

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41436
Docket No. MW-41615
12-3-NRAB-00003-110234**

The Third Division consisted of the regular members and in addition Referee William R. Miller 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 30 day record suspension and a three (3) year probation] imposed upon Mr. R. Jennings by letter dated May 14, 2010 for alleged violation of MOWOR 1.1.2 Alert and Attentive and MOWOR 6.50 Movement of on Track Equipment, in connection with alleged failure to be alert and attentive and allegedly failing to maintain a safe braking distance when riding in the water truck that collided with the rail grinder on March 5, 2010, at approximately 2250 hours, Mile Post 185.1, on the Chillicothe Subdivision, while assigned to work as rail grinder support crew was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File C-10-D040-25/10-10-0326 BNR).**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant R. Jennings 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.

This is a companion case to Third Division Award 41434. The undisputed facts indicate that on March 5, 2010, the Claimant was working as a pilot/escort on the high-rail water truck with the contractor's driver who was not railroad-rules-qualified. While the rail grinding train was sitting still on Main Track 2, it was struck from behind by a high-rail water truck, which the Claimant was assigned to as the pilot. It was alleged that he failed to do anything to prevent the accident.

On March 9, 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 be Alert and Attentive and for alleged failure to Maintain a Safe Braking Distance while performing duties of an escort, when you were riding in the water truck which collided with the rail grinder on March 5, 2010 at approximately 2250 hours, MP 185.1 on the Chillicothe Sub, while assigned to work as rail grinder support crew.”

On May 14, 2010, the Claimant was found guilty as charged and was assessed a Level S 30-day record suspension with a three year probationary period.

It is the position of the Organization that the Investigation was not "fair and impartial" because (1) the Claimant was pre-judged (2) the Notice of Investigation was not precise (3) not all witnesses with pertinent knowledge of the incident were called and (4) the discipline was not assessed by the Hearing Officer, who could judge the demeanor and credibility of the witnesses, but by another Carrier Officer who did not attend the Hearing.. The Organization asserted that because of those procedural errors, the claim should be sustained without even reviewing the merits. It further argued that the record shows that the Claimant was not in control of the vehicle and at the time of the incident, he was copying a track authority and repeating it back properly while looking at his track authority form. The Organization reasoned that it was impossible for him to also watch the driver simultaneously. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the Carrier's position that the record shows that the Claimant received a "fair and impartial" Investigation and he was guilty as charged. It argued that the testimony of various witnesses, as well as that of the Claimant, confirm that the water truck driver fell asleep and subsequently traversed more than one quarter of a mile before hitting the caboose. According to the Carrier, the water truck attained a speed of no more than 11 miles per hour, which meant that it took more than 90 seconds to make contact, and during that time, the Claimant did not realize that the water truck driver was sleeping and the truck was moving. The Carrier concluded that he failed in his duties as the escort/pilot because he was not alert and attentive in maintaining a safe distance between his vehicle and the train. The Carrier closed by asking that the claim remain denied.

Following the Board's thorough review of the record and transcript, the Board is not persuaded that any alleged procedural violations rise to the level to warrant sustaining the claim without reviewing the merits, or that the Claimant was denied his "due process" Agreement rights.

The record substantiates that on the night of March 5, 2010, the rail grinding train was working at about Mile Post 185, just west of Galesburg, Illinois. There was a Loram rail grinding train (including a caboose) and, separately, a high-rail water truck. The water truck is used for fire suppression because the rail grinding operation produces significant sparking. The Claimant was a Foreman and was

Rules-qualified and was assigned as a pilot/escort on the water truck because the contractor driver was not railroad-Rules-qualified.

At approximately 10:50 P.M., the rail grinding train had completed grinding a section of track at the Cameron connection and was stopped waiting to obtain authority from the Train Dispatcher to proceed with their work. The water truck was operated by the contractor driver and was about 1400 feet behind the rail grinding train waiting for instructions to proceed and follow the train. Subsequently, the Train Dispatcher authorized the train, as well as the water truck, to continue on with their work. The Claimant was required to copy the instructions provided by the Train Dispatcher onto track authority forms and to confirm the instructions that authorized their movement. After those instructions were copied, the Claimant was required to repeat them over the radio so as to ensure that they were correct before making any further movement on the tracks. The Claimant testified that he was aware that the vehicle was moving while he was involved with the Train Dispatcher, but he did not notice that the water truck driver had dozed off for approximately one and one-half minutes as the vehicle traversed more than one quarter of a mile of track before hitting the caboose. The Claimant had a responsibility to make sure that the driver maintained a safe stopping distance. The transcript substantiates that the Claimant testified that a safe distance was not maintained; nor did he caution or awaken the driver. During the course of the Investigation, the Claimant was questioned as follows:

“Michael Heille: Mr. Jennings, you are being charged with alleged failure to be alert and attentive and for alleged failure to maintain a safe braking distance while performing duties of an escort. As a escort are you responsible for the, for the movement of that vehicle?

Ricardo A. Jennings: As, as far, any that it makes, or.

Michael Heille: Yes, any movements that it makes.

Ricardo A. Jennings: Well, yeah, to some extent, yes.

Michael Heille: I mean that's why we put a Foreman in that vehicle, right?

Ricardo A. Jennings: Right, well, yes.

Michael Heille: So were you alert and attentive on March, March 5th, 2010?

Ricardo A. Jennings: Yes, I was copying the authorities. I was awake and alert and attentive.

Michael Heille: Okay, if you were attentive how did you not maintain a safe braking distance at, while performing the functions of an escort?

Ricardo A. Jennings: When we, when we copy our authorities on the move which is, we do this all the time, our truck driver assumes the role of keeping the safe braking distance and that's been kind of the practice since, since they made that particular rule as far as copying the authorities on the move.

Michael Heille: So was the safe braking distance maintained on March 5th, 2010?

Ricardo A. Jennings: No, it was not." (Emphasis added.)

The Claimant as the escort/pilot had a responsibility to make sure that a safe braking distance was maintained between the water truck and the caboose. The record is clear that substantial evidence was adduced at the Investigation that the Claimant was not alert and attentive to the driver's actions. 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. The discipline assessed in this instance 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.

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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.