

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 423 – Award No. 423 – Claimant: Fortin
Carrier File No. 14-12-0098
Organization File No. 493-13F1-111.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing December 14, 2011, when Claimant, Jeremy D. Fortin (7351299), was dismissed for his possession of a firearm in a company vehicle on December 13, 2011. The Carrier alleged violation of MOWOR 1.12 Weapons.
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 reinstated with seniority, vacation, all rights unimpaired and wage loss commencing December 14, 2011, and continuing forward and/or otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Jeremy D. Fortin, was hired by the Carrier in 1992. On December 14, 2011, the Carrier notified Claimant to attend an investigation for the purpose of ascertaining the facts and determining his responsibility, if any, in connection with his alleged possession of a firearm in a company vehicle in Murray Yard, Kansas City, Missouri on December 13, 2011. The notice stated that investigation would determine possible violation of MOWOR 1.12 Weapons. Following the investigation, the Carrier determined that Claimant had committed the Rules violation alleged, and, giving

consideration to his personal record and the Carrier's Policy for Employee Performance and Accountability (PEPA), dismissed him from service.

Carrier Maintenance of Way Operating Rules, 1.12 Weapons, provides, "While on duty or on railroad property, employees must not have firearms or other deadly weapons, including knives with a blade longer than 3 inches. However, railroad police are authorized to possess firearms in the course of their work."

At the opening of the investigation, the Hearing Officer noted that Claimant was not in attendance. The Organization representative stated that Claimant had vehicle trouble and had requested that the representative go forward with the proceedings. The representative also provided the Hearing Officer with a telephone number to contact Claimant, and the record reflects that the Hearing Officer called the number and the call went to voicemail. The record also reflects that the Hearing Officer left a voicemail message indicating that he was attempting to reach Claimant to discuss his availability for the hearing and they would attempt to contact him again later in the day. A second call to Claimant also went to voicemail.

Mike Herzog, Carrier Manager of Structures, Kansas Division, testified at the investigation that on or about Friday, December 8, 2011 he received call from Structures Supervisor Tm Fanning, who informed Mr. Herzog that a Foreman had advised him that his gang had clipped a deer while traveling in a Carrier vehicle. Mr. Herzog continued that he had been informed that the gang pulled over and one of the employees shot the deer.

Mr. Herzog continued that on the morning of December 13, 2011 he convened the gang and asked each employee to provide a written statement concerning the event. Mr. Herzog added that he received statements from all four employees and, based upon that information, questioned Claimant, who told Mr. Herzog that he had the firearm in his bag, in the Carrier vehicle. This exchange, Mr. Herzog added, took place during Claimant's on-duty time.

Mr. Herzog stated that short time later he, Claimant, Special Agent in Charge Joe White, and Carrier Special Senior Agent Gina Hunter went to the Carrier vehicle, which was parked on Carrier property outside the Maintenance of Way building in Murray Yard. Claimant opened his bag, and Mr. White removed and took possession of the firearm. At that point, Mr. Herzog testified, he removed Claimant from service pending the outcome of an investigation. He added that Mr. White later informed him that the firearm was not stolen, that there was ammunition in the case, and that he would return the firearm to Claimant when they reached his personal vehicle. Mr. Herzog stated that to the best of his knowledge no function test had been performed on the firearm and they did not attempt to fire it.

Mr. White confirmed Mr. Herzog's recitation of the relevant events at the investigation and added that Claimant possessed a valid concealed weapons permit but that did not allow him to have the weapon in a Carrier vehicle on Carrier property. He

stated that he explained the situation to Claimant and he understood. He confirmed that on December 13, 2011 he accompanied Claimant to the Carrier vehicle, where Claimant opened his bag and Mr. White removed the firearm. He described it as a 9 millimeter semi-automatic weapon. Mr. White stated that the magazine was loaded into the weapon but the chamber was not loaded. Mr. White explained that the magazine ejected properly, the slide action on the weapon operated properly and the safety mechanism on the weapon functioned properly. He stated that he did not pull the trigger to ascertain if the firing pin functioned as that would have raised safety concerns. He added that the Carrier officers went with Claimant to his personal vehicle where they returned the firearm to him.

