

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41434
Docket No. MW-41601
12-3-NRAB-00003-110221**

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The discipline (10 day record suspension) upon Mr. S. Miller by letter dated May 14, 2010 for alleged violation of MOWOR 1.2.7 Furnishing Information for alleged failure to promptly and honestly report on track collision and furnish the proper manager with the pertinent information when there was an on track collision between the water truck and the rail grinder at Mile Post 185.1 on the Chillicothe Sub at approximately 2250 hours on March 5, 2010, while assigned as a rail grinder support foreman was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-24/10-10-0325 BNR).
2. As a consequence of the violation referred to in Part (1) above, Claimant S. Miller 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.

The undisputed facts indicate that on March 5, 2010, the Claimant was working as a MOW escort on a rail grinding train. The Claimant was located at the front end of the train. As a pilot, the Claimant was responsible for obtaining necessary orders (authority) from the Train Dispatcher for movement and protection of the train to various locations while working on the Chillicothe Subdivision.

While the rail grinding train was sitting still on Main Track No. 2, it was struck from behind by a hi-rail water truck. The Claimant did not report the collision to the Train Dispatcher or any other Carrier official, but subsequently, he was contacted by the Train Dispatcher to determine what had transpired. It was alleged that he failed to give the Train Dispatcher an accurate report.

On March 10, 2010, the Carrier directed the Claimant to report for a formal Investigation on March 18, which was mutually postponed until April 22, 2010:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to promptly and honestly report on track collision and furnish the proper manager with the pertinent information when you were the employee in charge as MOW escort with the rail grinder, when there was an on track collision between the water truck and the rail grinder at MP 185.1 on the Chillicothe Sub at approximately 2250 hours on March 5, 2010, while assigned as rail grinder support foreman.”

On May 14, 2010, the Claimant was found guilty as charged and was assessed a ten-day record suspension.

It is the position of the Organization that the Investigation was not “fair and impartial” because the Notice of Investigation was not precise and the Organization

was blindsided when a surprise witness was called. It further argued that the discipline should have been issued by the Hearing Officer who had the opportunity to judge the witness's demeanor and the evidence presented rather than a totally different Carrier Officer. It asserted that because of those procedural errors, the claim should be sustained without even reviewing the merits. Regarding the incident under charge, the Organization argued that the Claimant was instructed by Seagroves, a Carrier exempt employee, to not say anything about what transpired, because it involved two different contractors. Thus, the Organization reasoned that the Claimant did nothing wrong. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position the record shows that the Claimant received a "fair and impartial" Investigation and he was guilty as charged. It argued the record proves that the Claimant failed to promptly and honestly report the collision between the hi-rail water truck and the rail grinder while he was working as a pilot on the rail grinder on March 5, 2010. It closed by asking that the claim remain denied.

The Board thoroughly reviewed the record and transcript and is not persuaded that any alleged procedural violations rise to the level so as to warrant sustaining the claim without reviewing the merits, or that the Claimant was denied his "due process" Agreement rights.

Maintenance of Way Operating Rule 1.2.7 Furnishing Information states:

"Employees must not withhold information, or fail to give all the facts to those authorized to receive information regarding unusual events, accidents, personal injuries, or rule violations."

During the Investigation, the Claimant was questioned about the incident as follows:

"Michael Heille: I have a couple of quick questions Mr. Miller if you were truthful and honest why wouldn't of you just told the dispatcher what happened?

Steven E. Miller: Because I didn't know what happened. I went on hearsay.

Michael Heille: Yeah but you, you stated on the recording to the dispatcher that you wanted to keep it under hat, you didn't want to full blown investigation, is that right?

Steven E. Miller: I had no idea what was going on back there, like I said I couldn't tell him exactly what happened cause I didn't know what happened, I was 700 foot from the rear of that train.

Michael Heille: So why didn't you just tell him that instead of telling him keep everything quiet?

Steven E. Miller: Oh because I was tired and I probably didn't even realize what I was even saying cause the Roadmaster told me he was going to take care of it, so that's, that's about, that's about it in a nutshell there, Mr. Heille.” (Emphasis added.)

The Hearing Officer read MWOR 1.2.7 into the record and questioned the Claimant as follows:

“Michael Heille: Were you in compliance of Maintenance of Way Operating Rule 1.2.7 on March 5th?

Steven E. Miller: I gave information to the dispatcher; information that I did not know so, so I probably shouldn't of gave him any information at all cause I did not know what was happening. . . .” (Emphasis added.)

The Organization argued on behalf of the Claimant that he had been instructed by Seagroves, an exempt employee, to not say anything about the incident. However, our review of the testimony reveals that Seagroves merely wanted to investigate the matter and discuss it with his superior before it was reported. Seagroves did not instruct the Claimant to not say anything about the accident. When the Claimant was questioned about the incident by the Train Dispatcher, he should have been forthright and said that he could not tell him anything because he did not know what happened and then referred him to Seagroves. The record is clear that substantial evidence was adduced at the Investigation to warrant the conclusion the Carrier met its burden to prove that the Claimant was guilty as charged.

The only issue remaining is whether the assessed discipline was appropriate. At the time of the incident, the Claimant had more than 33 years of service, during which time he had been issued discipline on 13 prior occasions, including a ten-day record suspension and a 30-day record suspension within the preceding 12 months. The discipline assessed was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). Therefore, the Board finds and holds that it will not be set aside because it was not excessive, arbitrary, or capricious. The claim will remain 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 5th day of September 2012.