

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 90, (Case No. 90)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES 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 March 17, 2011, when Claimant R. L. Johnson (1620293), was issued a Level S 30-day Record Suspension with 1 year review period, for failure to use the required equipment to tow a Roadway maintenance machine resulting in damage to the tie plugger machine being towed. The Carrier alleged violation of MOWOR 14.7 Push Cars.**
- 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 compensated for his lost time and expense and otherwise made whole."
(Carrier File No. 14-11-0110) (Organization File No. 50-13C2-1119.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 March 24, 2011, Claimant was directed to attend a formal Investigation on March 30, 2011, which was mutually postponed until April 20, 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 use the required equipment to tow a Roadway maintenance machine resulting in damage to the tie plugger, machine #X620074 being towed, at approximately 1800 hours, March 17, 2011,

on the Creek Subdivision."

On May 20, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30-Day Record Suspension with a one year probationary period.

The facts indicate that on March 17, 2011, there was a tie plugger that was broken down. The Foreman and the Mechanics on the gang had the broken machine brought out of the hole or tie up location and moved with the gang out to the work site. At the work site they were going to make repairs and put it back in service, but they were not successful in fixing the machine and because of that it was necessary to tow the machine back to the tie up location and while towing that machine there was an accident wherein the tie plugger was damaged.

It is the Organization's position that the Carrier did not meet its burden of proof. It argued that the Claimant did as instructed. According to it the Foreman personally hooked the Claimant's machine to the broken machine with a chain under the Mechanic's supervision and instruction. Claimant was directed to pull the broken machine with another machine pushing and providing braking for the broken machine. It was a line of three machines hooked together, one pulling, one pushing and one broken in the middle with the trailing machine being the final brake. It asserted that the last machine did not have enough braking power to stop the broken machine completely causing the middle machine to make contact with the lead machine. It concluded the Claimant did nothing wrong and it further pointed out that several other people were involved with the incident and no one other than the Claimant was charged with working unsafely. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the Claimant's machine was equipped with a tow bar and he chose not to use it. It argued that ultimately it is the Machine Operator's responsibility to safely operate the machine he is running in such a manner that it does not cause an accident and because he decided to use a chain to pull the broken machine rather than the tow bar he was responsible for the resulting accident. 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 has determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11 and Claimant was afforded his "due process" Agreement rights.

The Carrier is correct that Rule 214.525 states that when machines are used for towing purposes they will be equipped with **"...a towing bar or other coupling device that provides a safe and secure attachment."** Claimant's machine, the Speed Swing, had a tow bar on the opposite end of the machine from the broken machine, but Claimant testified on pages 14 - 17 of

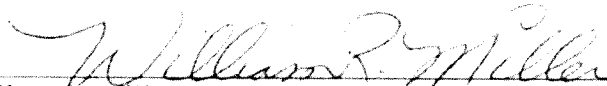
the transcript there was no place nearby to set off the track, turn the machine around and then get back on the track and that the Foreman (Claimant's superior) after a discussion with the Mechanic decided to use the chain for towing purposes and actually hooked it up himself.

Gang Roadmaster W. Kok testified on page 9 of the transcript the Foreman made the decision to have the tie plugger towed in. On page 10 he further testified that he was not certain as to who decided to have the Claimant's machine use a chain for towing purposes rather than a towing bar.

The Board has examined the testimony of the two aforementioned individuals. Claimant who was at the site of the incident testified that the Foreman decided to use the chain. That testimony was not refuted. The testimony of Mr. Kok, who did not witness the event, was speculative as to what transpired. Kok stated that he did not think the Foreman made the decision to use the chain, but he was not certain. In this instance the testimony of the Foreman would have been helpful, but without it the un-refuted testimony of the Claimant must be considered as factual. The Board will not debate the safety of towing with a chain versus a towing bar as that decision was made by the Foreman, nor are we persuaded that the Claimant should have attempted to override that decision. Claimant followed what appeared to be a reasonable and safe instruction, therefore, the Board finds and holds that the discipline is set aside and the claim is sustained in accordance with part 2 of the Statement of Claim and the Claimant's disciplinary status reverts to that he held prior to May 20, 2011, 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


Samantha Rogers, Carrier Member


David D. Tanner, Employee Member

Award Date: 9/24/2012