The Carrier's PEPA provides that an employee involved in a serious incident, as enumerated in the policy's Appendix B, will receive a 30-day record suspension and a review period of 36 months. A second serious violation committed within the review period may result in dismissal. Appendix B lists as serious violations numerous safety infractions as well as "other serious violations" of Carrier rules. Appendix B also includes a "non-exhaustive" list of stand-alone violations which may result in immediate dismissal. Possession of weapons is included in that category.

Claimant's personal record shows a dismissal for an incident on December 12, 2011 for failure to comply with fall protection requirements; a Level S 30-day record suspension, with a three-year review period, for an incident on August 18, 2009 for using derogatory and racial language while working as a foreman; a censure in 2000 for being absent without permission; a 10-day actual suspension in 1997 for failure to provide proper track protection; a censure in 1996 for failure to contact Foreman; and another censure in 1996 for making a reverse movement with a bridge crane resulting in damage to a switch and breaking a switch point.

The Carrier asserts that the case is not complicated. The Carrier points to the testimony of Claimant's supervisor, Mr. Herzog, that a Carrier vehicle hit a deer and an employee, later determined by witness statements to be Claimant, got out of the vehicle and shot the animal with a gun he had with him. The Carrier adds that Mr. Herzog's testimony was corroborated by Special Agent White, who testified that he assisted Mr. Herzog in obtaining the gun from Claimant's bag, which was in a Carrier vehicle on Carrier property. The Carrier also notes Mr. Herzog's testimony that Claimant told him the weapon was loaded and he had discharged it.

The Carrier adds that although Claimant failed to attend the investigation he admitted to both his supervisor and the special agent that he shot the gun, and he took them to his bag, inside the Carrier vehicle, to get it. The Carrier urges that it has met its burden of proving Claimant's guilt by substantial evidence. The Carrier notes that its PEPA provides that two serious, Level S offenses within a review period may result in dismissal, and Claimant's personal record shows this incident to be Claimant's third such event within the 36-month review period. Further, the Carrier states, the PEPA expressly provides that possession of a weapon is a stand-alone dismissible offense. Dismissal was

the appropriate penalty, the Carrier concludes, given the seriousness of this violation, Claimant's personal record, and the PEPA. The Carrier urges that the claim be denied.

The Organization points out that Claimant is a 40-year-old employee, with 19 years of service, and asserts that the Carrier has failed to prove him guilty of the charges. The fact that the Carrier removed Claimant from service at the time of the incident, the Organization asserts, shows prejudgment of Claimant's guilty and jeopardizes the entire concept of a fair and impartial investigation.

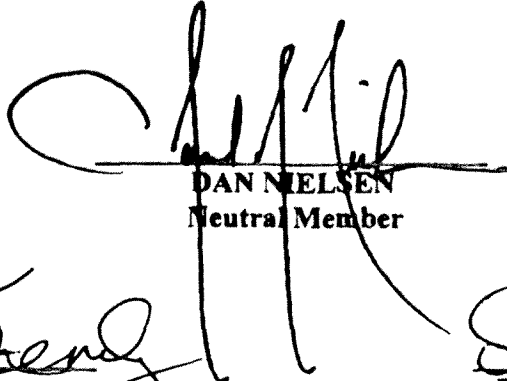
On the merits, the Organization states that no function tests were performed to verify that the alleged fireman was a complete working weapon as opposed to the possibility of firearm parts, the possession of which would not violate Carrier rules. The Organization urges that this uncertainty demonstrates that the Carrier failed to meet its burden of proof. Even if it had, the Organization concludes, the penalty is extreme and unwarranted in light of the alleged offense. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no procedural irregularity which denied Claimant his right to a fair and impartial investigation. On the merits, there is no question that the Carrier has met its burden of proving Claimant's guilt by substantial evidence. The undisputed testimony of the Carrier witnesses, which Claimant did not appear at the hearing to rebut or attempt to explain, is that Claimant possessed a weapon, in his Carrier vehicle, on work time, and on Carrier property. We cannot accept the Organization's assertions that because the Carrier officers did not actually fire the weapon the Carrier has not established that an actual weapon existed. The weapon was in working order when the deer was shot. The applicable Carrier rule clearly prohibits Claimant's conduct. Thus, Claimant's guilt has been established by substantial evidence.

