

Award No. 11

Case No. 11

NMB Case No. PLB-07602-000011

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)

EMPLOYES DIVISION—IBT)

v.)

BNSF RAILWAY COMPANY)

Carrier File No. 10-12-0617

Organization File No. C-12-D040-20

Claimant — Michael A. Luther

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The discipline [(10) day record suspension, rights as a Group 2/Lowboy Operator removed and restriction to those truck driver positions that are directly supervised] imposed upon Mr. Michael A. Luther by letter dated July 13, 2012, for alleged violation of MOWOR 1.13 "Reporting & Complying with instructions" and Engineering Instruction 14.3.1 "Operator's Responsibilities" in connection with charges of his failure to comply with instructions with regards to operation of trailer suspension when on June 7th, 2012, the rear suspension on the lowboy trailer he operated was damaged causing down time and repairs in excess of \$1000 dollars while assigned as a machine operator.
2. As a consequence of the violation referred to in Part (1) above, Claimant Michael A. Luther shall now receive the remedy prescribed by the parties in Rule 40(G).

BACKGROUND:

The Claimant was a Group 2/Lowboy Operator based in Galesburg, Illinois, until he was demoted as a result of the incident that led to the discipline that is at issue in this case. He entered service with the Carrier in August 2004. This is one of two Claims that arise from two separate investigations that were conducted on the same date, June 15, 2012, into the Claimant's job performance. (The other Claim is addressed in PLB 7602, Award No. 12, NMB Case No. PLB-07602-000012.)

At the end of April 2012, a new supervisor, Michael Buchholz, was assigned to oversee the Claimant and another lowboy operator in Galesburg. On April 25, 2012, Buchholz sent an e-mail to the two men setting forth his expectations regarding their performance. The final bullet point read "Always operate legally and within the rules...." Shortly after assuming his supervisory duties, Buchholz conducted an audit on the two lowboy trailers. On June 1, 2012, he sent the two men another e-mail, about the audit, detailing various operating practices he wanted them to follow. The third bullet point read: "Trailers will be operated with the air ride selector in the 'Normal' position. 'Regulate' will only be used to clear objects (traveling for less than ¼ mile) before returning it to 'Normal.' Running in 'Regular' breaks airbags and shock mounts and is very hard on the trailer and the equipment being hauled." The e-mail concluded: "Overall, things look good and doing the axle position and trailer air valve position rules should decrease parts breakage."

Problems with the Claimant's lowboy trailer came to management's attention on June 7, 2012, when Buchholz received a telephone call, then an e-mail, from Jeffrey Luna, Roadway Equipment Supervisor for the Chicago Division West, notifying Buchholz that Claimant had called Luna that morning about his trailer needing some repairs. According to Luna's e-mail, when he went to the S&L shop to look at the trailer, he discovered that "[t]he shocks on the front axle had the top mounting bracket ripped open and shock pulled out away from mounting bolt." The Claimant told Luna that the damage had first occurred on April 18, 2012, when the air bag had come out of its holder. A mechanic at the shop indicated that he believed the damage was caused by running the trailer with the air in the regulated position instead of the normal float position. The switch was in the regulated position. Luna asked the Claimant why he was not running in the normal position. Mr. Luther replied that the normal float position did not work correctly, causing the tires to rub. According to Luna, he had informed the Claimant on several occasions not to run the trailer in the regulated position; according to the Claimant, he had informed Luna of the problem when he brought the trailer in for repair in April. Testing of the float system revealed that it was not working. Luna interviewed the mechanic who had repaired the air bag, who told

Luna that the float position was working at the time and that he thought that the air bag and shock damage occurred due to the trailer being run in the regulated position. The Operator's Manual states:

IMPORTANT: While in the NORMAL transport of the trailer, you MUST operate the system on the automatic mode. When the system is on the REGULATED (manual) side, the automatic load levers are being over-ridden and will not function. If you try to run on the REGULATED (manual) side, odds are you will not have the correct air pressure. Too much air pressure is just as destructive to the suspension and shocks as is too little pressure. (Emphasis in original.)

The estimated cost of repairing the damage was \$400; an invoice entered into the record shows the final cost of repair to have been \$529.97.

