

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 82, (Case No. 82)**

**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 September 1, 2010, when Claimant, Charles Dixon (6463012), was issued a Level S 30-day Record Suspension with a 3 year review period, for failure to remain clear of a suspended load of railroad ties resulting in injury to himself on September 1, 2010. The Carrier alleged violation of MOWOR 1.1.2 Alert and Attentive and MOWSR 17.5.1 Restrictions Near Hoisting Equipment.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be compensated for his lost time and expense and otherwise made whole." (Carrier File No. 14-11-0005) (Organization File No. 100-1313-106.CLM)**

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 September 2, 2010, Claimant was directed to attend a formal Investigation on September 8, 2010, which was mutually postponed several times until November 4, 2010, 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 remain clear of a suspended load

of railroad ties resulting in injury to yourself on September 1, 2010 at approximately 1330 hours at Mile Post 78.5 on the Bay City Subdivision in violation of Maintenance of Way Operating Rule 1.1.2, Alert & Attentive and, Maintenance of Way Safety Rule S 17.5.1, Restrictions Near Hoisting Equipment."

On December 3, 2010, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30 Day Record Suspension along with a three year probationary period.

It is the Organization's position that the Claimant was denied a "fair and impartial" Hearing because it was postponed multiple times to allow the Carrier to arrange to have all witnesses with first-hand knowledge available, but to no avail as not all relevant witnesses appeared. Absent those witnesses the Carrier then proceeded to allow other witnesses to offer second hand information or hearsay testimony of the incident under charge. On the procedural grounds alone the Organization argued the discipline should be set aside without even addressing the merits. Turning to the facts it asserted that the record indicates that the Claimant was the ground man on the tie unloading operation and prior to the work beginning there was a job briefing where everyone was instructed including the Herzog Operator that the ties were not to be dropped unless the Claimant specifically gave the Operator a "drop" command by radio. It argued the Claimant never gave that order, but the Operator did it without direction. It further argued that the transcript shows that when the ties were dropped Claimant could not see that they were partially over him because of trees and dense underbrush on a curve. Lastly, it argued that if the Carrier had proven its case, which it did not, the discipline was excessively harsh. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the record shows that on the date of the incident the Claimant was standing in the wrong place and unaware of his surroundings. It argued that at the time the accident happened Claimant failed to stand clear of the overhead load resulting in his on the job injuries. It further argued the Claimant was not denied his "due process" Agreement rights and it closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and will first address the Organization's procedural arguments. It was alleged that because the Carrier did not produce the Herzog Operator (outside contractor) that operated the machine which dropped the ties, the Claimant was denied a "fair and impartial" Hearing. Countless Boards have determined that the Carrier does not have subpoena power and cannot compel a non-employee to appear for a formal Investigation and its inability to produce an outsider does not mean that an employee under charge was denied "due process". That same principle applies in this instance as well. Additionally, examination of the alleged hearsay testimony reveals that it was actually first-hand

knowledge proffered by a Carrier witness that interviewed the outside contractor immediately after the accident occurred. The Board has determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

There is no dispute that on September 1, 2010, Claimant was injured by a suspended load of railroad ties that were dropped by an outside contractor. The Carrier has alleged that the Claimant put himself in "harm's way" and was guilty of not being alert and attentive whereas the Organization argued that the Claimant was hurt through no fault of his own. It has been recognized by many arbitral tribunals that situations arise in the field or on the factory floor in which employees, through no fault of their own, are involved in accidents or situations which cause injuries and are unavoidable work hazards. The question at issue is whether the Claimant was not attentive to his surroundings or was he involved in an unavoidable work hazard situation.

On page 44 of the transcript Foreman K. Kelton was questioned by the Hearing Officer as follows:

"Tommy Brazier: Did you have an opportunity to interview or talk to the Herzog operator concerning this incident?"

Kirk Kelton: Yes.

Tommy Brazier: In the interview with the Herzog operator, what, what information did he give you, if any?

