

Public Law Board No. 6204

Parties to Dispute

Brotherhood of Maintenance of Way
Employees

vs

Burlington Northern Santa Fe

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Case 23/Award 23

Statement of Claim

1. The Carrier violated the Agreement when it assessed G. Devera a 30-day record suspension as a result of an investigation held on July 12, 2000. In the investigation the Carrier charged that Mr. Devera was at fault in a hyrail accident. Mr. Devera was then disciplined, however, for an act for which he was not charged.

2. Therefore, as a result of the violation of the Agreement cited in Part 1 of the Statement of Claim the Carrier shall be required to remove all mention of this incident from the Claimant's personal record.

Background

The Claimant was advised on May 24, 2000 to attend an investigation in order to determine facts and place responsibility, if any, in connection with his alleged involvement when BNSF hyrail vehicle 13063 derailed on a curve and rolled over at approximately 15:50 hours on Friday, May 19, 2000. This happened in the Carrier's Helena subdivision near MP 155.5. After an investigation was held on July 12, 2000 the Claimant was advised on August 10, 2000 that he had been found guilty of failure to wear a seat belt, of sleeping while on duty, and with failure to be alert and attentive while performing his duties which resulted in the hyrail accident. The Claimant was advised

that he was in violation of Maintenance of Way Safety Rule 14.2.1 and BNSF Rules S-1.11 and S 1.2 and S-1.2.3. The Claimant was assessed a thirty (30) day record suspension and was put on probation for three (3) years. He was advised that if there were "...any future safety rule or serious violations which require discipline during the three (3) year probationary period..." that further discipline could be dismissal. This discipline was appealed by the Organization, and denied by the Carrier, in the proper manner under Section 3 of the Railway Labor Act and the operant labor Agreement up to and including the highest Carrier officer designated to hear such. Absent settlement of the claim on property it was docketed before this Board for final adjudication.

Procedural Objection

There is an objection raised in this case by the Organization on grounds that the Claimant was charged with one thing and assessed discipline for another. According to this objection the Claimant was charged with "...his responsibility (if any) with a hyrail rollover accident..." but was found guilty of "...allegedly not wearing a seat belt , sleeping while on duty, and not being alert and attentive...". The Organization argues that in the notice of investigation there was "...no menton of failing to wear a seat belt, of sleeping while on duty, and of not being alert and attentive...".¹

A review of the original letter of charges against the Claimant, as well as the full

¹Quotes taken from Employees' exhibit A-4 although comparable versions of the arguments used are found at other points in the record, as well as in objections raised by the Organization at the investigation itself.

record in this case, fails to persuade the Board that this procedural argument has merit. The Claimant was charged with his "...alleged involvement..." with the hyrail derailment on May 19, 2000. It was concluded by supervision, and not denied by the driver of the hyrail, that speed was the most likely cause of the derailment. A review of the sketch of the location and the derailment leaves a strong impression in the mind of the Board that it was simply a matter of centrifugal force which caused the accident. The hyrail was going so fast around the curve that it simply flew off the track. Common sense and logic warrants this conclusion given all information available in the record. It is true that the Claimant was a passenger on the hyrail when the accident happened. But it is also true that he was on duty. BNSF Rules S-1.2 and S-1.2.3 clearly and unambiguously require employees to perform their "...work safely...", and to be "...alert and attentive when performing duties...". The Claimant was doing neither while he was sleeping on the job and while riding in the hyrail without a seat belt. As a passenger on the hyrail, rules such as those cited above, do not state nor imply that the Claimant was to be wholly passive. Again, he was on duty. He was also an experienced machine operator. As such he was in a position to have stopped the accident before it happened by signaling to the operator, as reasonable minds would but conclude he would have done had he not been asleep, that the vehicle was being driven too fast to negotiate the curve in question. Further, use of language such as "...alleged involvement..." in the derailment, by the Carrier, when it charged the Claimant, implies the rules cited above. The applicability of additional rules, such as Rules 14.1.2 and Rule S-1.1, are but further logical extensions.

Given its scrutiny of the record in this case the Board would be remiss in framing rulings here on basis of semantics rather than evidence. The fact is that Claimant and the operator could both have been either seriously injured or killed when the hyrail derailed. It was but fortuitous that they were not. During the investigation the Organization argued that "...sleeping (while on the job by the Claimant had) nothing to do with...the derailment and rollover of the vehicle...". The Organization's view on this particular point amounts to speculation. Evidence of record would suggest the opposite conclusion to reasonable minds. The procedural arguments raised here are dismissed.

