

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 59, (Case No. 59)**

**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 April 12, 2010, when Claimant, Guillermo F. Alonso (1430461), was issued a Level S 30-day Record Suspension with 1 year probation concerning his failure to place the cover over the steering wheel when the boom and outriggers were deployed on the grapple truck he was operating on April 12, 2010. The Carrier alleged violation of EI 15.5 Vehicles Equipped with Cranes.**
- 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 April 12, 2010, continuing forward and/or otherwise made whole."
(Carrier File No. 14-10-0129) (Organization File No. 60-13N1-1036.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 April 15, 2010, Claimant was directed to attend a formal Investigation on April 26, 2010, which was mutually postponed until May 11, 2010, 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 place the cover over the steering

wheel when the boom and outriggers were deployed on grapple truck, MP 382.3, Panhandle Subdivision, at approximately 1020 hours on April 12, 2010, while assigned as grapple truck operator.

This investigation will determine possible violation of EI 15.5 Vehicles Equipped With Cranes."

On May 27, 2010, 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 Carrier alleged that the Claimant violated EI 15.5 Vehicles Equipped With Cranes which states in pertinent part the following:

"All vehicles equipped with cranes must be equipped with a standardized steering wheel cover with a message reminding the driver to stow boom and outriggers prior to travel. The truck driver must place the cover over the steering wheel when the boom and outriggers are deployed...."

It is the Organization's position that on April 12, 2010, the Claimant placed the cover on the steering wheel before he deployed the boom and outriggers, but either the wind and/or vibration of the motor caused the cover to be dislodged from the steering wheel while he was working. When it was brought to his attention that the cover was not on the steering wheel he immediately found it and placed it back as the Rule prescribes. The Organization argued that this is a common occurrence which has been recognized by the parties and documented in a video which shows a steering wheel cover being vibrated off the steering wheel while a truck was sitting still and the motor idling, therefore, it concluded that the Carrier did not meet its burden of proof and it requested that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier the Claimant violated the aforementioned Engineering Instruction (EI) on April 12th because he had the boom and outriggers on his Grapple Truck deployed without the cover being placed on the steering wheel. The cover indicated to anyone that would walk up not to operate the truck due to the Claimant working and to remind the Claimant once he was finished to stow the boom. It argued that it is extremely important that the cover is used to provide protection to all employees and due to the seriousness of a boom being misused without the cover the Claimant and others were subjected to potential harm. It asserted that Signal Supervisor S. Phillips and Roadmaster M. Crowe witnessed the violation and there can be doubt of the Claimant's guilt. 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 two possible scenarios as to why the cover was not on the steering wheel. He testified that either the wind and/or vibration of the motor caused the cover to be dislodged. He asserted that the door to the cab had opened while he was working above in the crow's nest operating the boom and the wind may have blown through the open door or windows and removed the cover or the movement of the machine may have been the cause.

On pages 9 and 10 of the Transcript, Signal Supervisor Phillips was questioned about the incident and what the Claimant told him on April 12, 2010, as follows:

"Jeffery Soukup: Did you, did you stop Mr. Alonso from operating that boom once you noticed that his steering wheel cover was off?"

Stephen Phillips: Yes, we did. We went to Mr. Alonso to stop, stop the boom operation. Got him down, you know, to stop, stop work, and we talked about the steering wheel cover, and you know, the fact that it wasn't on there.

Jeffery Soukup: Did he tell you why he didn't have it on?

Stephen Phillips: If I remember correctly, he told me that he had just forgot to put it on.

Jeffery Soukup: Was there any adverse weather conditions that day?

Stephen Phillips: No, sir.

Jeffery Soukup: Could the wind have come into play and prevented him from keeping that on the steering wheel?

Stephen Phillips: The, both doors were shut, and the windows were up. So, no, I don't believe wind could have had anything to do with it. (*Underlining Board's emphasis*)

On pages 14 and 15 of the Transcript, Roadmaster M. Crowe was questioned about the incident as well and he testified as follows:

"Jeffery Soukup: Was there any adverse weather that day?"

Mark Crowe: No, just a regular day in Oklahoma. Wind might have been blowing a little bit, but it wasn't bad.

Jeffery Soukup: Were both doors closed on his, is grapple truck?

Mark Crowe: Yes.

Jeffery Soukup: Were both windows up?

Mark Crowe: Yes.

Jeffery Soukup: A little bit? Do you see any way the wind could have blown the steering wheel cover off?

Mark Crowe: No. (*Underlining Board's emphasis*)

The testimony above, of the two Carrier Officers, confirmed that the doors and windows to the cab on the grapple truck were closed. Additionally, Phillips testified that the Claimant initially told him he forgot to put the cover on the steering wheel and it was not until two or three days later that he told him that he thought the wind had blown the cover off. Claimant's recollection of the incident was different, as he testified on page 26 of the Transcript that he did not tell Supervisor Phillips he forgot to put the steering wheel cover on. Claimant further testified on pages 24 and 25 of the Transcript that the windows and door were open.

Review of the entire transcript reveals that Witnesses Phillips and Crowe's testimony was consistent and there were no reasons offered as to why they would not be forthright whereas careful examination of the Claimant's testimony indicates it was based upon selective memory. The suggestion that motor vibration might have been the cause as to why the cover was not on the steering wheel does not seem plausible in this instance because of the testimony offered by Phillips concerning what he stated the Claimant told him on April 12th as to why the cover was not in place. Substantial evidence was adduced at the Investigation that the cover was not on the steering wheel and Claimant violated EI 15.5.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately 11 years of service with a good work record. However, not having the cover on the steering wheel while the boom and outriggers was deployed is a serious offense account of the potential danger to employees and machinery. Therefore, because the discipline did not result in any actual time off and was in accordance with the Carrier's Policy

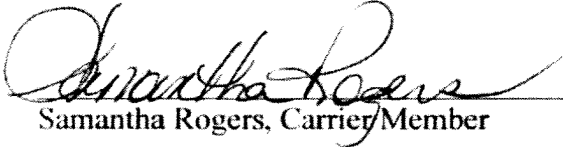
for Employee Performance Accountability (PEPA) , the Board finds and holds it will not be rescinded as it was not arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date: 6/29/11