Kirk Kelton: I asked him why he'd drop the ties when he did, cause we didn't make this what happened. And he said he dropped the ties, I said did you hear voice command from Mr. Turner, directing you to drop the ties, as was the process, and discussed every morning at our job briefing. He said, no, I did not have a voice command from Mr. Turner. I said, why did you drop the ties? He said, I dropped the ties cause saw a flag. He, he said, that's what I'm instructed to do by his company.

Brian Poston: Clarification, we're not, it's Mr. Dixon not Mr. Turner.

Kirk Kelton: Oh, I'm sorry, yeah, yeah, Mr. Dixon. (Underlining Board's emphasis)

Kelton on page 49 of the transcript re-confirmed that the Herzog Operator told the Division Engineer, M. J. McNabb that he was not instructed by the Claimant to drop the ties, but did it because he saw a flag. It clear from the aforementioned testimony as well as the Claimant's testimony the Herzog Operator did not follow the instructions set forth at the job

briefing and instead dropped the ties on his own volition and the Claimant had no fault in the premature release of the railroad ties. The question is then narrowed as to whether he was still at fault in being under the overhead load. On pages 62 through 63 of the transcript the Claimant was questioned as follows:

"Tommy Brazier: Okay, during the course of your normal duties, while you were walking, unloading ties, how were you normally positioned, in relation to the Herzog unloader?"

Charles Dixon: I was 2 to 3, 4 cars in front of him, away from his machine.

Tommy Brazier: At the time of the incident, what would have caused you not to have been in the normal 3 to 4 car length clearing distance from the machine at the time of the incident?"

Charles Dixon: At that that we was right up, about a car from the engine, right up on the side of the engine. Then we hollered he, just right the time we hollered he to stop the train, to stop, so everybody else stopped moving.

Tommy Brazier: So at the time that the command was given for the train to make, it needed to be stopped, on, and the Engineer failed to, you basically stopped walking?

Charles Dixon: At that time I was going up under the trees, and the tree limbs was rubbing against the trains and the cars. So I had to kind of stop to get passed the tree limbs, the bushes." (Underlining Board's emphasis)

The Claimant went on to testify that because of the thickness of the brush and trees he could not see the overhead load and that he instructed the operator four or five times to stop his forward movement until he could get through the undergrowth.

On page 66 of the transcript the Claimant was questioned about the incident as follows:

"Tommy Brazier: Okay, you've mentioned that as you were walking along the right-of-way, and you came up on the bush, which affected your ability to, to walk alongside of the train. Did you notify the train crew, the Foreman, or anybody, prior to getting to the brush, that you, that you had hazards ahead of you that would affect you to per-, would affect you keeping the proper clearance from the Herzog unloader?

Charles Dixon: Yes." (Underlining Board's emphasis)

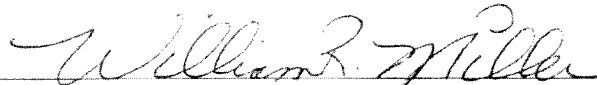
Claimant's testimony above was not refuted, that he advised others working on the tie unloading project that the train should stop because he was trying to work his way through thick underbrush that crowded the right-of-way and despite his instructions the train continued forward and the Herzog Operator subsequently chose to drop the railroad ties without a "drop" command.

The record substantiates that on September 1, 2010, the Claimant did not violate MOWOR 1.1.2 or MOWSR S 17.5.1, but instead was involved in an unavoidable work hazard that was the result of others failure to follow instructions, therefore, it is determined that the Carrier did not meet its burden of proof.

The Board finds and hold the discipline is set aside and the claim is sustained in accordance with part 2 of the claim and the Claimant's disciplinary status reverts to that he held prior to December 3, 2010, in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA).

AWARD

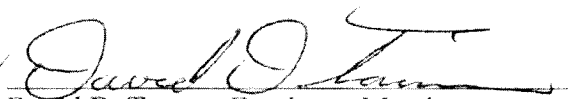
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date: May 3, 2012