for two years. He had previously held the positions of Trackman, Welder Helper, Welder, and

Track Inspector. On June 18, 2009, he was the second operator on a spiker machine on which the other operator was R. E. Woodson. They worked together that day on the spiker machine with a backhoe operator, B. L. Faulknier, to install ties in the switch at Maiden, Virginia.

Mr. Woodson was in charge of operating the spiker. He controlled the forward and backward movement of the machine by means of a pedal. He used a button on the control button to guide a device on the spiker machine called nippers to grab or release railroad ties during the spiking process. Claimant Taylor's task was to drive spikes into the ties in coordination with the nipping operation of Mr. Woodson. Mr. Taylor had no part in moving the spiker machine forward or backward. He testified that he had no control of the spiker and that it was his first day on the particular machine here involved. He is not a qualified spiker operator, he stated, and was filling in on the spiker because the Carrier was shorthanded.

The spiker machine here in issue has two operator seats. Mr. Woodson sat on the right side of the machine from which he controlled its movement. Claimant Taylor sat on the left side of the machine. Mr. Woodson noted on the Weekly Maintenance and Inspection form for the machine that he filled out on May 17, 2009, that everything worked on the right side of the machine, "but the other side don't work unless its manual with a switch made up by mechanic." Assistant Roadmaster K. Emerson testified that the reference was to a toggle switch that was hooked up on the left side of the machine.

In the process of supplying the spiker machine operators with spikes on June 18th, Mr. Faulknier was injured. His testimony of how the injury occurred was as follows. The Claimant informed him that he needed more spikes. Mr. Faulknier drove his backhoe to the section truck where there were kegs of spikes in the bed of the truck. He took some

kegs from the truck and placed them in the bucket of the backhoe. He got back into the backhoe and drove back to the spiker, which was stopped on the track. He had a job briefing with operators Woodson and Taylor regarding where to place the backhoe in order to be able to move the kegs of spikes from the bucket of the backhoe to the back of the spiker in the most efficient manner, i.e., without having to carry them any further than necessary.

In accordance with what was discussed, Mr. Faulknier parked the backhoe at a right angle to the track with the front edge of the bottom of the bucket resting on the ground next to the outer rail of the track. The height of the bucket was about thigh-level of a standing person. The backhoe was parked about two and a half feet behind the back of the spiker machine which sat on the track. The spiker is a wide machine, and its body extended several feet beyond the outer rail of the track on the side of the track where the backhoe was parked. The back frame of the spiker and the side of the backhoe bucket thus formed the walls of a kind of passage about two and a half feet wide where one could stand next to the track and move the kegs of spikes from the bucket to the floor of the back of the spiker.

Mr. Faulknier was standing in the two and a half foot space described above for the purpose of moving the kegs of spikes from the bucket to the back of the spiker when suddenly the spiker machine moved a couple of feet backwards, pinning his leg against the bucket and injuring the leg. He testified that the motor of the spiker was running at the time, but the machine was stopped. On-Track Worker Rule 727, Spacing of Equipment, provides in pertinent part as follows:

1. Work (Red) Zones:

- a. Red Zone for on-track equipment is defined as a point 15 feet in front of

the machine to a point 15 feet behind the machine or 10 feet beyond the maximum reach of any extended portion of the machine, in any direction, which ever is applicable.

* * *

c. Roadway workers must not enter a machine's Red Zone without first communicating with the operator to establish safe work procedures.

* * *

Mr. Faulknier testified, "[B]efore entering the red zone I spoke with Mr. Taylor and Mr. Woodson and we briefed and then I proceeded and the machine struck my leg and pinned me." The hearing officer asked Mr. Faulknier where he job briefed when he brought the spikes to the spiker. He stated, "At the side of the machine." Asked if the spiker was running at the time, Mr. Faulknier testified, "The motor was running." Questioned if all work was stopped when he proceeded to transfer the spikes from the bucket to the spiker, he testified, "That is correct. The parking brake on the backhoe was engaged when I got out of it and the spiker was sitting there and to my knowledge it was not being run."

Mr. Faulknier was asked how, if there was no work being done with the spiker, it rolled back? He replied, "That I don't know, I'm not a mechanic." The hearing officer asked him, "Are you stating that Mr. Woodson and Mr. Taylor acknowledged that you could enter into the red zone and that it was safe for you to enter into the red zone?" "Yes, they did," Mr. Faulknier stated. "We job briefed on it and I did not go through that red zone until we communicated and everybody was clear on what we were going to do." In his opinion the machine was secure and would not move, Mr. Faulknier testified. "If you job briefed and you determined that the machine was not going to move," the hearing

officer asked, "how did the machine move?" "On my knowledge," Mr. Faulknier answered, "the failure of the machine is what caused the incident." Mr. Faulknier estimated that the spiker moved about 18 inches or two feet.

