

NATIONAL MEDIATION BOARD

**PUBLIC LAW BOARD NO. 7394
AWARD NO. 10, (Case No. 10)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

**BNSF RAILWAY COMPANY
(Former St. Louis - San Francisco Railway Co.)**

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
R. C. Sandlin, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on October 15, 2009 when Mr. Jesse D. Fortin was dismissed for violation of BNSF Operating Rule 1.1.2, Safety Rules S-1.4.3 and BNSF Engineering Instructions 14.3, 14.3.1 and 14.3.2 by failing to follow manufacturer's specifications, failing to properly inspect equipment before and during use, failing to ensure that all safety appliances were in place and working properly on equipment he was operating, failing to report any problems with that equipment, and failing to remain alert and attentive at mile post 65.7, Fort Scott Subdivision, when he struck men and equipment while operating Bridge Timber Handler X17-00028, causing serious injury to co-workers and equipment damage on October 7, 2009.
2. As a consequence of the Carrier's violation referred to in part (1) above, we request Mr. Fortin be reinstated with all seniority, charges removed from his personal record and paid for all time lost."
(Carrier File No. 12-10-0044) (Organization File No. B-1806-1)

FINDINGS:

Public Law Board No. 7394, 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 indicate that on October 15, 2009, General Director of Maintenance, S. Heidzig sent the Claimant a letter which stated in pertinent part the following:

"This letter will confirm that effective immediately you are dismissed from employment with BNSF Railway Company for violation of BNSF Operating Rule 1.1.2, Safety Rules S-1.4.1, S-1.4.3 and BNSF Engineering Instructions 14.3, 14.3.1 and 14.3.2 by failing to follow manufacturer's specifications, failing to properly inspect equipment before and during use, failing to ensure that all safety appliances were in place and working properly on equipment you were operating, failing to report any problems with that equipment, and failing to remain alert with attentive at mile post 65.7, Fort Scott Subdivision, when you struck men and equipment while operating Bridge Timber Handler X17-00028, causing serious injury to co-workers and equipment damage on October 7, 2009."

On October 28, 2009, the Organization protested the Carrier's action and pursuant to Discipline Rule 91(b)(1) it requested a formal Investigation. The Investigation was set for November 10, 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 failure to inspect equipment before and during use, failure to ensure that all safety appliances were in place and working properly on equipment you were operating, failure to report any problems with that equipment, and failure to remain alert and attentive at Mile Post 65.7, Fort Scott Subdivision, on October 7, 2009, when you struck men and equipment while operating Bridge Timber Handler X17-00028, causing serious injury to co-workers and equipment damage.

The investigation will determine possible violation of MOWOR 1.1.2 Alert and Attentive, MOWSR S-1.4.1 Inspection, MOWSR S-1.4.3 Manufacturer Specifications, EI 14.3 Operator Responsibilities for Roadway Equipment, EI 14.3.1 Manufacturer's Instructions for Roadway Equipment, EI 14.3.2 Inspecting Roadway Equipment."

On December 18, 2009, Claimant was notified that he had been found guilty as charged and his dismissal remained intact.

The undisputed facts are that Claimant is a long term employee (Seniority Date: 1-10-74) with an unblemished disciplinary record. On October 7, 2009, Claimant was operating the aforementioned machine when an accident occurred that resulted in equipment damage and the

injury of two employees, one of whom had a crushed leg with a broken right foot and toes, while the other had a broken back, fractured cheek bone and two fractured ankles. The injuries sustained by both employees were career ending injuries.

It is the Organization's position that the Carrier erred in its dismissal of the Claimant. It argued that the Claimant is a 35 year employee who worked exclusively in the B&B Sub-Department primarily as welder or machine operator without any incidents involving the operation of machine until the subject incident. It argued that Claimant had not operated this type of machine for over ten years and no entries had been made in the machine's log book for over six months regarding potential problems with the machine. Claimant testified that before using the machine he made an inspection and noted nothing unusual except for typical oil leaks that occur with older machines. Subsequently, 30 to 40 minutes after using the machine an unforeseeable incident arose which was a machine failure and not operator failure. It concluded by requesting that the discipline be rescinded and the Claim be sustained as presented.

It is the position of the Carrier that there is no excuse based upon the Claimant's lengthy experience as a equipment operator that he didn't know the Rules and responsibilities, that go along with operating equipment and in this instance it was evident that he did not operate the equipment, in a safe, deliberate manner. It argued that Claimant's carelessness resulted in serious injuries to his co-workers and damage to machinery. It closed by stating that because of the seriousness of the accident the discipline was appropriate and it asked that the discipline not be disturbed and the Claim remain denied.