By letter dated June 8, 2012, Claimant was notified of the Carrier's intent to conduct an investigation "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with instructions with regard to operation of trailer suspension on June 7, 2012 the rear suspension on the lowboy trailer you operate was damaged causing downtime and repairs in excess of 1000 dollars while assigned as machine operator." Claimant was notified by a second letter of same date of a separate investigation into his alleged failure to follow his supervisor's instructions about calling in before working overtime. (See Award No. 12)

The investigations into the two charges were conducted June 15, 2012. At the investigation into the facts of this Claim, Supervisor Buchholz testified to the background facts as above. He testified that the Carrier had to hire a contractor to haul equipment for the day and a half that Claimant's lowboy was in the shop for repair, and that cost added to the cost of repair and the Claimant's wages during that period brought the total cost to the Carrier of the damage to over \$1000. The Claimant testified that he operated the trailer per Buchholz's instructions, in the normal position except when he needed to clear an obstacle. According to Mr. Luther, the switch was in the regulate position when Luna saw it because Claimant had moved the switch earlier when he demonstrated to the mechanic the problem with the air system. He explained how driving with the air valve in the normal position sometimes caused the tires to smoke and he raised the trailer up a small amount, but using a different lever, not the regulator toggle switch. Mr. Luther testified that he had reported having problems with the trailer's suspension several times but "nothing is done about it." In addition to the Claimant's testimony that the trailer has had numerous mechanical

problems, the record includes invoices showing that the trailer had been in the shop for repairs six times in the preceding nine months. The invoice for the April repair noted that "both front axle shocks are broken and need replaced." From the documents in the record, it appears that those shocks were not repaired until June, when the Claimant brought the trailer in to the shop: the June invoice shows that both the defective valve and two shocks were repaired at the same time. Claimant stated that he had previously asked Mr. Luna for a copy of the Operator's Manual for the trailer but never gotten one. He also testified that in order to go into the Marceline Yard, a common occurrence, he had to operate in the regulated position and even then had difficulty getting the trailer over the hump at the entry. Another lowboy operator with 33 years' experience, Bob Jarvis, testified regarding various operating positions offered by different switches on the lowboys, particularly as they relate to raising or lowering the trailer bed and to maintaining air in the airbags when the trailers are loaded. Specifically, Jarvis testified that the leveling valves on Claimant's trailer had never been properly adjusted by the mechanics, which made it difficult to maintain proper air in the air bags. Mechanics, not drivers, are the only who can properly adjust the valves. According to Jarvis, the mechanics on Claimant's lowboy were so "screwed up" that the airbags could have broken going over a bump even running in the normal position. Finally, the Hearing Officer at the investigation refused to permit the Organization to introduce evidence that through his union representative, on May 28, 2012, Mr. Luther requested a meeting with his supervisor and managers to discuss a variety of issues, including unequal and discriminatory treatment. No meeting was ever scheduled or held.¹

By letter dated July 13, 2012, the Carrier concluded that the Claimant was in violation of MOWOR 1.13 "Reporting & Complying with Instructions" and Engineering Instruction 14.3.1 "Operator's Responsibilities." It assessed him a Standard 10-Day Record Suspension for his failure to comply with instructions regarding operation of the trailer suspension on the lowboy trailer he was operating on June 7th, 2012. In addition, the Carrier effectively demoted him by removing his rights as a Group 2/Lowboy Operator and restricting him to directly supervised truck driver positions "due to your lack of fitness and ability to self-supervise."

The Organization filed an appeal, raising both procedural and substantive issues. Procedurally, the Organization contends, the discipline should be overturned because the investigation and hearing process were not fair and unbiased. The Carrier failed to provide

¹ The e-mail is part of the record in the companion case, No. 12.

information that the Organization requested and that it needed to prepare for the investigatory hearing. The Carrier failed to specify the charges that the Claimant was alleged to have violated. Substantively, it is clear that the Carrier is retaliating against the Claimant for having requested to meet with his supervisor and managers. The evidence at the investigation established that Claimant has worked for several Supervisors without any exception to his operation of the lowboy or following instructions. The evidence further established that the suspension on Claimant's lowboy had not been working properly since 2010. Management was notified but the problem was never fixed—until the Claimant took it to the repair shop on June 7, 2012, where it was found that the float valve was broken, a mechanical problem that the Claimant had nothing to do with.