Discussion & Findings on Merits

The Claimant in this case holds assignment as a Group 1 machine operator in the Carrier's Helena, Montana subdivision. He was a passenger on the vehicle which overturned on the date of May 19, 2000.

The rules referenced by the Carrier in assessing discipline in this case are the following, which are cited here in pertinent part.

Maintenance of Way Safety Rule 14.1.2

Employees must wear safety belts while operating or riding in equipment or vehicles that is equipped with them.

BNSF Rule S-1.11

Sleeping

Employees must not sleep while on duty. Employees reclined with their eyes closed will be in violation of this rule.

BNSF Rule S-1.2**Rights and Responsibilities**

We have the right and responsibility to perform our work safely. Our training skills and work experience, personal judgment provide the foundation for making safe decisions about work practices.

BNSF Rule S-1.2.3**Alert and Attentive**

Ensure that you are alert and attentive when performing duties.

Testimony at the investigation by the road master is that the Claimant and another employee by the name of Bertoli, were under his supervision. Bertoli called him on May 19, 2000 and told him that the hyrail vehicle they were using "...went off the track and flipped on (its) top...". No one was injured. This road master went to the location and did an investigation. He testified that he could see where the vehicle scratched the ties and made marks in the ballast before going off the tracks and turning over.

Testimony by the assistant division engineer of the Montana division was that he was also advised of the incident and went to the scene of the accident. He arrived there about an hour after the accident happened or at about 16:45. He interviewed Bertoli who appeared to him to be nervous and "...shook up...". The latter told the division engineer that he did not know what happened when the accident happened although he "...guess(ed he was) in a hurry..." but did not "...notice..." how fast he was going although he estimated that it was "...approximately 20, 25..." MPH. He stated that he did not have his seat belt on. The accident had happened when Bertoli and the Claimant were riding

together on the hyrail patrolling track. This engineer did not interview the Claimant.

Testimony by the division engineer at Havre, Montana, who was also notified of the accident and who went to the scene of the accident, is that he interviewed both Bertoli and the Claimant. Both stated that they were not wearing their seat belts at the time of the accident. Bertoli stated that he estimated that the hyrail had been traveling "...between 20 and 25 MPH..." although the track speed at this location was "...10 MPH...". A speed limit sign to that effect was posted "...just west..." of where the hyrail derailed. On cross examination this witness states that this speed limit sign is meant for all vehicles traveling that particular part of the track, in his estimation, although it was obviously posted for trains. According to Bertoli the hyrail left the track, ~~went~~ up a "...vertical embankment about 17 feet and rolled over...". The Claimant told the engineer that he "...was sleeping..." when the accident happened although he woke up when the hyrail was on the ground when it jumped the track. The engineer testified that in his estimation the accident was caused by the hyrail going too fast going around the curve. A survey of the hyrail after it turned over showed that it was in good mechanical condition at the time of the accident.


Testimony by track maintainer Bertoli simply substantiates that of the three witnesses cited in the foregoing. He states that in his estimation speed could have been one of the factors in the accident.

Testimony by the Claimant is that he was "...dozing off..." when the accident happened, and that he had not been wearing his seat belt.

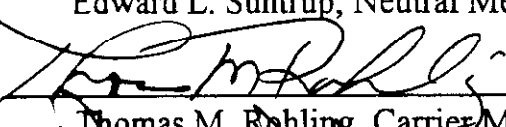
A review of the full record warrants conclusion that the Claimant violated BNSF Rules A-1.2 and S-1.2.3 by not working safely and by not being alert and attentive while on duty while he was riding on the hyrail which derailed on May 19, 2000. How could he have been working safely if he did not have his seat belt on as required by rule? How could he have been alert and attentive if he was asleep while on duty? Since he was engaged in both of these improper behaviors he was a fortiori guilty of also violating Rules 14.1.2 and Rule S-1.11. In view of this the Board can but reasonably conclude that the Claimant was involved in the derailment of the hyrail as charged, and he was party to a breach of safety which could have had extremely serious consequences. Given the gravity of the matters involved in this case the Board is in no position to disturb the Carrier's determinations with respect to discipline and it will rule accordingly.

Award

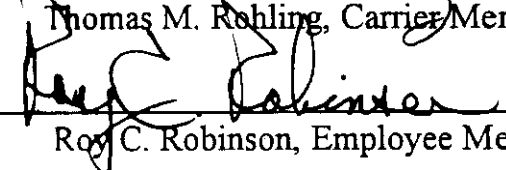
The claim is denied.



Edward L. Suntrup, Neutral Member



Thomas M. Rohling, Carrier Member



Roy C. Robinson, Employee Member

Date: September 18, 2002