

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 83, (Case No. 83)**

**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 October 18, 2010, when Claimant, R. Adams (6426118), was issued a Level S 30-day Record Suspension with 3 year review period, for critical decision violation for fouling the mainline track with the Front End Loader machine he was operating on October 18, 2010. The Carrier alleged violation of MOWOR 6.3 Track Occupancy.**
- 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 compensated for his lost time and expense and otherwise made whole."
(Carrier File No. 14-11-0021) (Organization File No. 10-13N1-1095.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 October 27, 2010, Claimant was directed to attend a formal Investigation on October 28, 2010, which was mutually postponed until December 3, 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 Critical Decision violation at approximately 1130 hours on October 18, 2010 at MP 17.48, when you were allegedly observed by the FRA, Fouling Main Track 1 with the Front End Loader your were

operating while assigned as Machine Operator."

On December 27, 2010, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30 Day Record Suspension along with a three year probationary period.

It is the Organization's position that the Claimant did not foul the mainline track on October 18, 2010, but instead was traveling down a well traveled right of way road. It argued he had to proceed around a building, between it and the tracks. At no time did the Claimant get up on the track nor did he work and/or travel foul of the tracks and he did not go within four feet of the nearest rail with his machine. According to it he simply traveled between the building and the tracks to get to his work locations. It concluded by stating that the Carrier did not meet its burden of proof and requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that the record shows that the Claimant was operating a front end loader and while doing so, he was observed by an FRA Inspector to be fouling the main line track 1 without proper authority. Following this observation FRA Inspector G. Stout discussed the incident with the Claimant and measured the distance between the wheel marks and tracks with a four foot measuring stick to decide if the Claimant had violated the Rules. It was determined the Claimant had traveled next to the track and was not outside the required four feet with his machine. Additionally, when the Inspector and various Carrier Officers went to talk to the Claimant about the matter the Claimant swung the machine bucket again over the mainline without protection. It closed by asking that the discipline not be disturbed and the claim remain denied.

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 the transcript indicates that on page 12 the Hearing Officer questioned the Roadmaster, B. Hildebrandt about the October 18th incident and Claimant's alleged culpability as follows:

"Michael Heille: Did you interview Mr. Adams?"

Brandon Hildebrandt: Yes, Mr. Adams and I talked about what occurred.

Michael Heille: What, what did occur?"

Brandon Hildebrandt: Mr. Adams stated that he was following the track with

his loader without a proper authority. *(Underlining Board's emphasis)*

Hildebrandt further testified on page 13 of the transcript that the FRA Inspector issued a Inspection Report wherein he stated that the Claimant was working to near the track occasionally fouling it with the bucket of the front end loader.

On page 28 of the transcript, the Claimant did not dispute the fact that the FRA Inspector measured how far his machine was from the mainline and advised him he was less than four feet from the tracks in violation of MOWOR 6.3. Claimant instead argued he was not in violation of the Rule because he was not working within four feet of the tracks, but was in the process of moving his machine to another location.

On pages 30 and 31 of the transcript, R. Dickerson, General Signal Supervisor was examined in regard to the incident as follows:

"Michael Heille: What happened that day?

Ronald Dickerson: We were in the area, accompanied by FRA Inspector, Jerry Stout. We were doing an investigation of the incident at Monroe Street. During that investigation Jerry Stout, the FRA Inspector, and myself, Keith Facicus, and Tony Brooks, were doing our investigation, and Jerry said, stop what we're doing. He then noticed Mr. Adams moving his machine between Main 1, and the Maintainer's Shed at Hindsdale. He said, stop, I don't believe that guy has clearance. We all took a look at the situation. We agreed it was very close, walked down to investigate further. Jerry has a fiberglass pole that's 4 foot in length. He took it down. We could still see where the tire tracks were in the ballast from the End Loader. And he put the fiberglass pole up against the rail, observed that the tire tracks were well within the 4 feet, making Mr. Adams foul the track. We then pulled Mr. Adams off his machine, had him get clear. Asked him what type of protection he had. He stated to us at the time he believed he had a Form B. After he went and inspected his paperwork it ended up the Form that he was speaking of was on Track 2. Therefore, he did not have any authority to foul the track...."
(Underlining Board's emphasis)

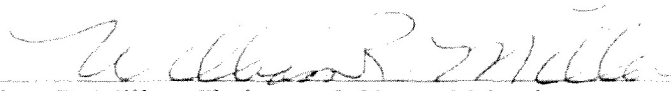
On pages 33 and 34 of the transcript Dickerson further testified that when the Claimant was asked to shut his machine down and discuss the matter he swung the bucket over the Main 1 track. General Supervisor Dickerson's and Roadmaster Hildebrandt's testimony was not effectively rebutted. The Claimant alleged he was not working, but just traveling along the right of way, however, it was not refuted that there was an actual road on the other side of the shanty that the Claimant could have used to get to the same location without placing his machine within

four feet of the mainline Track 1. The Claimant was working, when he moved his machine to a different work site and in the process he fouled a mainline track without protection. 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 Claimant had 29 years of service, however, a little over a month before this incident Claimant had been assessed a Level S 30-Day Record Suspension for carelessness and/or negligence resulting in a personal injury to himself, therefore, the Board finds and holds that the discipline exercised in this instance was in compliance with the Carrier's Policy for Employee Performance Accountability (PEPA) and 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: June 11, 2012