

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 78, (Case No. 78)**

**BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYEES 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 9, 2010, when Claimant, Terry J. Charley (1159722), was Dismissed for failure to properly secure the ballast regulator machine he was operating and it struck a switch causing damage to the switch and derailling the machine on September 21, 2010. The Carrier alleged violation of MOWOR 6.50.3 Equipment Components Clear.**
- 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 reinstated with seniority, vacation, all rights unimpaired and pay for wage loss commencing when Claimant was withheld from service and continuing forward and/or otherwise made whole."  
(Carrier File No. 14-10-0218) (Organization File No. 240-13C2-1059.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 September 21, 2010, Claimant was directed to attend a formal Investigation on October 4, 2010, which was mutually postponed until October 19, 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 properly secure the ballast plow**

**for travel, when on Tuesday, September 21, 2010 at 0730 hours, the ballast regulator BNX06-00135 you were operating struck the switch located at MP 181.7 on the Aurora Sub causing damages to the switch and derailling the regulator, while assigned as Machine Operator TP07."**

On November 9, 2010, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the Organization's position that the Claimant was not afforded a "fair and impartial" Hearing and on that basis alone the discipline should be set aside. It further argued that the Carrier did not meet its burden of proof and even if it had, which it did not, the discipline exercised was excessive rather than rehabilitative. It closed by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that Claimant failed to properly secure the ballast regulator machine he was operating and it struck a switch causing damage to the switch and derailling the machine on September 21, 2010, in violation of MOWOR 1.1.2 and MOWOR 6.50.3. It also argued that the dismissal was appropriate based upon the Claimant's past disciplinary record and was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). It concluded by asking that the discipline not be disturbed.

The Board has thoroughly reviewed the transcript and record of evidence and has determined that the Investigation was held in accordance with Rule 13(a) the Discipline Rule and Appendix No. 11.

On pages 18 and 19 of the transcript, the Claimant was questioned about the incident under charge and testified as follows:

**"Michael Heille: So, did you operate the machine with the plow unsecured?**

**Terry J. Charley: Yeah.**

**Michael Heille: And is that when you hit the switch?**

**Terry J. Charley: Yes.**

**Michael Heille: Did it stop the machine?**

**Terry J. Charley: It bounced it off.**

**Michael Heille: It did what?**

**Terry J. Charley:** It bounced it off.

**Michael Heille:** It bounced it.

**Terry J. Charley:** Yeah, I hit it and it bounced.

**Michael Heille:** It derail, derailed the machine?

**Terry J. Charley:** Yes.

The questioning of the Claimant continued on page 19 of the transcript regarding the cause of the accident as follows:

**"Michael Heille: Do you know why you didn't pin up the machine for travel?"**

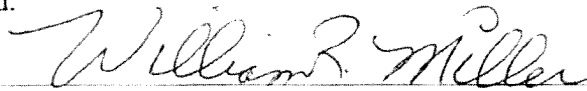
**Terry J. Charley: I thought it was all the way up, put it up, pinned it, adjusted the bolt, and I put it all the way up, and I think I forgot to lock it."**

On page 23 of the transcript, the Claimant also admitted he was not in compliance with MOWOR 6.50.3. Review of the record reveals that substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

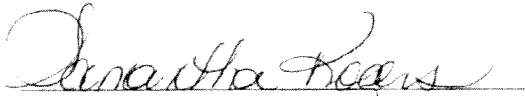
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately 13 years of service with eight disciplines including three Level S Serious incidents within the preceding 36 months. The Carrier's Policy for Employee Performance Accountability (PEPA) explains that two serious Level S offenses within a 36-month review period is considered grounds for dismissal under Dismissable Violations. The Board finds and holds the discipline will not be set aside because 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: May 3, 2012