

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40279
Docket No. MW-39860
10-3-NRAB-00003-070003
(07-3-3)**

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington Northern
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S Record Suspension of thirty (30) days and probation period of three (3) years] imposed upon Mr. J. J. Stults for alleged violation of Maintenance of Way Operating Rules 1.1.2, Alert and Attentive and 1.6 Conduct, while assigned as grinder at Willow Springs, Illinois, in connection with operating Grapple Truck #96017 and striking Trackman P. Cortes resulting in a personal injury at approximately 0840 hours on July 22, 2005 at Mile Post 47 in Elwood, Illinois, was arbitrary, capricious, excessive and in violation of the Agreement [System File C-05-D040-4/10-05-0298(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. J. J. Stults shall now receive the remedy prescribed by the parties in Rule 40(G).”**

FINDINGS:

The Third Division of the Adjustment Board, 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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

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

Prior to the July 22, 2005 incident from which this claim arose, the Claimant had established and held seniority in the Maintenance of Way Department dating from April 11, 2005. The Claimant was assigned as a Grinder Operator headquartered at Willow Springs, Illinois. On the day of the incident, the Claimant's work group was assigned to nip (raise) and tamp concrete cross ties at Mile Post 47 in Elwood, Illinois, using a grapple truck's boom to raise the ties. The Carrier notified the Truck Operator to report to Joliet, Illinois, for a Department of Transportation urine analysis and drug screening. The Operator left the work site. None of the employees in the group, including the Claimant, had ever operated a grapple truck. The Claimant entered the truck, began to operate it, and raised the boom. The vehicle's outrigger "feet" were not in the proper position to adequately stabilize the equipment. When the truck shifted position, the Claimant inadvertently pressed a control pedal swinging the boom to the side. It struck Trackman Pedro Cortes, injuring his right arm and shoulder.

Following the incident, by letter dated July 25, 2005, the Carrier directed the Claimant to attend an Investigation to assess responsibility, if any, with respect to the incident. After one postponement by mutual agreement, the Hearing was conducted on August 8, 2005

At the Hearing, the Claimant testified on the record that (1) he did operate the truck and boom (2) no one told the Claimant to get into or operate the truck (3) he had not been trained or qualified to operate the truck and (4) he had no experience operating it. There is no evidence in the record of any prior discipline.

Following the August 8 Hearing and by letter dated August 22, 2005, the Carrier notified the Claimant that due to his failure to have proper control of the grapple truck which struck Trackman Cortes, the Claimant was issued a Level S 30-day record

suspension for violation of Maintenance of Way Operating Rules 1.1.2 and 1.6 and assigned three years of probation.

The Carrier argues that the Claimant's inexperience, lack of qualification, impulsive actions, and panic caused him to lose control of the truck's boom and injure another employee all in violation of Rules 1.1.2 and 1.6. The Carrier points to Rule 1.1.2, entitled "Alert and Attentive" which states, in pertinent part, as follows:

"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."

The Carrier also points to Rule 1.6, entitled "Conduct" which states, in pertinent part, as follows:

"Employees must not be:

Careless of the safety of themselves or others
Negligent
Insubordinate
Dishonest
Immoral
Quarrelsome
Discourteous

Any act of hostility, misconduct, or willful disregard or negligence affecting the interests of the Company or its employees is sufficient cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated."

The Carrier points to the Claimant's testimony on the record that no one told him to get in the truck and to operate it (Question 173) that he did not have proper control of the grapple truck which resulted in Cortes' injury (Question 114) and that outriggers to stabilize the truck were not in use at the time of the incident (Question 109). It points to a statement that Cortes provided to the Assistant Roadmaster which was placed in the record. It related that Cortes was struck by the equipment and

thrown in between the tracks over the rail that he had been nipping the tie on. He was then helped to the side of the road to wait for the ambulance.

The Carrier asserts that substantial evidence in the record indicates that the Claimant violated Carrier Safety Rules and received discipline in accordance with the Carrier's stated discipline policy. In response to the Organization's complaint, the Carrier argues that the Claimant failed to show that the discipline imposed was harsh, unwarranted, inappropriate, arbitrary, capricious or in violation of the Agreement.