As for the penalty, given the nature of the offense, Claimant's disciplinary history and the guidelines set forth in the PEPA, we cannot accept the Organization's contention that dismissal represents an unfair, arbitrary or discriminatory exercise of the Carrier's discretion to determine penalties.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID TANNER
Organization Member

Dated this 21st day of MAY, 2013.



PLB5850-424

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 424 – Award No. 424 – Claimant: Fitz
Carrier File No. 14-12-0012
Organization File No. 70-13C2-1153.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing November 14, 2011, when Claimant, Jerry D. Fitz (1665421), was dismissed concerning his failure to be alert and attentive and his alleged careless conduct regarding the safety of himself and others from the improper securement of equipment resulting in collision of on-track equipment on September 25, 2011. The Carrier alleged violation of EI 14.4.1 B Operating Roadway Equipment Over Grade Crossing--Part B Unattended Equipment, MOWOR 1.1.2 Alert and Attentive, and MOWOR 1.6 Conduct.
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 reinstated with seniority, vacation, all rights unimpaired and wage loss commencing November 14, 2011, and continuing forward and/otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Jerry D. Fitz, had been employed by the Carrier since 2005. On September 29, 2011, the Carrier notified Claimant to attend an investigation, on October 12, 2011, to ascertain the facts and determine his responsibility, if any, in connection with his alleged failure to be alert and attentive, and his alleged careless conduct regarding the safety of himself and others from improper securement of equipment, on September 25,

2011, resulting in a collision of Carrier on-track equipment. The Notice stated that the investigation would determine possible violation of Maintenance of Way Operating Rule 1.1.2 Alert and Attentive, and 1.6 Conduct, and Engineering Instruction 14.4.1 Operating Roadway Equipment Over Grade Crossing--Part B Unattended Equipment. On October 4, 2011, the Carrier issued a letter indicating that the parties had mutually agreed to postpone the hearing until October 19, 2011. Following the investigation, which was held on October 19, 2011, the Carrier determined that Claimant had committed the misconduct alleged, and, taking into account his personal record, dismissed him from employment.

The applicable Maintenance of Way Rules provide, in relevant part:

1.1.2 Alert and Attentive

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive while performing their duties and plan their work to avoid injury.

1.6 Conduct

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome
- or
7. Discourteous

Any act of hostility, misconduct, willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.

The applicable Carrier Engineering Instruction provides, in relevant part:

14.4 Roadway Equipment Operation Instructions

**14.4.1 Operating Roadway Equipment Over Grade Crossings
B. Unattended Equipment**

When on-track equipment is not being used, it must be:

- Clear of passing trains
- Secured to prevent movement
- Locked, when not in sight to prevent unauthorized machine operation

At the opening of the investigation, the Organization's representative protested that the Carrier had violated the time limits of Rule 40 of the parties' Agreement, in that the hearing had not been scheduled within 15 days of the incident. The representative stated that although there had been a postponement granted, the Carrier was aware that it was outside the limits and could have, even with the postponement, scheduled within the limits but extended the investigation even further outside those limits. The Organization requested that the hearing be cancelled. That request was denied.

On September 25, 2011, Claimant was working as a machine operator on a Super Surfacing Gang, operating the "CAT 09," a big tamper. It is undisputed that Claimant's machine was involved in a collision with the BDS, another on-track machine. An employee who had been on the back of that machine was injured and taken to the hospital. Carrier Assistant Roadmaster Michael Sparks testified at the investigation that he was responsible for Claimant's gang at the time of the incident, and it was his responsibility to gather relevant information.

