

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 7394**

**AWARD NO. 4, (Case No. 4)**

**BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

**vs**

**BNSF RAILWAY COMPANY  
(Former St. Louis - San Francisco Railway Co.)**

William R. Miller, Chairman & Neutral Member  
Michelle McBride, Carrier Member  
R. C. Sandlin, Employee Member

**STATEMENT OF CLAIM:**

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on September 18, 2009 when Mr. Kevin L. Miller was assessed a Level S, 30-day Record Suspension with three (3) years probation for his alleged violation of Maintenance of Way Operating Rule 1.1.2-Alert and Attentive.
2. As a consequence of the Carrier's violation referred to in part (1) above, we request the all record of these charges removed from his personal record and he be paid for attending the investigation while on Medical Leave of Absence."  
**(Carrier File No. 12-10-0010) (Organization File No. B-3365-1)**

**FINDINGS:**

Public Law Board No. 7394, 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 facts indicate that on September 18, 2009, Division Engineer, D. F. Befort sent the Claimant a letter which stated in pertinent part the following:

**"This is to advise that you are hereby assessed a Level S 30 day, Record suspension with 3 year probation for failure to be alert and attentive, when you placed your hand in harms way in the tailgate area of a maintenance of way gang pickup that was being closed resulting in injury to yourself on September 10, 2009 at or near MP 493.6 on the Thayer South Subdivision.**

**This is a violation of MWOR 1.1.2 - Alert and Attentive...."**

On September 28, 2009, the Organization protested the Carrier's action and pursuant to Discipline Rule 91(b)(1) it requested a formal Investigation. The Investigation was convened on October 23, 2009, after several mutually agreed postponements, concerning in pertinent part the following charge:

**"...for the purpose of ascertaining the facts and determining your responsibility, if any, when you allegedly placed hand in harms way in the tailgate area of maintenance of way gang pickup that was being closed, resulting in injury to your right hand, ring finger which resulted in the tip of finger to be smashed and cut.**

**This is in violation of Maintenance of Way Operating Rule 1.1.2 - Alert and Attentive."**

On October 30, 2009, Claimant was notified that he had been found guilty as charged and his Level S 30 day record suspension with a three year probation remained intact.

It is the Organization's position that the Carrier erred in its discipline of the Claimant. It argued that the Claimant was in the process of unloading tools when another member of his gang closed a tailgate on his hand injuring him with no fault attributable to the Claimant. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the record proves that Claimant placed his hand in the tailgate jam area of a pickup while it was being closed, after completing the task that he was doing which resulted in a partial amputation injury to his finger. Therefore, it reasoned that Claimant did not take into consideration the possibility of injury to himself in placing his hand where he did and it asked that the discipline not be disturbed as it was appropriate.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the formal Investigation was held in accordance with Rule 91 the Discipline Rule. It is clear that the Hearing was conducted in a fair and impartial manner. Claimant was well represented by his Organization and he was not denied his Agreement "due process" rights.

Having determined that there were no procedural problems in the handling of this case the Board turns its attention to the merits. The facts indicate that on September 10, 2009 the Claimant was a Trackman assigned to Maintenance Gang TMGX0745 and was assisting another member of the gang with loading work material and equipment from a work pickup truck into the bucket of a backhoe for transportation to the work site. After loading of the material and equipment into the bucket, the Claimant turned around and placed his hand in a pinch point

location of the tailgate of the truck, at which time his co-worker closed the tailgate causing an injury to the Claimant's ring finger.

On page 30 of the Transcript Claimant was questioned by the Hearing Officer regarding the reenactment of the accident and what he said to Roadmaster J. A. Dowdy on September 10th. Claimant testified as follows:

**"I told him, you know, my hand probably, probably shouldn't have been right there as the time, but I was, you know resting my hand on the, on the side of the pickup as if I was, you know, looking on the back like, you know, see anything was missing and at the time when I turned around and get it back like, you know, see anything missing and at the time when I turned around and get it back, that's when the tailgate came up and shut my finger up there." (Underlining Board's emphasis)**

On pages 32 and 33 of the Transcript the Claimant when questioned by his representative went on to further explain the incident as follows:

**"Dana Sconyers: ...Were you careful as far as the prevention of injuring yourself, or was somebody else responsible for the injury that occurred?"**

**Claimant: I think someone else was responsible for my injury.**

**Dana Sconyers: He did not at any time state he was closing the tailgate, is that correct?**

**Claimant: That's correct.**

**Dana Sconyers: Do you feel you was alert and attentive when you was performing your duties?**

**Claimant: Yes, yes, I do."**

Questioning continued by the Hearing Officer on pages 33 - 36 wherein the Claimant acknowledged that he had responsibility as to where he placed his hand on the truck, but on page 36 of the Transcript he emphasized the following:

**"Claimant: ...Mr. Powell was, he was right there between, you know, right there at the tailgate and I was on the side, and that's when it happened, you know, we didn't, we didn't speak to each other about, you know, he was going**

to close the gate on it, or I was looking for whether or not we got everything out of the back of the truck because I didn't, I didn't know he was even planning on closing the tailgate.

**Calvin Bray:** Is communication a two-way street?

**Claimant:** Yeah.

**Calvin Bray:** Is job briefing one sided?

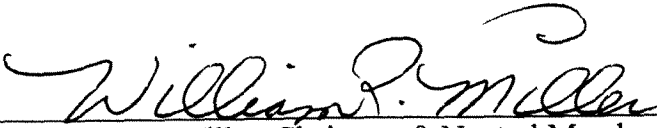
**Claimant:** No."

It is uncontested that on the date of the accident Claimant and his co-worker Mr. Powell had unloaded material and tools from the pickup to the loader and Claimant placed his hand on the pickup as he surveyed the truck to make sure that they had unloaded everything they needed for the job. While Claimant was checking the back of the truck Powell closed the tailgate. It is clear that the causal act of the injury was the fact that Claimant's co-worker closed the tailgate of the pickup without first advising the Claimant that he intended to close it. However, it is equally clear that Claimant could have surveyed the back of the truck without putting his hand in a dangerous area. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

The only issue remaining is whether the discipline assessed was proper. At the time of the offense Claimant had three plus years seniority with an unblemished record. Claimant did not instigate the accident, but he did place himself in danger by not being attentive, therefore, the discipline will not be disturbed because it was not contrary to the Carrier Policy for Employee Performance Accountability (PEPA), nor was it arbitrary, excessive or capricious as no time off was imposed.

**AWARD**

Claim denied.

  
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William R. Miller, Chairman & Neutral Member

Award Date: 8-24-10