

Special Board of Adjustment No. 1112

Parties to Dispute

Brotherhood of Maintenance of Way)	
Employees' Division/IBT)	
)	
vs)	Case 99/Award 100
)	
Burlington Northern Santa Fe)	
Railway Company)	

Statement of Claim

Appeal of discipline of a ten (10) day record suspension, and a one (1) year probation, assessed Claimant Wayne F. Pohhneier on January 11, 2006.

Background

On November 7, 2005 the Claimant to this case, Wayne F. Pohhneier was advised by the Division Engineer, Powder River Division South, to attend an investigation in order to determine facts and place responsibility, if any, in connection with his alleged failure to work safely while on duty on November 3, 2005. This resulted in his being struck and injured by a fellow machine operator by the name of Timothy Crawford. The latter was operating a machine called a plater. The latter was plater X6399413. When the **injury** occurred the two were working on the Akron Subdivision near the town of Max, Nebraska. Both the Claimant and Crawford were cited for alleged violation of Carrier's rules and both machinists attended the investigation that was held, after postponements, on December 14, 2005. The investigation was held in Grand Rapids, Nebraska.

On January 11, 2006 the Claimant was advised, as stated in the foregoing, that he had been found guilty as charged, and he was assessed discipline as stated in the Statement of Claim. This case is only about machinist Pohhneier. It does not deal with Crawford.

The discipline was appealed by the Claimant in accordance with Section 6 seq. of an arbitration agreement signed on July 29, 1998 between the Carrier and the Organization that created Special Board of Adjustment (SBA) 1112 under the authority of the National Mediation Board. In accordance with the provisions of that agreement this case is now properly before SBA 1112. The neutral member has been granted final and binding powers to issue an Award on this case based on the criteria outlined by the parties in Section 8 of the agreement creating SBA 1112, and in accordance with Section 3 of the Railway Labor Act.

Discussion

Testimony at the investigation by the road master supervising track work on November 3, 2005 between McCook and Brush, Nebraska is that at about 10:00 AM while installing switch ties with a maintenance gang near Max, Nebraska he was notified that the Claimant to this case had been injured while working the assignment of flipping plates. When the road master, whose name is Kenneth Cole, arrived on the scene the Claimant told him that his right leg and back was sore. The Claimant had been hit by the plater machine. Cole then took the Claimant to a medical facility in McCook, Nebraska to

see a doctor, and after that escorted the Claimant to the motel where members of the repair and maintenance force were staying. At a later point the Claimant went home but the road master did a re-enactment the next day of what happened when the Claimant's injury occurred.

The road master did observe that on this particular day and job, because it was done on a single track and because there were time constraints the machines used to do the maintenance and repair had of necessity to be bunched up. Under this scenario machine operators are supposed to use their horns when moving to **from** one spot to the next.

There was testimony at the investigation by various witnesses including foreman Pokomey who was not in the immediate vicinity of where the Claimant's injury occurred. But assistant foreman Hilliker was and he testified that the plater and its operator was told to move westward and the **Claimant**, along with another employee by the name of Jim Hartig, were putting plates up next to the plater. The latter machine lifts the rail and pushes the plate under it. The Claimant's job as an employee who "put up a plate" was to maneuver a plate in position so that it could be pushed under a rail by the plater. Another machine called a broom works **in** front of a plater and the Claimant's job was to work between the two machines: behind the broom, but **in front** of the plater. Two platers worked in tandem but the cause of the Claimant's injury in the instant case was the lead plater. This witness admits that it is difficult for the operator of a plater to see anyone working close by. In the simulation done on the day after the injury a picture was taken

from the driver's seat of the plater operated by Crawford and it confied, and a number of witnesses were in accord on this matter, that the operator's line of vision was very limited. This was mostly due to the fact that the plater's large motor obstructs the operator's line of vision when the machine is being moved **from** one location to another.