Mr. Sparks came to the scene. He briefly inspected the two machines and observed physical evidence of the collision.

Mr. Sparks testified that he spoke to Claimant briefly that day, who informed Mr. Sparks that he had released the machine's brakes, causing it to roll down a hill. He added that Claimant provided no explanation for his actions. Mr. Sparks acknowledged that the entire gang was present with the equipment when he arrived, and it was undisputed that two employees had been on the machine. He added that he also spoke to five or six employees as well as the Track Supervisor. He stated that he did not know if the machine had been unattended because he had not been present at the time of the incident, but he concluded that the machine had not been secured properly, which caused it to roll and strike another piece of equipment.

Claimant testified at the investigation that he had been operating the machine at issue, the CAT 09, for approximately two years prior to the incident. Claimant stated that he did not receive training on putting his machine into tow. He stated that on the day of the incident, the machine was never left unattended, as he and co-worker Justin Rade were both present.

As for the sequence of events for shutting his machine down, Claimant stated that he did not know the machine would roll free. He added that once it began to do so, he did everything possible to try to stop it. He stated that he attempted to operate the mechanical brake on the end of the machine but it was inoperable, a fact of which he was unaware. Claimant acknowledged that one of his duties was to perform daily inspections of the machine, in the morning and afternoon, and that on this day, he had not found any defects.

With respect to whether he had performed any briefing or received any instruction prior to setting the machine up in the tow position, Claimant stated that the other

operator, Justin Rade, had already chained everything up and the last things they had to do were take the lasers and then throw a valve.

Claimant acknowledged that he had set up a CAT 09 machine for train consist approximately once per month, and considered himself experienced at that task. He stated that he was unaware that, when he threw the valves, the brakes would release, which is what caused this collision.

The Organization entered into evidence an email purporting to be from Surfacing Gang Mechanic Phil Langhans to the Organization representative. It stated that all "Plasser" machines were "snowflakes," as no two were alike. It stated that their machine did not use steps five and six of the towing procedure, caging brakes. The message continued that Claimant had not been present for the training Mr. Langhans had conducted at the beginning of the work season for the gang on site.

The Organization also entered into evidence a written statement, again purporting to be from Mr. Langhans. It stated, in relevant part:

I'm currently the mechanic on SC31, the gang on which the collision occurred. This is the first time I've been asked to comment on the accident. This is my remembrance of the event. I was in my truck parked parallel to, but ahead of the tamper and behind the BDS. We were in the process of readying the equipment for train consist. I was on the phone with the truck driver lining up my parts trailer relocation to the next jobsite. I saw the tamper roll past and radioed them to slow down as it was going too fast for a couple into the BDS. Jerry answered back the tamper didn't have any brakes. Then they hit. This was with the tamper shut down, no engine power or hydraulics. After we did a headcount, checking for any personal injuries, I looked at the machines for any noticeable damage that would prevent them from separating and moving. We might have had a crossing partially blocked. When we set, we then set up the tamper for independent travel. I found the emergency air brake valve on the rear cab only had been pulled, the outside train air valve was in the towing position, and on the opposite side of the machine the spring air valve was also in the towing position. The following day, during the reenactment, I found the rear handbrake inoperable with a broken push/pull cable. After looking at the cable of the broken end, it could have been inop prior to the impact. The handbrake in the front was working and did stop and hold the machine on the same grade during reenactment. Did find that even with the machine shut down, there is enough bottled air in system to overcome the failsafe spring break chambers when the spring air brake lever is thrown for towing position. Jerry is a good and loyal person, my best operator, and given another opportunity an asset to our company. You don't know me, but I'm the on the backside of my career. I've met and worked alongside many throughout the years. Jerry is a quick study, has a great work attitude, and although you probably

wouldn't see it today, a necessary sense of humor. Given the chance, I promise you, he'll make you proud.

