

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 57, (Case No. 57)**

**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:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing November 10, 2009, when Claimant, J. W. Hecker (6504195) was issued a Level S 30-day Record Suspension with 1 year probation concerning his involvement with the on track equipment collision on November 10, 2009. The Carrier alleged violation of MOWOR 1.1 Safety, MOWOR 6.50 Movement of On-Track Equipment, MOWOR 6.51 Maintaining a Safe Braking Distance and EI 1.1.9 Traveling On-Track Equipment.**
- 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 November 10, 2009, continuing forward and/or otherwise made whole."
(Carrier File No. 14-10-0012) (Organization File No. 50-13C2-0947.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.

The facts are not in dispute that on November 10, 2009, Claimant was operating a Tamper near Walton, Kansas, and at approximately 5:30 p.m. his machine struck a Ballast Regulator while traveling eastward on Walton Storage Track to tie-up for the day.

On November 20, 2009, Claimant was directed to attend a formal Investigation on December 3, 2009, which was mutually postponed until December 11, 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 involvement with the on track equipment collision with Tamper (X5400351) and Regulator (X0600377) causing damage to both machines at approximately MP 178.4 on the La Junta Subdivision, Kansas Division, at approximately 1730 hours on November 10, 2009.

This investigation will determine possible violation of MOWOR 1.1 Safety, MOWOR 6.50 Movement of On-Track Equipment, MOWOR 6.51 Maintaining a Safe Braking Distance, and EI 1.1.9 Traveling On-Track Equipment...."

On December 22, 2009, 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.

It is the Organization's position that the record verifies that the Claimant was following instructions based upon his last job briefing and the two machines which preceded his stopped short of their briefing stop. It argued that it was very dark and it was his second day on the machine and he was still getting familiarized with it and the lights were out of adjustment. It further argued that subsequently it was discovered that the brakes on the rear of the machine were not functioning properly and had to be repaired after the accident. Lastly, it argued the Machine Operator that stopped in front of the Claimant failed to inform him that he stopped in advance of the briefing stop and had accepted total and full responsibility for the incident. It concluded by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that substantial evidence was introduced that Claimant violated the aforementioned Rules and despite his various excuses or shifting of blame it is clear that he did not maintain a safe distance while traveling his machine to be able to stop and avoid the accident. It closed by asking that the discipline not be disturbed.

The Board has thoroughly reviewed the transcript and record of evidence and determined that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11, therefore, the claim will be resolved on its merits.

During the Investigation the Claimant set forth a variety of possible reasons as to why the accident occurred. He stated the Tamper lights needed to be adjusted, oil was on the rail from the Regulator machine that preceded his machine and the brakes were not properly working on the Tamper. Review of the transcript indicates that on page 49 the Master Mechanic testified

there was no report of any brake malfunctions on November 10th on the Claimant's machine and it lights were set for 1,000 foot illumination. Additionally, the Claimant testified on page 57 of the transcript that on the same date when he tested his brakes at the start of the shift they were functioning properly and he had no problem with them during the day. On page 69 of the transcript the Claimant was questioned about the lights as follows:

"Joey Sprecht: Did you make any attempt to contact Dennis Frank, your Foreman, to get any equipment to adjust those lights?"

Joseph W. Hecker: Uh, no I didn't. At the time I, no I didn't."

On page 88 Machine Operator Dan Gable was questioned as to whether or not any leaking oil from the Regulator may have contributed to the accident and he testified as follows:

"John Garrard: On the, Mr. Gabel, on the Regulator you operated, on the date in question, X0600377, uh, was there any uh, hydraulic or motor oil leakage on that machine?"

Dan Gabel: No. Sir."

Gabel went on testify that a motor leak oil in the Regulator started after the accident, but it was not significant.

As to the allegation that the brakes malfunctioned it clear that on November 10, 2009, they were no problems with machine prior to the incident and the subsequent brake repair of the Tamper was not made until days after the accident had occurred. Lastly, it was argued in behalf of the Claimant the Machine Operator who stopped short of the planned stop in front of the Claimant without informing him had accepted the full responsibility for the accident. That acceptance on his part for the full responsibility of the accident may have been noble, but it did not excuse the Claimant from his responsibility of being able to stop within half the range of his vision. Substantial evidence was adduced at the Investigation that the Claimant did not maintain a safe distance while traveling the Tamper machine, causing the collision with the Ballast Regulator.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately 30 plus years of service with two prior disciplinary notations and clear record for 19 years. Claimant's good work record is grounds for considering mitigation of the discipline, but because the accident had the potential for serious consequences and did not result in any actual time off and was in accordance with the Carrier's Policy for

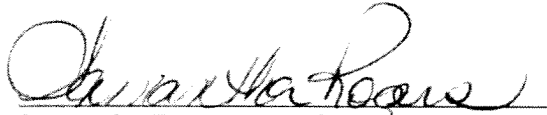
Employee Performance Accountability (PEPA), the Board finds and holds it will not be rescinded as it was not arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member


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

Award Date: 6/29/11