

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 104, (Case No. 104)**

**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 September 21, 2011, when Claimant, Chass V. Ashley (6442107) was dismissed for failure to stop short of a derail which resulted in his machine derailling on September 21, 2011. The Carrier alleged violation of EI 23.4 Machine Operator Roles and Responsibilities and MOWOR 6.50 Movement of On-Track 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 reinstated with seniority, vacation, all rights unimpaired and wage loss commencing September 21, 2011, and continuing forward and/or otherwise made whole." (Carrier File No. 14-11-0231) (Organization File No. 130-13C2-1150.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 21, 2011, Claimant was directed to attend a formal Investigation on September 30, 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 stop short of a derail which resulted in your machine derailling, at approximately, 0700 hours, September 21, 2011, while performing your duties, at MP 620.4 on the Madill Subdivision."

On October 28, 2011, Claimant was notified that he had been found guilty as charged and was dismissed from service.

The undisputed facts indicate that on September 21, 2011, the Claimant was assigned as a Machine Operator. Claimant attended a job briefing at 6:00 a.m. after which he was instructed to pull his Spike Puller machine up to the derail at MP 620.4. Claimant checked the machine prior to operating it and found it to be in satisfactory condition. Claimant was joined on the machine by the Foreman on the Gang, M. Jeter who wanted to ride with the Claimant to the derail location. Claimant sat on the right side of the machine and Jeter sat on the left. While traveling to the derail location neither employee saw the derail in time and the Spike Puller derailed five feet past the derail.

It is the Organization's position that the Claimant was denied a "fair and impartial" Investigation because he was removed from service prior the Hearing which also showed that he had been pre-judged and on that basis alone it argued the Claimant should be reinstated and the claim sustained without even reviewing the merits. However, if the merits are examined it argued there were several mitigating factors such as the fact that the machine's lights were dim, the derail was faded and testimony of Carrier Officer Hanson suggested that derail sign may not have been the correct reflective sign. It also pointed out that it is clear that machine only traveled five feet beyond the derail which showed that Claimant was operating the machine at a low speed and that coupled with the fact that the "spotter" the Foreman did not see the derail in time as well proved that the conditions were not good for the recognition of the derail. Lastly, it argued that if the Carrier had produced evidence to support their charges, which it did not do, the discipline was excessive for an employee with 17 years of immaculate service. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier there were no procedural errors involved in the handling of the Claimant's cases and he was not denied a "fair and impartial" Investigation. It further argued the transcript shows that the Claimant was instructed to pull up to the derail and wait for further instructions. It asserted it was the Claimant's responsibility to operate the machine safely and stop it prior to the derail before reaching the mainline which he did not do because he was negligent in its handling. Additionally, it pointed out that the Claimant did not have a clear disciplinary record as this was his second Serious Level S discipline event within the 12 month review period as he was administered a Level S on September 26, 2011, for positive test for a controlled substance, thus according to it dismissal was appropriate. 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 are not persuaded by the Organization's procedural arguments that the Claimant was denied a "fair and impartial" Investigation as it is clear that he understood the charges and was well represented by his Organization and was afforded his "due process" Agreement rights. It is determined that the

Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

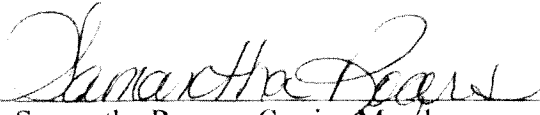
The Carrier is correct that the Claimant was instructed to pull up to the derail and wait for further instructions and that he failed to stop before the derail. The Organization is also correct that Claimant's co-worker became distracted by a malfunctioning radio and did not see the derail and it was not contested that the derail was faded and the derail sign might not have been the proper size or reflective. The record further indicates there was no damage to the machine and the crew had an approximate 30 minute delay/production loss while re-railing the Claimant's machine. Despite there being some merit to the Organization's argument that there were mitigating factors involved in the accident there was substantial evidence adduced at the Investigation that the Claimant was guilty as charged.

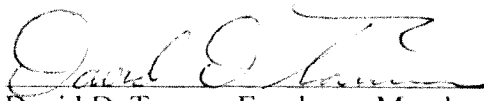
The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 17 years of service with a good work record. However, this was his second serious Level S, offense within a 12 month review period. The Carrier's Policy for Employee Performance Accountability (PEPA) states that two serious Level S violations may result in dismissal, but in this instance the Board finds and holds that based upon Claimant's years of service and good work record the discipline was excessive and is reduced to a lengthy suspension which is corrective in nature and in accordance with PEPA. The Claimant is to be reinstated to service at his former disciplinary status with seniority intact and all other rights unimpaired with no back-pay.

AWARD

Claim partially 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.


William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member


David D. Tanner, Employee Member

Award Date: 2/27/13