

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 111, (Case No. 111)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

**William R. Miller, Chairman & Neutral Member
Joy E. Mendez, 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 May 17, 2010, when Claimant, Barry K. Baird (1566041), was issued a 30-day Record Suspension with a 3 year review period, for failure to take specific precautionary actions while performing hot work on open deck bridges. The Carrier alleged violation of EI 1.7.2 Job Preparation - General and EI 1.7.3 Specific Precautionary Actions.**
- 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 May 17, 2010, and continuing forward and/or otherwise made whole."
(Carrier File No. 14-10-0146) (Organization File No. 90-13N1-1043.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 May 17, 2010, Claimant was directed to attend a formal Investigation on May 24, 2010, which was mutually postponed until July 1, 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 prepare for performing hot work activities and, failure to take specific precautionary actions while performing hot

work on open deck bridges resulting in violation of Engineering Instructions rules 1.7.2 and 1.7.3"

On July 16, 2010, Claimant was notified that he had been found guilty as charged and was assessed a 30-Day Record Suspension with a three year probationary period.

The facts indicate that the Claimant and his co-worker J. Hamel were welding on a bridge at Milepost 245.2 and approximately three and one half hours after performing hot work on that structure a fire broke out that did significant damage.

It is the Organization's position that the Claimant was denied a "fair and impartial" Hearing as he was pre-judged as being guilty. On the merits it argued that the record demonstrates that the Claimant and his co-worker took all necessary precautions before preparing to do their work. After arriving at the location to work, they surveyed the surrounding area and filled out the proper paper work and before starting their work they made sure everything was wet down as required. Additionally, they had the proper fire-fighting equipment as well as all other supplies and tools needed. After completing their work process, they once again wet down and inspected the area and waited one hour in accordance with Carrier Rules to make sure that nothing was left smoldering or burning after which they left. It further argued that it was only co-incidence that a fire occurred at this location where they had been working and the fire could have been caused by a passing train that had sticking brakes or bad wheel bearings or even by vandalism. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that there were no procedural errors involved in the handling of the Claimant's case and he was not denied a "fair and impartial" Investigation. It argued that it was determined through testimony, even though the Claimant and his co-worker both testified that they followed the Engineering Instructions, there was a fire that started within one hour from when they left the bridge that caused \$302,000.00 damage to the bridge. It argued that Assistant Director Maintenance Production T. Brazier testified the Claimant and his co-worker had authority on the bridge from noon to 3:00 p.m. and a hour later the bridge was ablaze. It further argued that contrary to the Organization's assertions that there were 3 1/2 to 4 hours between the time the Claimant and his co-worker quit and the time of the bridge fire - the testimony of Brazier shows different. Additionally, it asserted that Baird testified that the Dispatcher wanted them off the track so they cleared out and went to another location, instead of sitting at the crossing and watching the bridge per the Engineering instructions as required. 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 is not persuaded by the Organization's procedural argument and it is determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

The Board notes this is a companion case to Award No. 112 and is identical involving the same incident with the only exception being that each case involves a different Claimant.

There is no dispute that a significant fire occurred at the exact milepost the Claimant and his co-worker had done some welding repair. The Organization has suggested two alternative theories: 1) the fire might have been caused by vandals or 2) a passing train might have caused the fire. Vandalism seems to have been highly unlikely as the location of the bridge was at a remote site and the Claimant testified on page 25 of the transcript that he not seen any other people in the area. The second theory is possible, but again it is highly improbable that a "chance co-incidental" fire would happen at the exact location that the Claimant and his co-worker performed the hot work of welding. The question then becomes did the Claimant and his co-worker follow the safety guidelines as closely as they should have. Both employees testified that they did, however, review of their testimony shows that they did not adhere to all of the procedures to minimize the likelihood of a fire occurring on the bridge. Rule 1.7.3 Specific Precautionary Actions, Section 1(c) states:

"Use a combination of spark shields, thermite packing sand, and insulating blankets to protect bridge components. Spark shields control and confine sparks from cutting and grinding operations. Thermite packing sand can cover bridge stringers. Insulated blankets can protect wood components at welding sites." (*Underlining Board's emphasis*)

On page 40 of the transcript the Claimant's co-worker J. A. Hamel (Claimant in Award No. 112) was questioned as follows:

"Thomas (Chris) Knox: Did you use thermite packing sand to protect the bridge components?"

