

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD 7048

BNSF RAILWAY

(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

(Organization)

PLB No. 7048 Case No. 21
NMB Case No. 106
Carrier File No. 14-08-0170
Organization File No. 190-13C2-0817.CLM
Claimant: Harold J. Bong

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing August 14, 2008 when Claimant, H.J. Bong (1667351), was assessed a 5-day record suspension with a one year probation for failure to report damages to a Jackson 6700 machine on April 30, 2008. The Claimant was found in violation of Maintenance of Way Operating Rule 1.4- Carrying out Rules and Reporting Violation; and
2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate the Claimant with all seniority, vacation, all rights unimpaired and pay for all wage loss commencing August 14, 2008, continuing forward and/or otherwise made whole.

This claim was discussed in conference between the parties.

NATURE OF THE CASE

The Claimant, Harold J. Bong was serving as an Acting Gang Foreman on April 30, 3008 protecting a Surfacing Gang that was working under his supervision. Thereafter, a second gang began work within the zone of track encompassed by his protection. While he was serving in this position, a Machine Operator, who was operating a Jackson 6700 tamping machine apparently ran the machine backwards through a switch without retracting the work heads and struck a metal frog on the track. This action by the Machine Operator caused approximately six hundred dollars damage to the work heads and adjacent fittings on the machine. The damaged parts were replaced on site by the Machine Operator acting in conjunction with a traveling Mechanic called to the scene by the Claimant, and no loss of production occurred. The Mechanic filed a report about the repair and reported the incident to his supervisor the next day.

When the report and cost of the repair were eventually noticed at the Carrier's headquarters, subsequent inquiry determined that the Claimant had not reported the damage to his supervisor, although the Carrier considered the damage to have occurred while the Claimant was nominally supervising the Machine Operator. Subsequent investigation determined that the Machine Operator had apprised the Claimant of the

situation, but that the Claimant did not consider the matter to be other than a routine maintenance issue that did not require notification of the Carrier pursuant to Rule 1.4 - Carrying Out Rules and Reporting Violations, which provides in relevant part, that:

Employees must cooperate and assist in carrying out the Rules and Instructions. They must promptly report any violations to the proper Supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers, or employees and any misconduct or negligence that may affect the interest of the Railroad.

The Claimant was issued a five-day record suspension and placed on one year's probation for this alleged misconduct. The Organization grieved the imposition of discipline as being unwarranted. According to the Organization, the Claimant was not aware of any damage caused to the machine as a result of an untoward incident. The Claimant further alleged that he was not the direct supervisor of the Machine Operator who caused the damage and was, therefore, not obligated to report the incident, especially as no production time was lost, there was no damage to the track, and there was minimal damage to the machine that was rectified by notifying a Mechanic and installing replacement parts that are routinely carried on the tamping machine.

The parties were unable to resolve their dispute within the grievance procedure, and the matter was submitted to Public Law Board 7048 for adjudication.

FINDINGS AND DECISION

Public Law Board No. 7048 (the Board) finds that the parties herein are Carrier and Employee Organization within the meaning of the Railway Labor Act, as amended. Further, the Board has jurisdiction over the parties and subject matter involved.

The Claimant testified credibly that he did not believe he was the direct supervisor of the Machine Operator, who was part of another Surfacing Gang. The Claimant had been temporarily assigned responsibility for protecting not only his gang, but the gang to which the Machine Operator was assigned after this gang entered the zone of track protected under the permit issued to the Claimant.

The Claimant also testified credibly that the Machine Operator did not tell him exactly what happened, but related this information to the Mechanic. According to the Claimant, the Machine Operator did indicate that he had backed up and the work head touched the top of the frog. The Claimant testified credibly that he believed he was not required to report this incident because:

“There was no damage to the track, minimal damage to the machine. Both of those items are stock on the machine for the Operator to change himself. We had those items on the machine. I didn't feel that since there was no production time lost, no

damage to the track, and minimal damage to the machine that anybody outside of the Mechanic needed to be notified.”

Furthermore, the Claimant testified that he prepared none of the reports for the Machine Operator’s gang, and that he was not in charge of timekeeping or reporting for this gang. The Surfacing Gang to which the Machine Operator was assigned moved into the area in which the Claimant was providing protection for his own Gang and thus were working within the twenty-five to thirty mile window for which the Claimant was responsible. Thus, the Claimant was not the Supervisor in charge of this Gang.