There is testimony at the investigation by the operator of the plater. He testified that he was told by radio by the foreman and by hand signal by the assistant foreman to move the plater to clear the track for a tram to pass. So he climbed into the cab and honked the horn ("...whistled off...") and started the move. When inserting plates under the rails an operator of a plater generally walks along side it and operates it with portable controls. According to this witness when operating a plater he generally spends only about 20% of his time in the cab. He was in the cab when the plater was put in move, rather than operate, mode on the day and at the time the Claimant was injured. According to him the plater can only be put in travel mode from the cab. According to the operator there were three moves made stop and go fashion on the day in question and each time he thought he honked the horn and when he made the third move he bumped the Claimant whom he did not see in **front** of the machine. According to operator Crawford the Claimant must have been located not too far in front of the motor of the machine because that is "...**the** thing (he) could not see over..." when moving the machine. From the time he first started to make the move until the Claimant was hit the operator states that he had never gone back to work mode with his machine. When Crawford hit the Claimant he immediately put the machine's emergency brake on and shut off the motor and got off to

see if the Claimant was okay. According to the operator the Claimant must have been in a "...very blind spot and (he) did not see him. ..".

Testimony by the Claimant is that he was working between the broom machine, that had a cart behind it, and the plater and he was placing plates on the ties for the plater to insert. He walked along the track when the moves were made although he states that he had no communication with the plater operator about this. He states that he was wearing ear plugs, and he also states that he never heard any horn sound when the move was being made with the plater machine when it hit him. He corroborates Crawford's testimony that three stop and go moves were made. After the broom machine made its final move the Claimant states that he was getting set to start throwing plates again. He had no communication with Crawford at that time. He was getting ready to flip some plates when he was hit by the plater machine. He was facing away from the machine --- facing west, since the whole maneuver was to the west --- when he was hit. According to the Claimant he did not think that Crawford could have seen him from the cab of the plater. When the Claimant started back to work getting ready to flip plates he states that he was about 20 feet or more in front of the plater. The Claimant intimates that he believed that he was working in a safe manner.

Findings

On merits, the Claimant is charged with violation of a number of the Maintenance of Way Operating Rules. At issue here are Rule S-1.2.5 , 1.1.2 and 1.1.8 inter alia. These

rules state the following in pertinent part.

Rule S-1.2.5

Comply with all company safety rules, training practices and policies, and engineering instructions

Rule 1.1.2

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.

Rule 1.1.8

When on-track equipment is being used, workers and machine operators must follow the guidelines below for maintaining safe distances to prevent machines from contacting other machines and workers.

When machines must be spaced closer than guidelines require because of work or travel conditions, the machine operators and the employee in charge must have a thorough understanding of:

- The specific task
- The conditions under which the task will be done
- How the task will proceed

A. Work Zones Around Machines

Roadway workers must not enter a machine's work zone without **first** communicating with the operator to establish safer work procedures.

Note: Unless a different understanding is established through a job briefing, the work zone extends from a point 15 feet in front of the machine to a point 15 feet behind the machine. The work zone limits on each side of the machine will be designated in the job briefing.

If a machine is approaching workers who are foul of the track, the operator must communicate with the workers before getting closer than 15 feet to them.

A review of the full record in this case does not persuade the arbitrator that the Claimant to this case violated any of the rules cited in the immediate foregoing. He testified that when he was hit by the plater machine he was some 20 feet or more from that machine and was ready to start back to work throwing plates. The brush machine was already in work mode. The Claimant was facing away from the plater and did not hear a horn.

The operator of the plater states that he sounded a horn. He made three moves and he may have been mistaken about sounding the horn on the third move. In either case, the Claimant states that he never heard a horn sound, and the operator of the plater admitted that he was at fault when the accident occurred and he signed a waiver accepting a ten (10) day record suspension for what he admits he did.

As a logical matter it is unlikely that both of these employees were guilty of what happened when the Claimant was injured: the odds in favor of such a coincidence are not statistically good. In addition, the evidence in the record of this case supporting the guilt of the Claimant does not stand up to the normal standards of substantial evidence. There is no showing that the Claimant was negligent, that his behavior was unsafe, or that he was inside the work zone of the plater machine when he got ready to start back to work when he was injured. It was the machine operator who broke the barrier of the work zone, not the Claimant. The record as a whole in this case supports the conclusion that the claim ought to be sustained, and not denied. The arbitrator will rule accordingly.

SBA 1112
Awd 100

Award

The claim is sustained. The Claimant, Wayne F. Pohlmeier, shall be made whole for all lost wages because of the discipline assessed against him by the Carrier on January 11, 2006. His personal record shall also be amended and the one (1) year probation shall be removed. Implementation of this Award shall be within thirty (30) days of its date.



Edward L. Suntrup, Chair &
Neutral Member

Date: 5/20/06