

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 79, (Case No. 79)**

**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 9, 2010, when Claimant, Luther Sage (1698570), was Dismissed for failure to be alert and attentive and maintain a safe braking distance when he was involved in an on track collision with BNSF machine BNX2800160 on September 26, 2010. The Carrier alleged violation of MOWOR 1.1.2 Alert and Attentive and MOWOR 6.5.1 Maintaining a Safe Braking Distance and MOWOR 6.5.2 Spacing of On Track Equipment.**
- 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. 14-10-0215) (Organization File No. 170-13C2-1063.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 be Alert and Attentive and alleged failure to maintain a safe braking distance, when the BNSF machine BNX3800160, you were operating on September 26, 2010 at approximately 0800 hours was involved in a on track collision at approximately MP 175.0 on the Aurora Sub resulting in approximately \$1,000.00 damage 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 sustained as presented.

It is the position of the Carrier that Claimant failed to be alert and attentive in maintaining a safe braking distance between his machine and another on September 26, 2010, at approximately 0800 hours resulting in a on track collision at MP 175.0 on the Aurora Sub resulting in about \$1,000.00 in damages. 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.

A review of evidence substantiates that the Claimant admitted in his statement and in his testimony that he failed to stop his machine the Plater before it slid into the back of the Nipper Tamper's buggy. In his statement he wrote in pertinent part the following:

"...I was traveling around MP 173 when I hit the machine in front of me which was the Nipper Tamper who Darren Dillinger is the Operator, and he had Johnson Benally and Leon Yazzie as a passenger. I was with Terry Thomas who sat on, on the steps by the door looking out to the side. I was looking with him towards the site where the river was running. I looked and saw the Nipper Tamper well ahead of me. I looked around towards the river once again and this was for about 3 minutes, when I looked back to see the Nipper Tamper, I looked back to see where the Nipper Tamper was and the sun blinded me to make it hard to see, his reaction at the Nipper Tamper was traveling slow and less than

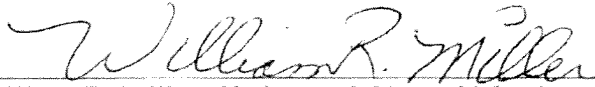
10 yards away. I stepped on the brakes and part brake, and I felt the slide into the Nipper Tamper...." (*Underlining Board's emphasis*)

It is clear from the statement above and Claimant's testimony that he was not attentive to his duties on September 26, 2010, resulting in the accident. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

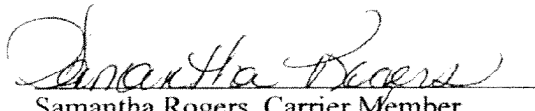
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately four and half years of service with one Serious Level S offense on his record for dishonesty within his 12 month review period and that coupled with instant Serious Level S violation gave him two serious offenses. The Carrier's Policy for Employee Performance Accountability (PEPA) explains that two serious Level S offenses within a 12 or 36 month review period may be 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