The hearing officer asked Mr. Faulknier whether the spiker machine should have been turned off as opposed to merely being stopped. He replied, "Only if the rule had stated so." He added, "If the rule had stated 'cut it off,' that's what we'd have done." The hearing officer asked Mr. Faulknier if in their job briefing it was determined that Mr. Woodson and Mr. Taylor would be working while he brought the spikes to them. He stated, "No, they were not working."

The hearing officer noted that Mr. Faulknier had testified that the spiker machine was running and asked him, "What communication did you have with Mr. Taylor or Mr. Woodson that it was okay for you to come on in to unload spikes?" He answered:

I approached the machine on Mr. Taylor's side of the machine, got his and Mr. Woodson's attention. Notified them that I had the spikes in the bucket. They acknowledged my presence there, the spikes in the bucket of the backhoe and we discussed me going through there and loading the spikes on the back of the machine. And upon my walking through that red zone they were setting on the machines like this. Grandy [Claimant Taylor] was looking this direction to me and Woody was looking, Mr. Woodson and Mr. Taylor were watching me as I walked through. I have no reason to believe that they would have done anything to jeopardize me.

Ron Hale, Engineer of Track, the charging officer of the Carrier, conducted an investigation the next day, June 19, 2009, at the scene of the incident. Mr. Hale testified that what prompted the hearing in this case was that "we were told by the employees that

the nippers on the machine had slipped off the tie—causing the machine to move backwards in an eastward direction, pinning the employee between the machine and the backhoe.” During the reenactment of the incident on June 19, 2009, in the presence of Claimant Taylor, the nippers were made to slip off the tie a number of times, but not once when this happened did the spiker machine move. The reason the machine did not move, Mr. Hale explained, was that once you take your foot off the pedal, the brake is automatically engaged on the machine. Mr. Hale testified that in his opinion there is no way that the accident could have happened as claimed by the employees because there is an electric eye that engages the brake when the pedal is released.

The employees, according to Mr. Hale, told him that they had a job briefing after which Mr. Faulknier went to the truck to get spikes, loaded them in the front end of the backhoe bucket, and drove the backhoe back to the spiker. Then, Mr. Hale continued, Mr. Faulknier sounded the horn on the backhoe, and Mr. Woodson and Mr. Taylor, the operators on the spiker, acknowledged his presence. Mr. Faulknier, Mr. Hale stated, then positioned his backhoe with the bucket on the rail, dismounted the backhoe, and went between the two machines. His understanding, Mr. Hale testified, was that the job briefing they had consisted of Mr. Faulknier sounding his horn and the acknowledgment by Mr. Woodson and Mr. Taylor that he was going to come in behind the spiker.

If there had been a complete job briefing, Mr. Hale testified, the incident would not have happened because they would have identified the safe job procedures, including the shutting down of the spiker machine, before Mr. Faulknier entered the red zone. Mr. Hale read into the record Engineering Department Safety Rule ES-15 e, which states:

ES-15 Mechanized Equipment

Operator must: * * *

- e. Stop equipment when the operator's attention cannot be directed exclusively to controlling the movement.

General Safety Rule GS-3, Job Briefing, was not followed, Mr. Hale testified, in that a thorough job briefing was not held, just a sound of the horn and a nod of the head. The operators of the spiker, Mr. Hale stated, should have gotten off of the machine and discussed the sequence of steps to be followed in delivering the spikes and the hazards involved. The spiker, Mr. Hale asserted, should have been shut down so that it could not move. Mr. Faulknier, Mr. Hale stated, would then have had a safe place in which to work. Mr. Hale also cited On Track Worker Rule 700, Job Briefing, as another rule that would require a more thorough job briefing than was had in this case.

Jim Seeders, an equipment mechanic with the Carrier for 31 years, was assigned to go to the site of the incident on June 19, 2009, to check out the spiker machine. His inspection, he stated, showed that the brakes were "probably 60% to the good" and "all the machine checked out satisfactorily." He found nothing with the machine, he testified, that would cause it to roll backwards on its own. He cycled the machine three or four times, he stated, and it worked through its functions properly.

