

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 97, (Case No. 97)**

**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, Employee Member

STATEMENT OF CLAIM:

- 1. The Carrier violated the Agreement commencing March 16, 2011, when Claimant, Kenneth E. Dellinger (6491047), was issued a 30-day Record Suspension, by letter dated May 20, 2011, for failure to properly lock-up and pin up machine before traveling causing workhead to strike a crossing resulting in machine damage on March 16, 2011. The Carrier alleged violation of E.I 14.3.3 Section A.9.**
- 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. 14-11-0111) (Organization File No. 60-13C2-1118.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 properly lock-up and pin up machine before traveling causing workhead to strike a crossing resulting in damage to machine #X4400406, at approximately 1700 hours, March 16, 2011, on the Creek Subdivision."

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

It is the Organization's position that on March 16, 2011, the Claimant properly inspected the Production Spiker Machine that he operated at the beginning of his workday to make sure that all locking devices were secure before he traveled with that machine to the work site. The machine in question has four "guns" or separate pieces of machinery that can drive spikes on both or separate rails on each side of track and on March 16th the Claimant only used one side of the machine all day. According to the Organization, during the day other employees came on the machine and sat on the other side, but did not use the guns, nor unlock them as far as the Claimant knew. It asserted that before he tied up the equipment to travel, he secured the side he had used and inspected the side he had not and noticed nothing out of place. It reasoned that some time during the day someone had inadvertently unlocked the other work head and only moved it back up against the locking device making it appear as the work head was still locked in place, as it was originally when inspected, or there was an electrical short in the machine that caused the work head to become unlocked and dropped below, but against the safety lock pin. It concluded the actions of either an electrical malfunction or another person caused the work head to drop with no fault of the Claimant and the discipline should be rescinded and the claim sustained as presented.

It is the position of the Carrier that Claimant admitted he was operating the Production Spiker Machine when it hit the crossing damaging the machine and it was his responsibility for preparing the machine to travel, therefore, it reasoned the Claimant affirmatively established that the accident was his fault. It further argued that the discipline exercised was reasonable and 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 40 the Discipline Rule of the former BN Agreement and Claimant was afforded his "due process" Agreement rights.

The Claimant testified that in the morning before he started to travel to the work site he made a thorough inspection of the machine that included making sure that both sides of the machine and all locking devices were secure. On pages 24 and 25 of the transcript the Claimant testified that it was a fairly common occurrence for the other side of the machine to be activated during a workday because other employees bumped into the starting mechanism. He testified that it was not unusual for it to happen eight or nine times a day. On page 26 of the transcript the Claimant explained how he thought the accident occurred as follows:

"And, all I can think of is there's only two ways of getting it, either somebody did it on purpose, which I highly doubt. There's nobody on the gang that I know of that would do that. The only thing I can think of is somebody was on

the machine when I wasn't on there, activated it, and just didn't know which switch to throw, you know, to shut it off and they cycled it backwards."

On page 34 of the transcript the questioning of the Claimant continued as follows:

"Michael Messner: That you did not use, uh, were you, you're, were you inspecting the, the height of the workhead or were you inspecting any of the pin connectors, an-?"

Kenneth Dellinger: I was looking to see if anything malfunctioned over there.

Michael Messner: Okay.

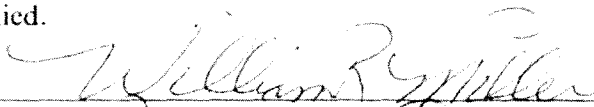
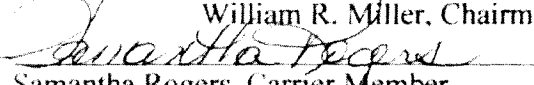
Kenneth Dellinger: Th-, I didn't see the lo-, I didn't see the workhead any, any lower. I didn't, I, I missed it somehow. (*Underlining Board's emphasis*)

The record was not refuted that the Production Spiker Machine operated by the Claimant on March 16, 2011, had one side of the machine that had not been used for the prior two days, however, on the morning of March 16th the Claimant believed it was prudent to thoroughly inspect both sides of the machine to ensure that it could be safely moved. At the close of work on March 16 he made a careful and thorough inspection of that side of the machine he used, but the other side was only given a cursory review. Claimant should have made a careful inspection of both sides of the machine especially in view of the fact that he knew that it was common for the side of the machine not being used to be activated during the day. Substantial evidence was adduced at the Investigation that the Claimant's afternoon inspection of the machine on the date of the accident was lacking and he was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 31 years of service with a good work record. The discipline assessed against the Claimant will not be set aside as it was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA) and it was not excessive, arbitrary or capricious. The claim will remain denied.

AWARD

Claim denied.


William R. Miller, Chairman & Neutral Member

Samantha Rogers, Carrier Member

David D. Tanner, Employee Member
Award Date: 9/24/2012