

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 115, (Case No. 115)**

**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 March 31, 2011, when Claimant, Charles Dixon (6463012), was issued a Level S 30-day Record Suspension with a 3 year review period, concerning his failure to properly job safety brief as the job tasks and conditions changed on March 31, 2011. The Carrier alleged violation of MOWSR 1.1 Job Safety Briefing, MOWSR S-1.2 Rights and Responsibilities, and MOWSR S-1.2.4 Coworkers Warned.**
- 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 March 31, 2011, and continuing forward and/or otherwise made whole."
(Carrier File No. 14-11-0143) (Organization File No. 100-13S1-119.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 April 7, 2011, Claimant was directed to attend a formal Investigation on April 29, 2011, which was mutually postponed until May 6, 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 properly job safety brief as the job tasks and conditions changed on Thursday, March 31, 2011 at approximately

1300 hours at Crossover 1429 in the Mykawa Yard in violation of Maintenance of Way Safety Rule S-1.1, Job Safety Briefing, Maintenance of Way Safety Rule S-1.2, Rights and Responsibilities, including Rule S-1.2.4, Coworkers Warned...."

On June 3, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30-Day Record Suspension with a three year probationary period.

The facts indicate that on March 31, 2011, the Division Engineer, Roadmaster and two Assistant Roadmasters arrived at a derailment site at Crossover 1429 in the Mykawa Yard, wherein a accident had happened the day before. The Carrier Officers approached the work group that was cleaning up the area and were stopped by the Foreman who gave them a job briefing. The Foreman told them they were working using a lookout form at which time the Division Engineer noticed the backhoe that was being used was fouling the track. Because of that alleged safety violation the Officers removed the work group from service and subsequently a formal Investigation was called concerning the Claimant's conduct while performing services as a Trackman.

It is the Organization's position that a review of the transcript reveals that Foreman Vega was the employee in charge at the derailment site and Claimant was a Trackman assigned to help clean up the area. It asserted the combined crew met in the Section's work truck for a job briefing at which time the Foreman/EIC (employee in charge) Vega, briefed the group that he had talked to the Yard Master and had permission to be working at that location and he (Vega) would be acting as Lookout. The plan for the job was the Section forces were going to walk a stretch of yard track picking up material and depositing it in the front bucket of the backhoe as it followed parallel to the tracks. It argued the Foreman changed the job plans when he directed the Backhoe Operator to swing his boom across the track and use his bucket to knock down a dirt pile without knowledge of the Claimant and by the time the Claimant was in a position to have knowledge of that change and voice any opposition the event had already occurred. It argued the Carrier did not meet its burden of proof and because of that it concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that when Foreman Vega instructed the Backhoe Operator to swing his boom across the track and knock down a pile of dirt with the backhoe bucket the Claimant should have voiced his opposition because the backhoe was fouling the tracks. It argued he had a responsibility to assure that he was working safely so as to protect himself, his co-workers and equipment on the track and in this instance he failed to do such. 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 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 that this is a companion case to Award Nos. 117 and 118 which involves the same incident, but different Claimants.

The Carrier's argument is that the Claimant had the right to challenge Foreman Vega's directive as it was an unsafe act and he would not have been disciplined as he had a right to make a good faith challenge and that he should have exercised that challenge whereas the Organization argued that the Claimant was at the back of the truck when the Foreman issued his instructions and was not in a position to see or forewarn his co-workers that they had been instructed to work in a unsafe manner.

Examination of the transcript reveals that on page 14 of the transcript Roadmaster P. McAleese testified that the Claimant was at the rear of truck when Foreman Vega gave instructions to the Backhoe Operator to re-position his machine; and on page 23 Assistant Roadmaster Wilson testified that he could not state whether or not the Claimant was in a position to see the Foreman waiving the Backhoe Operator to swing his boom across the track.

On page 30 of the transcript the Claimant testified that after he had finished picking up scrap, junk and other material he went to the back of the pickup to get a drink of water. On pages 30 and 31 he was questioned as to how far away he was from Foreman Vega and the backhoe as follows:

"Aaron Whitney: Approximately how far away from him are you away?

Charles Dixon: I'd say maybe about 50 feet.

Aaron Whitney: And when did you see the backhoe fouling the track?

Charles Dixon: As I was turning around.

Aaron Whitney: And at that point did you warn, did you warn him?

Charles Dixon: The were through what they were doing."
(Underlining Board's emphasis)

On page 33 of the transcript Assistant Roadmaster Wilson was re-questioned and reiterated his prior testimony stating in pertinent part the following:

"Timothy Wilson: ...Now whether he could see the action or not, I could not honestly say. I, I don't know what Mr. Dixon seen,...so as far as, if he seen it I couldn't honestly say I can't speak for Mr., Mr. Dixon...."


On pages 36 and 37 of the transcript Truck Driver, Cameron Marvin testified that he and the Claimant were at the back of the pickup getting a drink of water and could not see that the backhoe had moved and fouled the tracks. On page 41 Mr. Marvin confirmed that the backhoe and Foreman were about 50 feet away and on page 42 he confirmed that Foreman Vega's decision to have the Backhoe Operator to foul the tracks was made without the input of the Claimant.

The record indicates that Foreman Vega's instructions to the Backhoe Operator appear to have been an after-thought that he did not discuss with anyone beforehand. Those instructions were done in a effort to clean up the derailment site, but they were done in a hasty and careless manner while the Claimant was at the rear of the pickup getting a drink of water and by the time the Claimant knew what had transpired the Backhoe Operator had completed the assigned task and a forewarning would have been an exercise in futility as the deed was already done. The Board is not persuaded that the Claimant knew what his Foreman had decided to do or that he could have forewarned his co-worker not to perform an unsafe act while challenging his Foreman's decision, therefore, it is determined that the Carrier did not meet its burden of proof.


The Board finds and holds that the discipline is rescinded and removed from the Claimant's disciplinary record and the Claim is sustained as presented. Claimant is returned to his prior disciplinary status 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



Joy E. Mendez, Carrier Member



David D. Tanner, Employee Member

Award Date: May 21, 2013