

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7048

AWARD NO. 34, (Case No. 34)

**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, Labor Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing August 17, 2009 when Claimant, N. A. Hart (6468847) was dismissed. The Carrier alleged violation of Maintenance of Way Operating Rule 1.19 Care of Property. The incident concerned alleged damage to spiker while assigned as Grapple Truck Driver.**
- 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 17, 2009, continuing forward and/or otherwise made whole."**

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.

The Board notes that this is the second in a series of two cases involving the same Claimant. Both Investigations were held on the same date and the subsequent discipline was assessed on the same date as well. The facts indicate that on August 18, 2009, Claimant was directed to attend a formal Investigation which was postponed and subsequently held on September 29, 2009, 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 use and care for company property when damaging the air conditioner on Spiker X4400400 and breaking a window in Spiker X4400401, while assigned as Grapple Truck Driver on gang TTPX0009, temporarily headquartered at Alliance, Nebraska."

On October 21, 2009, Claimant was notified that he had been found guilty as charged and he was dismissed.

It is the Organization's position that the Carrier erred in its dismissal of Claimant. It argued that the record substantiates that the Claimant was charged with improper Care of Property. It contended that there were no eye witnesses to any alleged actions and the Carrier's case was based upon speculation and assumptions. It further argued that the Carrier alleged that a window glass on one Spiker was broken when it was only slightly pushed out of a gasket at the bottom of a window, and on a second Spiker it alleged an air conditioner was damaged which only had a broken wire. It suggested that the damage might have been the result of vandalism, but however it happened it was no fault of the Claimant. It closed stating that the Carrier did not meet its burden of proof and it asked that the dismissal be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the facts prove that on August 17, 2009, the two Operators of the Spiker Machines in question left their respective machines at the close of their daylight shift and neither was damaged as indicated in the charges and the next morning they reported the damage to their Supervisor. It contended that Claimant who loaded the machines in the afternoon while working alone operated the grapple truck magnet unloading spikes in a careless manner which caused the damage. It further argued that it was highly unlikely that the damage could have been the result of vandalism as the machinery was parked in a rural area. It concluded by requesting that the discipline not be disturbed.

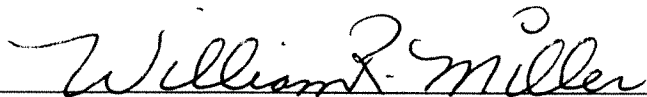
The Board has thoroughly reviewed the record and found that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11. Examination of the record reveals that the Carrier's case at best is speculative lacking foundational proof. The fact that vandalism might occur more often in the city does not mean that it cannot happen in the country or that it did not happen in this instance. The Carrier's primary witness against the Claimant testified on page 19 of the Transcript that he did not believe the Spikers were vandalized, but instead suggested that the damage to the Spikers appeared to have occurred over a lengthy period of time as opposed to having been done on the evening of August 17, 2009. Additionally, the actual charge was that the Claimant broke the window in Spiker X4400401 while Supervisor Kaiser testified that the casing was pushed in and on page 22 he stated he did not take any pictures of the air conditioner on the other machine because he could not tell what was damaged. The only thing we know for certain regarding the air conditioner on Spiker

X4400400 is it did not work the next day which may have been the result of a variety of reasons having nothing to do with the allegations made against the Claimant. Further emphasizing the lack of proof in this case is the Equipment Damage Report attached to the Transcript. That report was for Machine X4400402 which had a broken window, but was not the machine that Claimant was alleged to have damaged and the reported incident date on that machine was August 20, 2009, as opposed to August 17th the date under charge. The record is clear that the Carrier did not meet its burden of proof.

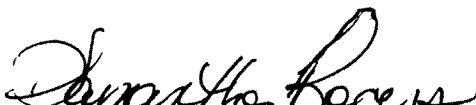
The Board finds and holds that the termination is rescinded and removed from the Claimant's disciplinary record. As previously determined in Award No. 33 of this Board we reaffirm that Claimant is reinstated to service with seniority intact, all benefits unimpaired and made whole on the same basis as that Award. Even though the Claimant was found not guilty in this case he is not owed any monies from October 21, 2009 through and including April 21, 2010, because the Board upheld a suspension for that period of time in Award No. 33. The compensation owed the Claimant in the former case will make him whole in this case.

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


Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

Award Date:

8/6/10