Regarding nippers on a spiking machine, Mr. Seeders testified that on a good tie nippers would hold virtually 100 percent of the time. "You take an old tie where the bottom of it is soft," he stated, "I've seen nippers . . . slide off the ties." During the reenactment of the incident, he testified, the nippers did not come off the ties. At a switch, Mr. Seeders stated, because of the angle at which ties go into the switch, that could contribute to nippers slipping off.

The hearing officer asked Mr. Seeders whether, if the nippers slipped off, the machine would move backwards without the foot pedal being depressed. He answered, "

“... I couldn't say. I've seen ... your nippers slip off with just the up force of the nippers coming up ... will vibrate the machine.” The braking system of the machine is engaged, Mr. Seeders testified, so long as you don't touch the foot pedal.

The following additional testimony was given by Equipment Mechanic Seeders:

Q. (By Organization Representative): So based on your testimony previously when you stated that it is possible that if a spiker was nipping a tie that was old and under strain that it could possibly move back, 2 feet is not a very long distance for it to actually ...

A. (By Mr. Seeders): No. If the rail was oily – you know, I know the machine probably leaked oil as most do. It's possible it could have slid on the rail, yes sir.

The hearing officer then asked Mr. Seeders the following questions:

Q. (By hearing officer): Mr. Seeders, again – this braking system is engaged unless the pedal is pressed, correct?

A. (By Mr. Seeders): Correct.

Q. (By hearing officer): So for this to move, it would have to be done under the braking system applied, correct?

A. (By Mr. Seeders): In order for the machine to move you have to press the pedal, yes – correct.

After the testimony of Mr. Faulknier, Equipment Mechanic Seeders was called back by the hearing officer to testify and asked if the spiker would on its own move back if it was “in non-operational mode” and the pedal was not depressed. He answered, “No. If the machine was not functioning in any way, the machine should sit there.” He was asked “if the nippers come straight up, would that propel the machine?” He answered that it was his opinion that if the machine “was on a little bit of a bind” and the nippers

came straight up “it could . . . move the machine forward or reverse, one way or the other, just as long as there’s a little bit of bind.” He added that “if your rail is wet, rails got oil on it, it don’t take much to move a machine when it’s wet.”

Equipment Operator Woodson testified that he has been an Equipment Operator since 1981. He had a job briefing, he stated, regarding what he was going to be doing with regard to the loading of the spikes. Claimant Taylor told Mr. Faulknier that they needed some more spikes, Mr. Woodson stated, and instructed him to take the backhoe and bring some spikes over. After Mr. Faulknier brought the backhoe back, Mr. Woodson stated, he got off of the backhoe and asked where they wanted him to put the spikes. They stopped the spiker but did not turn it off. The machine was running, Mr. Woodson stated, and the nipper was clamped to the tie. He and Claimant Taylor, Mr. Woodson testified, did not do any more work.

The hearing officer asked Mr. Woodson what was discussed during the job briefing concerning how Mr. Faulknier was to enter into their red zone. He answered, “Well he told him bring the backhoe bucket around, and he brought the backhoe bucket around, and we unloaded it.” Mr. Faulknier, Mr. Woodson continued, was putting the spikes on the spiker machine “and Mr. Taylor and I were taking the spikes and dumping ‘em over in there in the chute. . . .”

The hearing officer asked Mr. Woodson whether, when Faulknier came back with the spikes, a job briefing was held with him to limit the hazards of his entering the spiker’s red zone. He answered that they stopped completely and had a job briefing. If they had a job briefing and identified the hazards, the hearing officer asked, why did the machine roll backwards? Mr. Woodson suggested that “when the nippers came up I guess it threw the machine back. It wasn’t because we were working,” Mr. Woodson

insisted, "because we had completely stopped working." Questioned by the hearing officer if the machine had ever done the same thing previously, Mr. Woodson testified that previously he had seen the nippers come up, but "the machine did never move back."

The hearing officer asked Mr. Woodson what safe work procedures were established before Mr. Faulknier entered the red zone to make sure that the machine was not going to move. He stated, "We stopped working the machine." Mr. Woodson testified that he is not aware of any CSX rule that requires one to turn off a machine (as opposed to stopping the machine from moving) before someone enters the machine's red zone. When questioned by the hearing officer about compliance with Rule ES-15 e, Mr. Woodson testified, "We did stop the equipment."