Joseph A. Hamel: No.

Thomas (Chris) Knox: Did you use insulating blankets to protect the bridge components?"

Joseph A. Hamel: No." (*Underlining Board's emphasis*)

Based on the aforementioned testimony it is clear that the Claimant and his co-worker chose not to use two safety devices to lessen the chance of a fire.

Rule 1.7.3 also makes another recommendation under the same Section 1(d) to minimize the likelihood of a fire. The recommended precautionary action to be taken by workers before performing hot work on a wooden structure is the following:

"Pre-wet the wood components surrounding the immediate area with a soap and water solution. Soap helps to slow water evaporation." (*Underlining Board's emphasis*)

On page 40 of the transcript the questioning of J. Hamel continued as follows:

"Thomas (Chris) Knox: What did you use to wet the wood components?"

Joseph A. Hamel: Water.

Thomas (Chris) Knox: Did that water have a mixture of soap and water?"

Joseph A. Hamel: I'm not sure." (*Underlining Board's emphasis*)

Hamel was not sure whether it was a mixture of soap and water, however, the Claimant was asked on page 23 of the transcript what they soaked the wood components with. The question and response was as follows:

"Thomas (Chris) Knox: What did you soak them with?"

Barry K. Baird: Water." (*Underlining Board's emphasis*)

Based upon the aforementioned testimony it is apparent that the Claimant and his co-worker again chose not to use another precautionary action for the prevention of a possible fire.

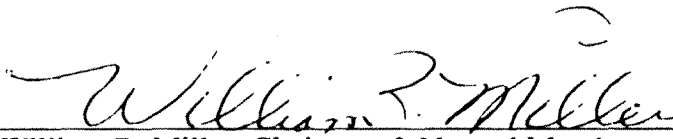
The Carrier also suggested that the Claimant and his co-worker failed to watch the bridge for at least one hour following the completion of hot work activities, however, examination of the testimony reveals that the Claimant testified on page 35 of the transcript without rebuttal that he and his co-worker completed the welding at approximately 11:00 a.m. and did not depart the site until 12:36 p.m., therefore, there was no showing that they failed to protect the job site for the required time. Even though Claimant and his co-worker stayed for that required time does not absolve them from their other errors that contributed to the subsequent fire that smoldered for several hours before igniting. The Organization's alternative theories for the cause of the fire were not persuasive and it is clear that substantial evidence was adduced at the Investigation that the Claimant did not fully comply with EI 1.7.2 and 1.7.3 on May 7, 2010.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 7 years of service with a good work record with one prior

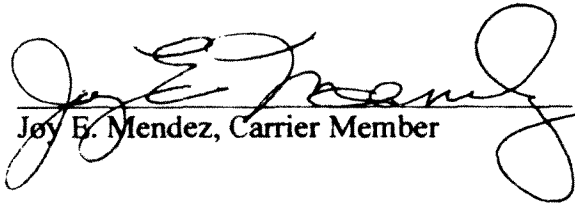
discipline. The Board finds and holds that the incident was of a serious nature and the discipline assessed was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The discipline exercised was not excessive, arbitrary or capricious, therefore, it will not be set aside and the claim will remain denied.

AWARD

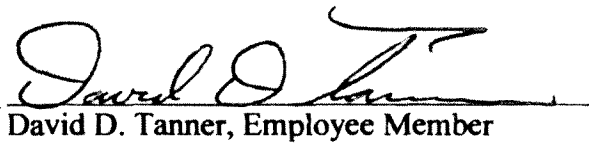
Claim denied.



William R. Miller, Chairman & Neutral Member



Joy E. Mendez, Carrier Member



David D. Tanner, Employee Member

Award Date: May 21, 2013