The Carrier's Policy for Employee Performance Accountability (PEPA) provides that an employee involved in a serious incident, as enumerated in the policy's Appendix B, will receive a 30-day record suspension and a review period of 36 or 12 months depending upon the employee's length of service and discipline/injury records. Appendix B lists as serious violations numerous safety infractions a first violation of Rule 1.5, as well as "other serious violations" of Carrier rules. The PEPA provides that a second serious violation committed within the applicable review period may result in the employee's dismissal. Claimant's personal record shows a Level S conditional suspension assessed October 4, 2011, for a violation on September 25, 2011, the same day as the incident in this case, in connection with a first time violation of Rule 1.5. The suspension was effective October 4, 2011 through October 18, 2011.

With respect to the Organization's procedural arguments, the Carrier states that the Organization's contention that the investigation was held outside the 15-day time limit is invalid, as a postponement notice reset the investigation. While the Organization asserts that the investigation was not fair and impartial, there is nothing, the Carrier stresses, to support its contention.

On the merits, the Carrier states that Claimant admitted at the investigation that the machine he was operating rolled through a crossing and then rolled free when he threw the valves. The Carrier notes the Organization's assertion that the machine's brakes were faulty, but Claimant testified he found no defects during his morning inspection. The Carrier states that the Organization alleged that Claimant did not have proper training, but Claimant acknowledged he had operated the machine for about 2½ years and had put it in a consist, as he was doing at the time of the incident, numerous times.

The Carrier states that the gravity of this situation was severe; Claimant's co-worker was rushed to the hospital with an injury. Claimant simply cannot be unsure as to whether he complied with the applicable Rules, which are in place to protect employees. Here, the Carrier continues, Claimant's attitude had the potential for catastrophe and the Carrier's determination as to the seriousness of his violation was correct. The Carrier concludes that it has proven the charges against Claimant by substantial evidence. As for the penalty, the Carrier urges that dismissal was appropriate given the seriousness of the violation and the fact that this was Claimant's second serious violation within a 36-month review period, which subjected him to dismissal under the Carrier's Policy for Employee Performance Accountability. Therefore, the Carrier maintains, the claim should be denied.

The Organization raises procedural and substantive objections to the discipline assessed against Claimant. The Organization first asserts that the original Notice of Investigation set the hearing 17 days from the date of the incident, clearly outside the 15 day-period prescribed by Rule 40(a) of the parties' Agreement. The Organization adds

that the postponement requested by the Carrier was simply an effort to skirt the fact that the investigation was originally scheduled outside the applicable time limits. The Organization also notes that the Carrier had full opportunity to reschedule the investigation to a date within the time limits, but moved it further to October 19, 2011, with no explanation.

In addition, the Organization stresses, the Carrier Officer who presented the Carrier's case at the investigation had absolutely no first-hand knowledge of the events that transpired on the day of the incident. His testimony, the Organization points out, consisted only of information gathered second, third, or fourth hand. Moreover, the Organization states, there were no written statements provided to substantiate any of the testimony.

Further, the Organization states, the record suggests that there was a great deal of prejudice of Claimant's guilt, making it impossible for him to receive a fair and impartial investigation. While the Organization concedes that the machine at issue rolled free and unrestrained down the track and collided with another machine, the Organization urges that there were, at the very least, mitigating factors and the distinct possibility that this particular machine experienced a mechanical failure which allowed the incident to occur.

On the merits, the Organization first states that the Carrier did not prove the Claimant failed to be alert and attentive. The Organization notes that at the end of their shift Claimant and another Machine Operator were preparing the machine to be added to a consist of machines to be pulled by a locomotive. The machine, the Organization notes, weighs more than 75,000 pounds and is 54 feet long, with thousands of feet of air and hydraulic lines, and dozens of valves and actuators. The Organization contends that its evidence, a written statement by the Equipment Mechanic in charge of the machine's maintenance, demonstrates that Claimant was not present for the training on how to put the machine into "train" setting, and only received on-the-job training from other Operators.