Claimant Taylor testified that he, Mr. Woodson, and Mr. Faulknier had a job briefing before Faulknier entered the spiker's red zone. He was present at the reenactment of the incident, Claimant Taylor stated, and the nippers came up several times. When that happened, the machine did not move backwards. The hearing officer asked the Claimant, "Was all work stopped prior to this job briefing?" He answered, "Yes sir." The hearing officer asked, "Did you all agree that Mr. Faulkner could enter into your red zone and that you would not be working?" Mr. Taylor answered, "That's correct." The hearing officer asked, "Did you all agree that it was safe for Mr. Faulknier to enter the red zone?" The Claimant answered, "We had a job briefing and communicated we knew what was going to happen." The hearing officer asked, "It was all agreed that the machine would not be worked, correct?" The Claimant answered, "Yes sir."

The hearing officer asked "What was discussed in your job briefing prior to Mr. Faulknier entering into your red zone?" Claimant Taylor answered:

We were running low on spikes, told him to come there. He come there, talked to me, talked to Woodson, we communicated news of what the job was, you know, to do. He was gonna give us spikes. He was taking the lids off, putting them in that bucket, setting 'em up there, you know, with the top off of 'em. And we were looking at it, we were dumping spikes into the tray, you know what I mean?

The following questions and answers between the hearing officer and Claimant Taylor then ensued:

Q: When Mr. Faulkner brought the spikes back to your location to load 'em into the machine, did you stop at that time to discuss how he was actually going to put 'em on the machine, or had you already discussed him coming into your red zone and working, or unloading the machine?

A: No. We, you know, told him take the lids off, when these spikes, he was doing that to make it easier while he was just setting 'em in position for us. And we knew that he was back there. I was looking at him. Real close enough to touch, you know what I mean?

Q: In your opinion, under GS-3 Job Briefing, if a proper job briefing was done, how do you [if] all hazards was identified, . . . what in your opinion caused Mr. Faulknier to get hurt?

A: We conducted a job briefing and the equipment malfunctioned is what caused Mr. Faulknier to get hurt. When the nippers released romped off the tie and went back and it squeezed his leg.

Q: This was done with the machine in non-operational mode and you and Mr. Woodson just setting there looking at Mr. Faulknier as he entered into the red zone?

A: Yes

Dewey Jewell, Regional Manager for the Work Equipment Group, whose job is to oversee work equipment needs, testified that if nippers come up off of a tie, they would come directly straight up and would not kick to the front or the rear. The brakes on the spiker machine are spring loaded, he stated, and it takes hydraulic pressure to release the brakes. When the travel pedal is placed in neutral position, he testified, the spring overtakes and pushes the brakes back on. As the brake shoes wear, he explained, they progressively spring out to maintain the braking capacity of the machine. Mr. Jewell

expressed the opinion that even if the nippers would have come up, the spiker machine would not have overridden the braking system and moved backwards. To shut down the machine, he stated, you have to turn off the power switch on the control console. In his opinion, Mr. Jewell testified, Mr. Faulknier was not injured as the result of a mechanical failure of the spiker machine. He has been with work equipment for 33 years, Mr. Jewell stated, and he has not seen a situation where a spiker machine moved without the pedal being pressed just by the nippers coming up.

Mr. Jewell inspected the brakes and other functions on the machine on July 30, 2009, in connection with a good faith challenge regarding the machine made on July 29, 2009, by Mr. Faulknier. According to his testimony and a written report regarding the results of the challenge, he found that the brakes and other machine functions performed correctly and that there was no safety issue.

Assistant Roadmaster Kenny Emerson took Mr. Faulknier to the hospital on June 18th. Mr. Faulknier, Mr. Emerson testified, told him that he went to load some spikes on the spiker and that somehow or other the spiker got kicked back and caught his leg between the spiker and the backhoe bucket. Mr. Emerson was in charge of the reenactment of the incident the next day. The reenactment, he stated, was conducted at the position on the track which Claimant Taylor said appeared to be the location of the incident. They tried several times, Mr. Emerson testified, in Claimant Taylor's presence to get the machine to kick back by releasing the nippers but could never get the machine to move or get into travel mode.

Mr. Emerson expressed the opinion that the only way that the machine could have moved back if it was stopped but not shut off was that "the traverse pedal had been hit at the time that he [Mr. Faulknier] come in between the machine[s]." After Mr. Faulknier

was attended to at the hospital and he [Mr. Emerson] got back to the Scottsville office, Mr. Emerson testified, he approached Claimant Taylor and Mr. Woodson and asked them what happened. They told him, he stated, that they were stopped and were not working at the time; that the nippers just released, and the machine rolled back pinching Mr. Faulknier's leg between the machine and the bucket. And they said, Mr. Emerson continued, that when they heard him scream when he was caught between the machines, they pulled the machine up and shut it down and proceeded to help him.