The Carrier relies for authority on the doctrine of *res ipsa loquitur* as summarized and applied in Third Division Award 32758:

“... where conduct causes an accident of a type that does not happen in ordinary course of events if due care is exercised, and the instrument of harm is shown to have been under control of one party, a case of negligence is made out in the absence of any explanation tending to show that it was not due to his want of care.”

The Carrier argues that this incident involves a “serious” violation of the Maintenance of Way Rules as stated in Section 7 of Appendix B of PEPA and that the Carrier is permitted, but not required, to allow alternative handling. It calls the Board's attention to the following PEPA language under the heading “Serious Rule Violations:”

“b. An employee involved in a first-time serious incident will be given a 30-day record suspension and may be offered training to help correct the behavior that gave rise to this discipline. If an employee declines training, an actual suspension may be imposed. . . .”

The Organization argues that the accident was caused by the Carrier's actions including the following:

“1. The Carrier failed to have an adequate number of employees available to perform both this project and a second project where the Foreman was working.

- 2. The Carrier's Foreman was required to work away from the crew as a Flagman because they were shorthanded, thus leaving Claimant's gang unsupervised.**
- 3. Claimant told his Foreman he was going to operate the grapple truck while the regular Operator was absent and the Foreman did not take exception to this.**
- 4. The Carrier failed to require the gang to stop working on this project until the Grapple Truck Operator returned from his urine analysis.**
- 5. Claimant told his fellow workers to stand back because he had not operated the grapple truck before, but they ignored these warnings.**
- 6. The Carrier followed a program of deferred maintenance.**
- 7. Claimant was punished for trying to assist the shorthanded Carrier in order to accomplish the work without delay.**
- 8. If no injury had occurred, the Carrier would not have objected to Claimant's operating the Grapple Truck but would have encouraged it."**

The Organization argues further that the discipline imposed was harsh, unwarranted, inappropriate, arbitrary, and capricious and cites Rule 40, entitled "Investigations and Appeals," which states, in pertinent part, as follows:

"A. An employe in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held.

*** * ***

G. If it is found that an employe has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from record."

It was the Carrier's burden to establish by substantial evidence considered in the record as a whole that the Claimant was guilty of the charges against him and that the penalty was not harsh, unwarranted, inappropriate, arbitrary, or capricious. For the reasons which follow, the Board concludes that the Carrier met its burden in all respects.

Based on review of the parties' Submissions and the Hearing transcript, the Board is persuaded that on July 22, 2005, the Claimant operated the Carrier's grapple truck and boom without authority or direction, for which he had no training, qualification or experience, and that his actions resulted in Trackman Cortes being struck and injured.

This incident establishes a serious violation of Rule 1.1.2 as well as Rule 1.6, which states, in part, that "Employees must not be . . . careless of the safety of themselves or other. . .," and establishes the basis for the Carrier being authorized to discipline the Claimant by issuing a Level S 30-day record suspension and three-year probationary period as a result of this conduct.

The Board notes further that neither Rule 1.1.2 nor Rule 1.6 provides an exception for understaffing, deferred maintenance or inadequate supervision, nor does either speak to failure of a Supervisor to object to an employee's intended actions. The evidence, as elicited at the Hearing, fails to establish any of those elements and establishes the Claimant's active participation in operating the grapple truck and its boom. Even if the Board were to take into account staffing levels, level of maintenance and supervision, it would not reduce the consequences or authority of the Carrier to discipline the Claimant for his injury-producing conduct.

The Board finds that the Carrier met its burden of providing substantial evidence to establish that the Claimant violated both Rules 1.1.2 and 1.6. The Board also finds that the Carrier met PEPA standards and its burden of providing substantial evidence to support its discipline of the Claimant as an appropriate penalty. The Claimant received a 30-day Level S record suspension and not a dismissal. Based on the evidence provided by the parties at the Hearing, the Board finds that the Carrier's discipline is neither arbitrary, capricious, improper, unwarranted, based on unproven charges, nor in violation of the Agreement. The Award so reflects.

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The Carrier proved by substantial evidence in the record that the Claimant violated Rules 1.1.2 and 1.6 by operating a grapple truck and its boom without authority, training or experience. The penalty of a Level S 30-day record suspension and three-year probationary period is appropriate. Because the Carrier did not in violate the Agreement, the claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of January 2010.