

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7048

AWARD NO. 41, (Case No. 41)

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member

Samantha Rogers, Carrier Member

David D. Tanner, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing July 9, 2009, when Claimant, Tony Hernandez (1709625), was issued a Level S 30-day record suspension with 3 years probation for failure to control machine he was operating, resulting in a collision with another machine on November 20, 2009. The Carrier alleged violation of Maintenance of Way Operating Rule 6.50 and Engineering Instructions EI 1.1.8 and EI 1.1.9; and**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing November 20, 2009, continuing forward and/or otherwise made whole."**

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence; finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

On November 24, 2009, Carrier notified Claimant to appear for a formal Investigation on December 8, 2009, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to control a Jackson 6700 Tamper,

machine number X5400439, while you were assigned as tamper operator on the Lafayette Surfacing Gang TSCX0737, which resulted in a collision with a Ballast Regulator, machine number 60297, at repair cost of approximately \$5,000, on Friday, November 20, 2009 at approximately 1530 hours on the Lafayette Subdivision, Line Segment 1281, Mile Post 81.9, in violation of Maintenance of Way Operating Rule 6.50, Movement of On-track Equipment, Engineering Instructions Rule 1.1.8, Spacing of On-track Equipment and, Engineering Instructions Rule 1.1.9, Traveling On-track Equipment."

On January 12, 2010, Claimant was notified that he had been found guilty as charged and was issued a Level S 30-day record suspension with a three year probationary period.

The parties are in agreement that on November 20, 2009, at approximately 3:30 p.m., Claimant was operating the aforementioned Tamper Machine and was in the process of tying up the machine for the evening in the Berick House Track. Claimant's machine followed in behind the Ballast Regulator and subsequently collided into it. The estimated damage in the Notice of Investigation to the Ballast Regulator was \$5,000.00, however, at the Investigation on page 14 of the Transcript, Traveling Mechanic J. Hoffman placed the final estimate at \$2,200.00. Whatever the actual cost was, the damage was significant.

It is the Organization's position that the Carrier did not meet its burden of proof. It argued that the evidence substantiates that the siding had a very steep grade with overgrown vegetation. It asserted that if the vegetation had been mowed or sprayed to control the growth the incident would not have happened. It also suggested that because of this track's past history the Roadmaster in the area should have briefed the Operators and alerted them to the steep grade at this set out track.

It further argued that the facts indicated the Regulator was the first machine to go down the track and in the process it crushed vegetation on to the track making the track highly slippery. After the Regulator was parked approximately 150 to 200 feet from the switch the Claimant followed with his machine going no more than four m.p.h., he attempted to stop the machine 50 plus feet from the other machine so that they would have the required distance between the machines to work on them, but the brakes did not stop the machine and it slid like a car sliding on ice. It concluded that the accident was unavoidable on the Claimant's part and requested that the discipline be rescinded and the Claim be sustained as presented.

It is the position of the Carrier that the record proves that the Claimant ran a 70,000 lb. Tamper down a track and misapplied the braking unit causing the Tamper to collide with the Regulator. It argued that the excuses the Claimant testified too, did not add up to a justifiable excuse for the collision. It further argued that grass on the rail should not cause a Tamper not to stop as there is often dampness or ice on rails and machines stop. Additionally, it pointed out

that a large machine (the Regulator) preceding the Tamper went down the incline and it stopped fine. Lastly, it argued the Claimant did not stop the Tamper and he collided with the other machine because he did not maintain a safe braking distance. It closed by asking that the discipline not be disturbed and the Claim remain denied.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the Investigation was held in compliance with the applicable provisions of Rule 13(a) the Discipline Rule and Appendix No. 11.

Claimant testified that he backed the Tamper into the Berick Track Siding at no more than four m.p.h. recognizing that the track had a steep grade and applied his braking unit in proper fashion to stop at an appropriate distance from the Regulator, but because the Regulator had already crushed vegetation onto the track it had become slippery beyond any reasonable anticipation. In the Carrier's declination letter of April 23, 2010, it argued there was no reason the Claimant should not have been able to stop when it stated: **"And there was a large machine preceding the tamper and it stopped fine."** (*Underlining Board's emphasis*) If the Carrier had argued that another machine followed in after the Claimant's machine and had stopped with no problem that argument would have carried weight, but instead its statement is consistent with the Organization's assertion at the Hearing that the track was not as slippery for the preceding machine (the Regulator) because the vegetation had not been crushed on the track. That assertion coupled with the Organization's argument that the preceding machine was the causal effect of the following machine sliding as it crushed the vegetation making the track slippery beyond normal expectation is substantive. Additionally, the Board notes that **no** testimony was offered at the Hearing that suggested that the Claimant entered the track to fast, misapplied the brakes or that he should have done something differently. In a similar case, Third Division Award No. 29319 it was ruled as follows:

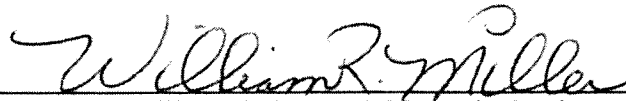
"However, having said that, we are unable, in this case from this Hearing record to find that this employee acted negligently at the time and place in question. The fact that an injury did occur, did not, ipso facto, prove that overt negligence had occurred."

In this case just as in the aforementioned Award we cannot determine from the testimony elicited at the Hearing that Claimant violated any Operating Rules despite the fact that a machine was damaged. The Carrier did not meet its burden of proof by substantial evidence to impose discipline.

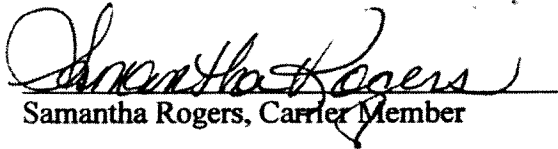
The Board finds and holds that the discipline is rescinded and removed from the Claimant's disciplinary record and the Claim is sustained as presented. Claimant is returned to his prior disciplinary status in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA).

AWARD

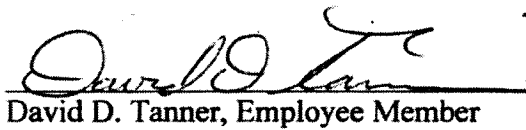
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date: 12/6/10