At Scottsville, Mr. Emerson testified, he asked Claimant Taylor and Mr. Woodson to give him written statements about the incident. The Claimant wrote the following statement:

June 18 2009

I J. G. Taylor while operating south side of SD9536 asked B. L. Faulknier to get some spikes. He returned with spikes in backhoe bucket and we communicated [sic] for backhoe to come in tracks east of spiker, the rear to unload spikes. Spiker was spiking and nippers released and rolled east into leg into backhoe bucket.

/s/ J. G. Taylor

Mr. Woodson gave the following written statement:

06/18/09

Chilly [Mr. Faulknier] was asked to get spikes off back of the truck. So he took the backhoe and got them, then he came back with them and put the bucket down and got them off. While getting them off after he had discussed with us he started unloading. The spiker never moved backward no it moved forward. The nipper came off the tie after spiking and the machine moved because the ties sometimes go it [?] crooked in a switch and the rippers don't catch them exactly right. We heard Chilly holler and we looked around. He was behind the machine hurt.

/s/ Robert E. Woodson

Assistant Roadmaster Emerson testified that he did not believe that communication

among the three employees was at the required level. "I think the proper way that they should've done it," Mr. Emerson stated, "was to shut the machine down before entering in between the two pieces and stopped working, which I don't believe was done."

On cross-examination Mr. Emerson testified that for the reenactment the spiker machine was shut off and the parking brake set. There were a few small leaks on the machine, Mr. Emerson acknowledged, but nothing, he stated, that would keep it from being operable. Mr. Emerson described what they did to try to get the machine to move as follows:

We dropped the nippers in various positions leaning more towards one side of the tie with the other and [sic end?]clamped . . . the tie in a bind position [and] while the nippers were clamped moved the machine up to where there was a lot pressure on the back side of the nippers. And then allowed the nippers to come up and see if it would shift the machine backwards. We done that both ways. And we dropped the nippers in various different locations trying to get it to jerk the machine.

According to what Mr. Faulknier told him on the way to the hospital, Mr. Emerson stated, he had not yet begun to unload the spikes at the time he was injured.

Assistant Roadmaster Emerson testified on cross-examination that he has had an opportunity to run a spiker on a regular basis, and it never happened that the machine moved if it was in a bind and the nippers released. Even if the machine was in a bind, Mr. Emerson insisted, and the nippers released, it was impossible for the machine to move a few feet, but a couple of inches was possible. When told on cross-examination that a CSX mechanic had testified to the contrary, Mr. Emerson maintained, "I've never seen one move more than one or two inches."

The hearing officer recalled Mr. Woodson to testify and asked him the following question:

In your statement basically you said we heard Chilly holler and we looked around

and he was behind the machine hurt. Previously you had made a comment that you, Mr. Faulknier and Mr. Taylor had had a job briefing and you all agreed that no work was to be done and that you was not operating the machine when Mr. Faulknier entered into the red zone. How come in this statement you basically act like you was surprised when you heard Mr. Faulknier holler and then you looked around and he was hurt?

Mr. Woodson answered:

I wasn't looking at him unload the spikes. . . . I'm done with the spikes I'm done spiking my chute. That's when I heard him holler. I just looked around done spiking the chute. I wasn't working the machine. I wasn't directing my attention to him. Why would I [have] sat up there and look at him do all the work and we supposed to be helping with the spikes. I was driving the spikes down there in the chute after he opened them up and I heard him holler that's what I mean I looked back. Quite naturally I wouldn't run no machine when I was looking around. That's what I was talking about.

Asked by the hearing officer if he could have hit the pedal in the process of loading the spikes, Mr. Woodson stated, "No sir, I couldn't."

The hearing officer asked Mr. Woodson if he would not consider loading spikes in the chute contrary to his testimony that they had a job briefing and that all work was stopped. He answered that the chute "is a big bucket" situated between both operators and does not have anything to do with the controls of the machine.

According to Mr. Woodson's testimony (Tr. 105), the sentence in his written statement that says, "The spiker never moved backward no it moved forward." should have said, "The spiker never moved backward nor it moved forward." By that, he explained, he meant that they had already spiked the tie that was there, and the machine was standing still. He clarified that he was not saying that they were spiking but, rather, that they had completed the spiking and that the machine moved after they had completed the spiking.

