

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 84, (Case No. 84)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES 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 December 9, 2010, when Claimant, Daren W. Morris (1646611), was issued a Level S 30-day Record Suspension with 1 year review period, for his failure to maintain a safe operating distance between working machines resulting in a collision while assigned as a Machine Operator on December 9, 2010. The Carrier alleged violation of EI 14.3.3 Maintaining Roadway 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. 14-11-0042) (Organization File No. 130-13C2-1076.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 December 23, 2010, Claimant was directed to attend a formal Investigation on January 4, 2011, 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 maintain safe operating distance between working machines, between MP 595.0 and MP 596.) on the Hereford Subdivision, at approximately 1100 hours on December 9, 2010, resulting in

collision while assigned as Machine Operator.

This investigation will determine possible violation of EI 14.3.3 Maintaining Roadway Equipment."

On January 20, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30 Day Record Suspension along with a one year probationary period.

It is the Organization's position that the Claimant was denied a "fair and impartial" Hearing because the Notice of Investigation denoted the location site of the incident of December 9, 2010, as being on the Hereford Subdivision which was improper because Claimant was working on the Plainview Subdivision. It argued that the Notices are very important and when they are vague and ambiguous, as was the case in this instance it is impossible to prepare a proper defense and on that basis alone the Organization reasoned the discipline should be set aside without even addressing the merits. Turning to the incident it argued that Claimant was operating a Ballast Regulator. According to it he had adequate spacing between his machine and other equipment while pulling rock up on the shoulders behind the Production Tamper. He had lifted his shoulder blades and was preparing to stop, maintaining the required distance when a major mechanical malfunction with the braking system occurred. It argued that he quickly proceeded to do everything possible. He immediately threw the travel into reverse because of the brake failure and applied the parking or service brake, but unfortunately the brake failed to stop the Regulator before it "tapped" the Tamper in the rear. It asserted that the accident was unavoidable and it concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the Claimant was not denied his "due process" Agreement rights because the Notice had the incorrect Subdivision shown, Hereford Subdivision, when the accident took place on the Plainview Subdivision. It argued the Notice did have the correct Mile Posts and the Organization and Claimant had more than enough information contained in the Notice to prepare a proper defense. On the merits it argued that the Claimant admitted that he was guilty of running into the back of machine in front of him because he panicked and did not use the service brake as quickly as he could have to stop the Ballast Regulator. It further argued there was no record that Claimant's machine malfunctioned. 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 argument. The Organization is correct that Notices must be clear enough that the charged employee understands the allegations made against him so as to prepare a proper defense. Examination of the transcript confirms that the Claimant and Organization understood where, when and what the charges were. 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 December 9, 2010, Claimant was involved in a minor accident when his Ballast Regulator "tapped" the rear end of the Production Tamper. As previously stated in Award No. 82 of this Board, it has been recognized by many arbitral tribunals that situations arise in the field or on the factory floor in which employees, though no fault of their own, are involved in accidents or situations which might cause injuries or damage to machinery and are the result of unavoidable work hazards. The question at issue is whether the Claimant failed to maintain safe operating distances between working machines or was he involved in an unavoidable work hazard.

On page 10 of the transcript the Claimant testified that when he went to stop the Ballast Regulator with the travel reverse lever there was a mechanical failure and the transmission jumped into neutral which did not allow the hydrostatic transmission to apply its brake. The questioning of the Claimant continued on page 11 of the transcript about the accident as follows:

"Jefferey Soukup: Okay. Um, in that rule, that 14.3.3, Maintaining Roadway Equipment, um, on number five it say, uh: Maintain safe operating distances. It says keep, uh, equipment 50 feet, 50 feet apart while working and 300 feet apart while traveling. Uh, were you maintaining that 50 feet while you were working?

Daren Morris: Yes Sir. I was approximately 110 to 120 feet when I put the reverser up to the neutral position to allow the transmission to start braking me.

Jefferey Soukup: Okay.

Daren Morris: Which, if it would not have jumped out of gear, it would have been way more than enough to get stopped within that 60 feet area and not getting inside of this 50 feet.

Jefferey Soukup: Right, um, so.

Daren Morris: Generally, generally it takes 20 to 30 feet to stop.

Jefferey Soukup: 20 to 30 feet, with th-

Daren Morris: The transmission, when the transmission is braking.

Jefferey Soukup: Okay, 20 to 30 feet to stop when transmission is braking.

Daren Morris: Yes. Yes Sir."

On page 12 of the transcript the Claimant further testified that he put the travel lever in the forward position and applied the service brake to halt the forward movement of his machine to no avail.

The Carrier argued that the cause of the accident was because the Claimant panicked during the incident. It relied upon the following testimony:

"Gary Marquart: Just, uh, a couple. One, this was a mechanical malfunction that occurred with your, the machine you were operating on that day.

Daren Morris: That is correct.

Gary Marquart: Okay. And, you said you almost had it stopped, uh, in advance of the bumping of the two machines?

Daren Morris: Yes Sir, I had, I when I kind of panicked and when I gathered myself and grabbed the service brake, the brakes were being applied, but, uh, I, I needed another ten feet to stop without making contact."

Because the Claimant had a moment of panic, which would have been a fairly normal reaction of anyone, does not mean that he failed to properly respond to the situation nor does it negate the un-refuted fact that Ballast Regulator malfunctioned. That malfunction was further attested to by Ballast Regulator C. McGinnis's written statement wherein he wrote that he had operated the same machine as the Claimant from January to July of 2010, and during that timeframe, he experienced the same malfunction problem the Claimant had when the hydrostatic transmission brake failed to work. McGinnis further stated he thought the problem had been fixed in March, but it now appeared that it was only a temporary fix. Claimant's testimony was not rebutted that his machine malfunctioned and he was operating well beyond the required safe distance between operating machines. The record substantiates that on December 9, 2010, the Claimant did not violate EI 14.3.3 Maintaining Roadway Equipment, but instead was involved in an unavoidable work hazard that was the result of a mechanical malfunction, therefore, it is determined that the Carrier did not meet its burden of proof.

The Board finds and holds 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 January 20, 2011, 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: 5-21-12