The Carrier contends that the evidence is clear that Claimant failed to follow his supervisor's instructions, running his lowboy continuously in the regulated position instead in the normal position, as directed in Supervisor Buchholz's e-mail of June 1, 2012. Testimony from Mr. Luna shows a pattern of abuse by Claimant in operating his truck. These continued instances of neglect and abuse led the supervisor put his expectations in writing on April 25 and June 1, 2012. It is unclear whether the ongoing trailer issues were caused by the driver or ongoing mechanical problems. What is clear is that Mr. Luther did not follow the written instructions as issued by his supervisor. There were no procedural deficiencies. The discipline assessed was fair and reasonable and should stand as issued.

FINDINGS AND OPINION:

The Board, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Public Law Board has jurisdiction over the dispute involved herein.

One of the problems that is clear from the record in this case and its companion case is that there may be communication difficulties between the Claimant and his supervisors and managers. Claimant is not a native English speaker, and his testimony at the investigation was sometimes hard to follow; in fact, during the two investigations, the Hearing Officer noted at one point that he was having difficulty understanding what Claimant was saying and changed his position in an effort to obtain a better audio recording of the proceedings. It appears to the Board likely that some of the problems between

Claimant and his supervisors have to do with these communication problems, and both sides need to work on better understanding each other.

That being said, the charge against the Claimant is that he failed to follow his supervisor's instructions, specifically by running his lowboy trailer in the regulated position instead of the normal position. Supervisor Buchholz expressly set forth this direction in his June 1, 2012, e-mail to Claimant and his fellow lowboy operator. When the Claimant brought his lowboy to the shop on June 7, 2012, with broken airbags, Buchholz concluded that the damage had been caused by Claimant's operating the lowboy in the regulated position, contrary to his instructions.

The evidence does not support the Carrier's conclusion that the Claimant either continuously (or too often) operated the lowboy in the regulated position or that the damage to the trailer discovered on June 7, 2012, was caused by such operation. The Claimant testified credibly that he did *not* tell Buchholz or Luna that he routinely operated in the regulated position and that he *did* tell Luna that the switch was in the regulated position when they looked at it because Claimant and a mechanic had been discussing the problem prior to Luna's arrival at the shop and he had moved the switch to "regulate" as part of their examination. The float valve was found to be broken, which is what Claimant had tried to tell management previously—not specifically that the float valve was broken (as the Claimant stated, he is not a mechanic), but that the system was not working properly. Tellingly, the invoice for the April 2012 repairs to the trailer clearly states on its face that the shocks were already broken and needed to be replaced—but they were not repaired until *after* Claimant brought the trailer to the shop on June 7, 2012. Mr. Jarvis testified to a variety of circumstances under which the damage to the airbags could have occurred, unrelated to driving in the regulated position. Numerous repair invoices establish that the lowboy at issue was a piece of equipment with continuous ongoing mechanical problems that were not always addressed when taken to the shop. Under such circumstances, it is not surprising that the Claimant sometimes encountered difficulty with its operation—but he should not be held accountable for problems beyond his control.

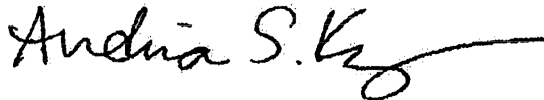
All in all, the evidence in the record taken as a whole fails to establish that the Claimant routinely operated in the regulated position, which is the "failure to follow instructions" with which he was charged. Accordingly, the Claim is sustained and the discipline should be reversed and removed from his record.

AWARD

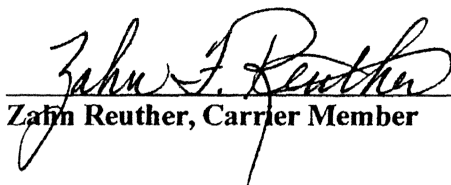
Claim sustained.

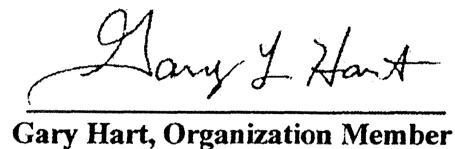
ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. Specifically, the 10-Day Record Suspension shall be removed from his record. The Claimant shall be returned to his position as a lowboy operator and made whole for any losses incurred as a result of his removal. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



Andria S. Knapp, Neutral Member



Zafin Reuther, Carrier Member

Gary Hart, Organization Member

May 30, 2014

Date