The hearing officer also recalled Claimant Taylor to testify and asked him what he meant in his written statement by "Spiker was spiking and nipper released and rolled east

into leg into backhoe bucket.” He stated that “it was our job for the day on the spiker is what I meant.” Claimant Taylor testified that the earlier testimony was correct that he, Mr. Faulknier, and Mr. Woodson had a job briefing and that he and Mr. Woodson had stopped work and were looking at Mr. Faulknier when he entered the red zone.

The hearing officer recalled Mr. Faulknier to testify and asked him, “Was Mr. Woodson looking directly at you when you entered in the red zone?” He answered, “Until he turned around to check in the bend.” He was asked whether, when he entered the red zone of the spiker, it was his opinion that the spiker was not going to move. He answered, yes, that it wasn’t going to move. He acknowledged that, in fact, the spiker did move and stated that it was “due to a machine failure.”

By letter dated November 10, 2009, L. M. Wharton, Division Engineer, notified Claimant Taylor of the Carrier’s finding “that the charges against all principals were proven without a doubt. CSX Operating Rules 700 and 727 and Safe Way Rules ES 15e, GS-3 were violated,” the letter continued, “when Mr. Faulknier entered into Mr. Woodson’s and Mr. Taylor’s red zone without all having a proper job briefing first.” The letter characterized the evidence presented at the hearing as follows:

The hearing centered on if the principals had a proper job briefing; and if they did, then why was Mr. Faulknier struck by the spiker? The principals’ testimony centered on machine failure of the spiker. They all agreed that all work was stopped, they had a job briefing and they were watching Mr. Faulknier enter the spiker’s red zone when he was struck.

The letter concluded as follows:

After a thorough review of the transcript, personnel record; and based on the evidence and testimony that has been given, the charges upon which this investigation was based were upheld. It was determined that an inadequate or no job briefing was held thus allowing Mr. Faulknier to be struck by the spiker. It is my decision that the discipline to be assessed in your case is 25-days actual plus 5-days overhead for a total of 30 days. (5 days were for a previous on-track work violation in which you signed a waiver). This discipline will start on November

11, 2009 and run to December 11, 2009.

It should be noted that separate charge letters were also sent to Mr. Faulknier and Mr. Woodson. The three cases were consolidated for hearing on October 22, 2009. However, a separate decision letter, sustaining the charges, was sent by the Carrier to each employee. In each case, the discipline assessed was appealed to this Board. Mr. Faulknier's case was decided by the Board in Award No. 59. Mr. Woodson's case is before this Board as Case No. 61.

The decision letter of November 10, 2009, accurately characterized the Claimant's position regarding the cause of the accident as "machine failure of the spiker." As the letter also notes, that, too, was the position of Mr. Faulknier and Mr. Woodson. When the Carrier attempted to reenact the incident, however, despite repeated attempts, it could not get the spiker machine to move forward or backwards by causing the nippers to release from the tie, even when the spiker machine was placed in a bind position. Further, Mr. Woodson has been an Equipment Operator since 1981, and he acknowledged that it has never previously happened to him that the spiker machine moved forwards or backwards as the result of the nippers coming off a tie. Nor did Claimant Taylor state that he had ever witnessed such an occurrence previously.

In addition, Mr. Emerson, who had personally operated a spiker machine on a regular basis, testified that it was not possible for the machine to move more than an inch or two as a result of the nippers coming off of a tie. Regional Manager Jewell, whose experience with work equipment spans 33 years, testified that in his experience he has not seen it happen that a spiker machine moved just from the nippers coming up.

The only testimony to support the claim that the release of the nippers propelled the spiker backwards was that of Equipment Mechanic Seeders. From his testimony,

however, it is clear that the only movement he personally observed as a result of nippers coming off of a tie was vibration of the machine. Thus he stated when asked by the hearing officer whether the machine would move backwards without depressing the foot pedal if the nippers slipped off, "It all depends on . . . how much twist the nippers were in . . . I've seen a machine move . . . your nippers slip off with just the up force of the nippers coming up will make them, will vibrate the machine – yes." (Tr. 27). That testimony is consistent with Assistant Roadmaster Emerson's testimony that it's possible that the machine might move an inch or two. The Board has carefully scrutinized the transcript, and nowhere in the transcript is there any testimony by Equipment Mechanic Seeders that he personally observed a spiker machine do anything other than vibrate where the nippers came off the tie without the travel pedal being depressed.

