

In the Matter of the Arbitration Between:

BURLINGTON NORTHERN SANTA FE

Case No. 5

Claim of E. D. Smith
Level S 30-Day Record
Suspension - Failure
to Employ "Lock Out/
Tag Out" Procedures

and

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION**

STATEMENT OF CLAIM: Claim on behalf of Machine Operator E. D. Smith requesting removal of the Level S 30-day record suspension and three-year review period from his record with seniority, vacation and all other rights unimpaired, and that he be made whole for all time lost.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee, within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein.

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Maintenance of Way craft. The Board makes the following additional findings.

Claimant has been employed by the Carrier since September 5, 2006. On July 8, 2011, Claimant was assigned to operate spiker machine X4400400, located on the Galveston Subdivision, near Somerville, Texas, at MP 142.9. During his assignment, Assistant Director Maintenance Production Tommy Brazier walked up to the spiker machine while it was running and saw Claimant and a co-worker sitting on it while David Borm, a Work Equipment Employee, lay under it, attempting to remove a spike that had jammed. Mr. Brazier determined that the machine was not locked out/tagged out at the time Mr. Borm was under the machine, in a location where, had the machine moved, he could have been injured.

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant in violation of Engineering Instruction 1.10.2 (General Requirements) and assessed him a 30-day record suspension.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property on an expedited basis, up to and including the highest designated official, but without resolution. The Organization invoked

arbitration, and the dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burdens to prove Claimant's violations of the Rules and the appropriateness of the penalty. It asserts that the facts and testimony presented at the investigation make it clear that Claimant failed to lock out/tag out the spiker machine, in violation of applicable rules. It points out that Mr. Brazier and Claimant both testified that Claimant admitted at the scene that the machine should have been locked out/tagged out.

BNSF contends that the Organization's contentions - its references to de-energizing the machine and eyewitness accounts that would exonerate the Claimant - are without merit. It maintains that de-energizing a machine cannot be used in lieu of lock out/tag out procedures. The Carrier asserts that, when there is conflicting testimony, it is the Hearing Officer, not a Board, who makes credibility determinations.

As to the Organization's argument that the charge was too vague to be addressed and, therefore, the Carrier failed to comply with Rule 13 and Appendix 11 of the Agreement, the Carrier asserts that BMWE failed to prove its contention. It points out that Claimant was given a fair and impartial investigation before being issued discipline and the investigation notice and discipline were both issued timely. As to the penalty, BNSF contends that the discipline imposed is appropriate and that leniency is not within the Board's jurisdiction, it being a prerogative of the Carrier.

The Carrier urges that the claim be denied as without merit.

The Organization argues that the Carrier failed to prove that any rules violation occurred. It contends that, even if there was such a violation, the discipline assessed is extreme, unwarranted and unjustified and is an abuse of the rules. It asserts, in addition, that the Carrier failed to comply with Rule 13 and Appendix No. 11 of the Parties' Agreement.

BMWE further argues that Carrier Officer Rick McNichols testified that, when the "electrical interlock" is used, it de-energizes both the hydraulic and electrical systems of the spiker machine as well as set the brakes. It asserts that Mr. Borm testified that he instructed the machine operator to de-energize the machine and then used a 34-inch plate hook to try to dislodge the jammed spike. BMWE maintains that Mr. Borm's testimony is corroborated by Signal Foreman Ray Wilburn, who was within 20 feet of the activities and never saw Borm put his hands or other part of his body into the point of operation on the machine.

The Organization urges that the Claim be sustained, that the Level S 30-day record suspension and three-year review period be removed from his record with seniority, vacation and all other rights unimpaired, and that he be made whole for all time lost.

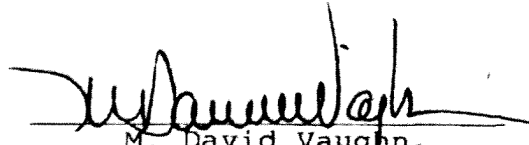
DISCUSSION AND ANALYSIS: EI 1.10.2 requires employees to employ lockout/tagout procedures, not just to de-energize the machine, when "[a]ny part of an employee's body is placed in a point-of-operation" or when "[a]ny part of an employee's body is placed in an associated danger zone during a machine operating cycle." It is similarly undisputed that the lockout/tagout procedures are to be used when "inspecting, servicing, or performing maintenance activities on machinery or equipment that may unexpectedly energize, start up, or release energy." Locking out ensures that the machine cannot be energized; tagging out ensures that no one will re-energize the machine. An employee's failure to follow the LO/TO procedures is a serious violation.

It is undisputed that Claimant did not implement the lockout/tagout procedures on the spiker machine when a spike got caught for a second time. Mr. Brazier repeatedly testified at hearing that the spiker machine was running when he walked up to the machine and saw Mr. Borm laying underneath it, attempting to remove a spike that had jammed. Claimant, and others, testified that the machine was not running and/or that Mr. Borm was not under it. Clearly, the testimony offered at the Investigation was in conflict. However, the Conducting Officer, not this Board, makes credibility determinations. There is nothing in the record requiring the Conducting Officer to have disbelieved Mr. Brazier. Indeed, LO/TO procedures were required whether the machine was running or not.

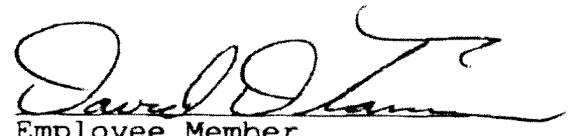
Given the nature and circumstances of Claimant's violation, the Board concludes that the penalty of a Level S 30-day record suspension with a three-year review period was within the range of reasonableness. The Award so reflects.

AWARD: The claim is denied. The Carrier met its burdens to prove Claimant guilty of the charges and to prove his 30-day record suspension to have been an appropriate penalty.

Dated this 18 day of MARCH, 2013.


M. David Vaughn,
Neutral Member


Carrier Member
Ms. Samantha Rogers


Employee Member
Mr. David Tanner