

## PUBLIC LAW BOARD NO. 2529

Joseph Lazar, Referee

AWARD NO. 22

CASE NO. 29

PARTIES ) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES  
TO ) and  
DISPUTE ) BURLINGTON NORTHERN RAILROAD (Former Fort Worth  
and Denver Railway Company)

STATEMENT  
OF CLAIM:

1. That the Carrier violated the provisions of the Agreement when they suspended Mr. R. C. Trammell from its service for a period of seven (7) days on charges not sustained by the hearing record, said action being unduly harsh and in abuse of discretion.
2. That Claimant be compensated for all time loss suffered and that his record be cleared of all charges.

**FINDINGS:**

FINDINGS: By reason of the Memorandum of Agreement signed November 16, 1979, and upon the whole record and all the evidence, the Board finds that the parties herein are employee and carrier within the meaning of the Railway Labor Act, as amended, and that it has jurisdiction.

Claimant Roger C. Trammell, Machine Operator for over one year and one month, Section Laborer since May 14, 1979, and on the dates in question assigned as a Tie Handler Operator, received notice of suspension dated November 23, 1982, reading: "You are hereby served notice of your suspension for seven days from the service of the Fort Worth and Denver Railway Company for violation of Rule 830 of the Burlington Northern Rules of the Maintenance of Way Department in connection with the October 20, 1982, incident at approximately 3:00 p.m., at about M. P. 10.5 involving an unsafe operation of tie handler, resulting in damage to company property while employed as Machine Operator on Extra Gang One, as evidenced by a formal investigation afforded you November 4, 1982, Fort Worth, Texas."

Rule 830 reads:

"A careful lookout must be maintained to provide safe clearance to the sides and overhead while working or moving. The operator of a crane, pile driver or other similar equipment must use particular care to avoid coming close to or striking wires or other overhead obstructions. The operator must understand that power carried in wires can arc several feet and that an accident could occur without the machine touching such wires. To prevent arcing, a minimum clear distance of 15 feet must be maintained between power lines and equipment or any portion thereof."

The evidence is clear and beyond dispute that Claimant rotated his tie handler around and around, spinning it like a merry-go-round on the Main Line, at about 3:00 p.m., October 20th, 1982.

The testimony of Assistant Foreman Elvis Bowens, Jr. is that: "The machines were being returned to the hold after completing the day's work putting in ties. I observed Mr. Trammell taking the tie handler round and round and round, playing merry-go-round on the main line." (Tr., p. 2). Similarly, Truck Driver Donny Hickmott testified: "Well, I saw Mr. Trammell spin a machine around down on the Main Line...". (Tr., p. 8). Laborer R. J. Garcia testified that: "I saw a machine spinning around on the Main Line" and that the operator of the machine was the Claimant. (Tr., p. 12). The Claimant testified, in part: "I was rotating the machine in a full circle, stop position, at the North Side of the switch at Saginaw, with no laborers standing around, as stated in Donny Hickmott's testimony..." (Tr. p. 18).

Immediately following the spinning episode, as observed by the Assistant Foreman Elvis Bowens, Jr., "They went down to the end of the switch and came back up the pass and started throwing tie butts away from the pass. Just before he got to the crossing he hit a wire and it fell down and hit one of the employees on the head. If it had been a hot wire, the man would be dead right now." (Tr., p. 2). Truck Driver Donny Hickmott testified: "...whey they came down the pass, I saw him throwing tie butts over to the side. I was talking to Bard Davis and the wire, one of the company phone lines, came down. I didn't see it come loose or anything like that, but I grabbed him. All I caught was a picture of it out of the corner of my eye and I grabbed him and pulled him out of the way." (Tr., p. 8).

Mr. Bernell Bunch, the machine operator directly behind Claimant, in statement read into the record (Exhibit "C"), said, "I Bernell Bunch was working on the FW&D Railroad on the 10-20-82, behind Mr. Trammell; while working on the pass track, Mr. Trammell accidental hit a telephone wire while moving some tide butts away from the track...." (Tr., p. 21).

Claimant denied knowledge that he struck the telephone wire: "Q. While operating you tie handler in the siding at Saginaw, at about Mile Post 10.5, while doing your duty as tie handler operator, kicking tie butts away from siding, did you strike the telegraph wire on the pole line? A. Not to my knowledge. Not that I know of. No sir." (Tr., p. 17).

A statement by Jessie Reed was entered into the record by the Organization (Exhibit "A"), establishing the fact that the same line had been hit by another employee just prior to the incident involving the Claimant:

"Jessie and Lonnie were on the tie handlers putting in the ties, Lonnie hit the line, and knocked it loose. The damage to the line was already done, before Mr. Trammell was wrote up for damaging the line on October 20, 1982." (Tr., p. 6).

Assistant Foreman Bowens was asked: "Were you aware that Lonnie had hit that same line?" Bowens answered: "Yes. Lonnie did not hit the line. He scraped it. And when he saw that he was too close, he adjusted his boom. He had already told me about it earlier. He is an observant machine operator. He reported the incident to me." (Tr., p. 6).

Viewing the evidence of record as a whole, the Board finds that Claimant did in fact hit the wire that had been previously hit by another employee.

In the opinion of the Board, Claimant engaged in the spinning around of the machine on the Main Line immediately prior to his movement into the Saginaw pass where he hit the telegraph wire. Although the spinning did not contribute or cause the hitting of the telegraph wire, it is the opinion of the Board that Claimant was careless and unmindful of what was going on around him, and he displayed indifferent and reckless behavior just prior to knocking down the wire. Compliance with Rule 830 is necessary to maintain a safe work environment. Claimant's frivolous and dangerous behavior is not to be condoned.

The Organization, in its Position, has argued that Claimant was denied due process and a fair and impartial hearing because the Carrier did not call as witnesses certain employees who allegedly declined to testify on behalf of the Claimant for fear of retaliation from the Carrier. The evidence of record shows that one of these witnesses did in fact serve as witness in another case on the very date of the investigation afforded to Claimant. Further, the evidence shows the statement of the General Chairman, "if the witnesses (called by an accused) have testimony that bear out our facts, the Organization has had no problems in having them paid for the day." (Tr., p. 22). The evidence of record totally fails to support any basis for Claimant's allegations that employees who declined to testify on behalf of Claimant were actually in fear of retaliation from the Carrier. Although it is the duty of the Carrier, so far as it is able, to notify and arrange for the presence of each witness who is known by it to possess any essential facts, it is not prejudicial error, and an accused's complaint is without merit, not to have additional witnesses when all material facts at issue are admitted or where a witness desired by an accused could not supply evidence which in any way could change, modify, or explain the undisputed facts which support discipline. The Board finds no prejudicial error in the present case.

A W A R D

1. The Carrier is not in violation of the Agreement.
2. The claim is denied.

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JOSEPH LAZAR, CHAIRMAN AND NEUTRAL MEMBER

C. F. Foose

C. F. FOOSE, EMPLOYEE MEMBER

B. J. Mason

B. J. MASON, CARRIER MEMBER

DATED: April 3, 1977