From the Carrier's decision in this case it is clear that it did not credit the testimony of the witnesses who attributed the movement of the spiker to the nippers slipping from the tie but, on the contrary, credited the testimony of Assistant Roadmaster Emerson and Regional Manager Jewell that the spiker could not move as much as two feet as the result of nipper slippage. The Carrier's credibility determination on that factual issue was supported not only by substantial evidence but by a preponderance of the evidence. The Board so finds.

The Board has rejected the defense put forward by Claimant Taylor (and Mr. Faulknier and Mr. Woodson) that it was machine failure by the spiker that caused Mr. Faulknier's injury. Having properly ruled out spiker machine failure as the cause of the accident, the Carrier reasonably concluded that Mr. Woodson and Claimant Taylor were responsible for the machine's moving and striking Mr. Faulknier. It follows therefore, as charged by the Carrier, that, in violation of Rules 727 and GS-3, proper communication

between the spiker operators (Woodson and Claimant Taylor) and Mr. Faulknier to establish safe work procedures did not take place before Mr. Faulknier entered the spiker's red zone. Procedures should have, and could have been, established for Mr. Faulknier to deliver the kegs of spikes to the spiker machine without getting hurt. Claimant Taylor and Mr. Woodson were properly subject to discipline for their role in the violations. See Public Law Board 7120, Award No. 59.

In the Board's opinion, however, as explained below, Mr. Woodson was significantly more culpable in the matter than Claimant Taylor, and Mr. Taylor should therefore not have received as severe discipline for the incident as Mr. Woodson.

The Carrier found that Claimant Taylor violated Operating Rule 727, Spacing of Equipment. The pertinent portion of the rule reads:

- c. Roadway workers must not enter a machine's Red Zone without first communicating with the operator to establish safe work procedures.

Rule 727 speaks of communication between the roadway worker entering the machine's Red Zone and the "operator." In the present case the only person who controlled the movement of the spiker was Mr. Woodson. It is not disputed that Claimant Taylor was not a qualified Spiker Operator (Tr. 60). Nor did he have the ability to control movement of the machine from his side of the spiker without first engaging a toggle switch (Carrier Exh. 16, Tr. 84). It was never contemplated that Claimant Taylor would control the movement of the spiker on June 18th, and, in fact, he never did. He testified without contradiction that he has never run the spiker machine (Tr. 59). The principal person with whom Mr. Faulknier had to communicate regarding establishing safe work procedures before entering the Red Zone of the spiker machine was the person who controlled the

movement of the machine, Mr. Woodson.¹ Claimant Taylor's responsibility for establishing safe work procedures with Mr. Faulknier was subsidiary to Mr. Woodson's.

The Carrier found that Claimant Taylor violated Engineering Department Safety Rule ES-15 e. The rule states "Operator must: . . . e. Stop equipment when the operator's attention cannot be directed exclusively to controlling the movement." As noted, Claimant Taylor had nothing to do with controlling the movement of the machine. He did not have the ability to stop the machine or make it move. Nor is there a reasonable possibility that it was he that inadvertently did something that made the machine move backwards to pin Mr. Faulknier against the backhoe bucket. That is so because the spiker machine could not be moved from his side of the machine without first engaging the toggle switch and then stepping on the travel pedal. That he would have accidentally done both acts is extremely unlikely, and it is virtually inconceivable that he would have done so on purpose. The Board finds that the Carrier has not established by substantial evidence that Claimant Taylor violated Engineering Department Safety Rule ES-15 e. In addition, since Mr. Woodson was the operator who solely controlled the movement of the

¹The Board is not stating that the second operator on a machine operated by two employees would have no role whatsoever in establishing safe work procedures pursuant to Rule 727 1 c. In a situation where the operators change off controlling the movement of the machine on a regular basis, the two operators would have substantially equal roles. Similarly if the second operator operates any equipment that could endanger a roadway worker, the second operator will have an important part in establishing safe work procedures. The Board is limiting its remarks regarding the role of the second operator to the particular facts of this case where not only was it not the Claimant's job to control the movement of the machine, but the machine was mechanically disabled from being moved from the side on which the Claimant worked. Nor did he operate any equipment that could have endangered Mr. Faulknier while Faulknier was in the machine's Red Zone. Even in this case, however, the Board is not saying that the Claimant would have no role or responsibility with regard to establishing safe work procedures for the roadway worker entering the Red Zone but that the primary responsibility would rest with the operator controlling the movement of the machine. In the present case that was Mr. Woodson who not only had sole control of the movement of the machine but had more than three times the seniority of Claimant Taylor.

spiker machine and the only one of the two employees who had qualified to operate that machine, he and not Mr. Taylor would have been the one who decided not to shut off the machine, which Charging Officer Hale testified should have been done in this case.