The evidentiary record below established persuasively, particularly at page 33 of the transcript, that the management official who imposed discipline upon the Claimant understood that the Claimant had not been apprised directly by the Mechanic that the incident that occurred on April 30, 2008 constituted negligence by the Machine Operator. Although the Claimant had admittedly been aware that oil was leaking from the bottom of the tamping machine and was involved in calling the traveling Mechanic to the work site to rectify the situation, the failure of the Mechanic to communicate the degree of the Machine Operator’s negligence in causing the damage by backing over the switch without raising the work heads sufficiently out of production mode precludes sustaining the full extent of the penalty imposed by the Carrier, which was explicitly predicated not on the cost of the repairs, but on the

Claimant's failure to report the incident to a proper supervisor as required by Rule 1.4.

Moreover, many of the parts that were damaged by the incident were parts that were required to be replaced from time to time during routine operation of the tamper. Much of the repair was made by the Machine Operator using parts kept routinely on the tamper or provided by the Mechanic, and no production time was lost.

Although the Claimant's Supervisor properly expressed his concern that all incidents causing property damage or injury be reported to supervision in a timely manner, the Claimant's failure to report this incident does not seem to be tainted by any collusion or intent to avoid reporting the incident, as the Claimant was clearly unaware of the Mechanic's evaluation of the facts and circumstances underlying the damage to the Carrier's property. Had this information been communicated to the Claimant, then the Claimant may have been obligated to assure that someone higher in his reporting sequence was aware of the incident, but only if he was properly construed to be supervising, rather than simply protecting, the second gang. The Claimant testified without refutation that he was not responsible for the timekeeping or other indicia of supervisory authority over the Machine Operator's gang.

The Mechanic reported his actions to his Supervisor in the normal course of business, and this expense and time record ultimately triggered the investigation culminating in the imposition of discipline on the Claimant. Road Equipment Supervisor Randy Hutter was notified of the incident the next day by the Mechanic, thus satisfying the underlying requirement that the incident be reported to the Carrier.

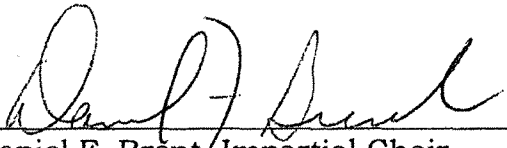
Given the admitted absence of notice to the Claimant by the Mechanic of an untoward incident involving employee negligence, rather than routine replacement of damaged parts, as set forth in pages 33 to 35 of the transcript of the investigative hearing below, there was inadequate basis in the evidentiary record to construe the Claimant as the supervisor of the Machine Operator's gang or to impute actual knowledge of an incident involving employee negligence sufficient to create responsibility for reporting the April 30, 3008 incident to management.

Based on the evidence submitted, there was not cause to impose a five-day record suspension and one year probation on the Claimant, Harold J. Bong. The Carrier may instead elect to issue a non-disciplinary letter to the Claimant reiterating his responsibility to report all incidents involving non-routine maintenance to a proper supervisor

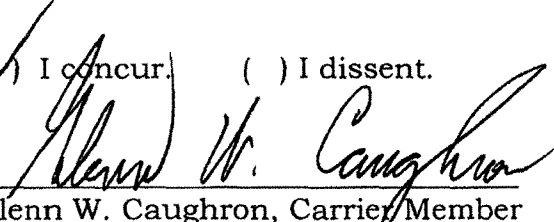
when such incidents occur on a gang for which the Claimant has been assigned responsibility, and identifying the title of the appropriate supervisor. Such communication will serve a valid educational purpose of clarifying the Claimant's understanding should a similar incident occur on a gang for which he has unequivocal supervisory responsibility.

The instant claim is hereby sustained. The five day record suspension and one-year probation shall be expunged from the Claimant's record.


We so find.


Daniel F. Brent, Impartial Chair

Dated: October 1, 2009

(☒) I concur. (☐) I dissent.

Glenn W. Caughron, Carrier Member

Dated: 11-23-09

(☐) I concur. (☐) I dissent.

David Tanner, Organization Member

Dated: 11-12-09