Nevertheless, the Organization states, when it was apparent that the machine began to move, the very alert Claimant mounted it at the rear cab and attempted to apply the manual hand brake on that end, only to find it inoperable. A post-incident inspection, the Organization asserts, showed that it would have been possible to stop the machine had the brake been functioning properly.

In addition, the Organization contends, there is no evidence to support the Carrier's conclusion that Claimant was guilty of leaving the equipment unattended. The cited Rule, the Organization states, is clearly intended to govern situations where an employee leaves equipment standing for a period of time with no one in the area. This was not the case here, the Organization asserts; rather, numerous employees from multiple crafts were present on and around the machine and work was in progress. The Carrier's charges, the Organization argues, distort what occurred. For these reasons, the

Organization urges that the Carrier has failed to prove its charges against Claimant by substantial evidence.

Even if the Carrier had produced substantial evidence to support these charges, the Organization submits that the discipline assessed is arbitrary, excessive and completely out of proportion to the misconduct alleged. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no procedural irregularity which warrants vacating the discipline in this case. In particular, with respect to the Organization's assertion that the Carrier failed to schedule an investigation within the applicable time limits, the Notice was sent only four days after the incident, and there is no evidence that the Organization objected to the fact that the hearing was scheduled more than 15 days after the incident. Moreover, the postponement notice states that the hearing was postponed by mutual agreement, and there is nothing to demonstrate that that was not the case. Thus, we find the Organization's argument without merit.

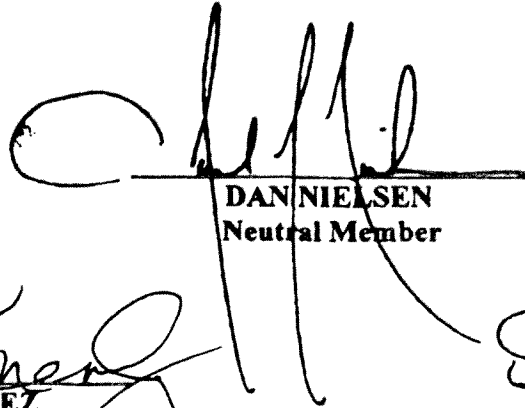
On the merits, we find that the Carrier has met its burden of proving Claimant's guilt by substantial evidence. There is no question that Claimant's machine rolled free. The Organization's defense is that Claimant lacked training and did not know the brakes would release when he threw the valves, but he was an experienced operator who had performed the shutdown procedure numerous times. As for his assertion that the handbrake was not working, Claimant maintained he had examined the machine that morning, as he did every day, and found no defects. The written statement of another employee provided by the Organization states that it was unclear if that brake was inoperable before impact, and also notes that another handbrake was working and stopped the machine during a reenactment.

Even if a handbrake had been able to stop the machine, the issue is not whether he attempted to stop the machine once it rolled free. The Rule violation is in failing to properly secure the machine in the first place. While the evidence does not indicate that Claimant left the machine unattended, the machine was not in use and had not been properly secured. Claimant was responsible for doing this, a task he had performed many times before. Given his experience, it is difficult to understand how he could have been unaware that throwing the valve meant releasing the brakes. The more likely conclusion, and the conclusion that we draw, is that Claimant was not alert and attentive to his duties. We therefore conclude that the Carrier has met its burden of proving his guilt by substantial evidence.

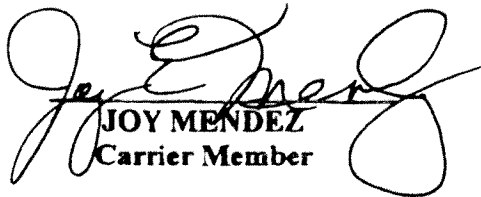
As for the penalty, Claimant allowed his machine to roll free, causing injury to a co-worker. He committed a serious offense. We cannot say that the Carrier's decision to assess the maximum penalty as provided for in its PEPA represents an unfair, arbitrary or discriminatory exercise of the Carrier's discretion to determine penalties.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID TANNER
Organization Member

Dated this 21st day of May, 2013.