The Carrier also found that Claimant Taylor violated Operating Rule 700, Job Briefing. That rule begins with the sentence, "Prior to starting a work period that will require an employee to foul a track, the employee-in-charge designated to provide on-track safety for all members of a group, or other designated employee, shall provide a job briefing." Every other relevant paragraph of Rule 700 speaks of the "employee-in-charge" doing what is required in terms of communication or establishing on-track safety methods to be used and followed. No evidence was presented to establish that Claimant Taylor was the employee-in-charge or the designated employee with regard to Operating Rule 700. Since Claimant Taylor was not the foreman of the team, nor the senior man on the team or on the spiker machine, there would be no reason to assume that it was his responsibility to appoint someone to act as employee-in-charge or the designated employee. The Board finds that the Carrier has not established by a preponderance of the evidence that Claimant Taylor violated Operating Rule 700.

In Award No. 59, involving Mr. Faulknier, this Board stated,

The failure to properly communicate in violation of Operating Rule 727 was also a violation of General Safety Rule GS-3 Job Briefing. That is so because the "communicating with the operator to establish safe work conditions" is another name for a job briefing. The elements of Rule GS-3 that were not complied with were the following: Discuss the sequence of job steps; Identify, eliminate, contain, or communicate all potential hazards related to the job; and Ensure understanding of the planned sequence of events.

The Board has found that Claimant Taylor's responsibility in this case for establishing safe work procedures pursuant to Rule 727 1 c was subsidiary to Mr. Woodson's, who had the primary responsibility for doing so together with Mr. Faulknier. Since any

violation here of Rule GS-3 must relate back to Rule 727 1 c, it follows that the principal responsibility for breaching Rule GS-3 must rest with operator Woodson. The Board so finds.²

In Awards Nos. 7 and 16 of Public Law Board No. 7120 the Carrier assessed greater discipline against two members of a four-man team whose vehicle was involved in an accident with property damage because it determined that they had greater responsibility than the other two with regard to the accident. All four employees were occupants of a truck that struck and damaged a crossing gate while backing up. They were all in violation of a rule requiring that where two or more persons are occupants of a motor vehicle, one person be designated to guide backing movements from the ground. Yet the Carrier decided to impose more severe discipline on the foreman and the driver because, in its opinion, they had greater responsibility for the accident. The foreman and the driver were suspended, and the other two employees were given formal coaching and counseling.

Similarly, in the Board's view, because, for the reasons explained above, Mr. Woodson had significantly greater responsibility for the accident than Claimant Taylor,

²In Award No. 59 this Board stated, "The Board has carefully considered the degree of discipline assessed against the Claimant. It notes that the Claimant's discipline is twice that assessed against the operators of the spiker, who each received a 30-day suspension. Certainly the Claimant's violation was not more serious than theirs. It was their machine that struck the Claimant and not vice versa." A more accurate statement would have been, "Certainly the Claimant's [Mr. Faulknier's] violation was not more serious than Mr. Woodson's." As explained in the text of this Award, it was only Mr. Woodson who controlled the movement of the spiker machine. Claimant Taylor's side of the machine was disabled so that he did not even have the ability to make the spiker move without first engaging a special switch. He would then have had to do a second act of stepping on the travel pedal. On the record in this case it is highly improbable that Claimant Taylor was the one who caused the spiker machine to move and pin Mr. Faulknier against the backhoe bucket. In addition, since he had nothing to do with the movement of the machine and had never been qualified on the spiker machine, Claimant Taylor would not have been the one who made the decision not to shut off the spiker machine, which Charging Officer Hale testified should have been done in this case.

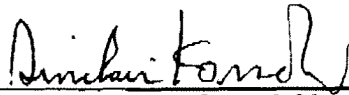
Mr. Taylor's discipline must be reduced. The Board has determined that the appropriate discipline to be assessed against Claimant Taylor in this case is a total of ten days' suspension, consisting of five days' suspension for the present incident and five days, representing the overhead suspension. The Board so finds. Claimant Taylor shall be made whole for the difference between the level of suspension originally assessed against him and the level allowed in this proceeding.

A W A R D

Claim sustained in accordance with the findings.

O R D E R

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



Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
March 3, 2010