The Board thoroughly reviewed the transcript and the record of evidence and has determined that the formal Investigation was held in accordance with Rule 91 the Discipline Rule and it is clear that the Hearing was conducted in a fair and impartial manner. Claimant was well represented by his Organization and he was not denied his Agreement "due process" rights.

The facts are clear Claimant was involved in a serious accident which involved career ending injuries to two employees and damage to equipment. On the date of the incident Claimant operated a Bridge Timber Handler machine, designed for handling and installing ties on a bridge which failed to stop short of men and equipment resulting in the accident. Claimant suggested that he was not familiar with the machine, however, witness J. Johnson, B&B Foreman testified on page 85 of the Transcript that he had seen the Claimant handle the same machine in the past in a safe manner. Johnson also testified on pages 80 -81 of the Transcript that Claimant did not report any defects to the machine to his Supervisor or anyone else in charge. On pages 68 - 69 of the Transcript the Claimant was questioned about the machine and he testified as follows:

"Q But did you check the safety appliance.

A No, sir, I did not check that.

Q Okay. So do you feel like you complied with the safety rule S-1.4.3, manufacturer's specifications, read and follow the specifications when using tool and equipment, and out of the manufacturer's specifications it specifically states that this pedal, there's even a danger warning on it, and it said this side of safety plate to be down when operating.

A Yes, sir, but it's like Mr. Talbot said, you couldn't even see the warning on it, the thing because it was soiled and dirty, you couldn't see the warning on the, on the flap.

Q Whose responsibility would it be to clean that off?

A That should have been my responsibility for, I should have took the machine out of service, I should have..."

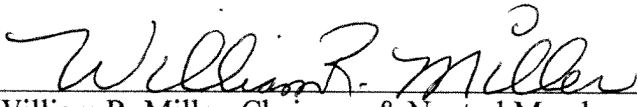
Claimant went on to testify that it was his responsibility to make sure that the machine was ready to use and he had the authority to take a machine out of service if it was not ready to go. Carrier Engineering Instruction - 14.3.1, states in pertinent part: **"...that operators must study and understand the manufacturer's instructions for the specific roadway equipment being operated."** Review of the Transcript reveals that Claimant further testified that he operated the machine with the safety appliance in the "tow mode" rather than the "operation mode" as recommended by manufactures instructions. During the Hearing, Claimant testified that the travel pedal stuck in the travel position, and that the brakes would not stop the equipment that he was operating, however, it was un-rebutted that on the same day following the incident and the next day, several brake tests were performed with the equipment and no defects were discovered. The brakes performed as intended and stopped the equipment short of the 50 to 60 feet distance that Claimant stated that he traveled, from starting point to the point of impact. The tests performed by the Carrier determined that Claimant did not operate his machine in a safe manner when he approached the men and equipment working on a bridge near Mile Post 65.7, Fort Scott Subdivision. Substantial evidence was adduced at the Investigation that Claimant failed to exercise caution and he violated the Rules charged with. It is clear that the Carrier met its burden of proof that the accident was "man made".

The only issue remaining is whether the discipline assessed was appropriate. At the time of the instant dispute the Claimant had 35 years of service with an unblemished disciplinary record. Claimant's testimony vacillated between being remorseful over his errors and its subsequent injuries to his co-workers to suggesting that he should have been given re-training on a machine that he had not operated on a regular basis in several years. The Board has no reason

to disbelieve Claimant's remorse over the accident, however, that does not excuse or negate the consequences of his errors that led to the career ending injuries of two employees. The Board is always reluctant to dismiss a long term employee, especially one with a admirable work record, but in this instance based upon the severities of the injuries, and the language of the Carrier's Policy for Employee Performance Accountability (PEPA), Appendix C, which states that a single aggravated offense is grounds for dismissal when there is a "**rule violation that results in serious collision and/or derailment, serious injury, fatality or extensive damage to company or public property.**" (*Underlining Board's emphasis*) to do such would be an exercise in leniency which is not within our discretion. The Board finds and holds that the dismissal for this very serious offense was consistent and appropriate with the Carrier's Policy for Employee Performance Accountability (PEPA), therefore, it will not be rescinded because it was not arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member

Award Date: 12-13-10