

6-2272-2

PUBLIC LAW BOARD NO. 5696
AWARD NO. 23
CASE NO. 23

BURLINGTON NORTHERN RAILROAD

PARTIES
TO DISPUTE:

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it unjustly dismissed Machine Operator Mr. E. E. Eddie from service based upon his alleged responsibility in conjunction with the collision of the on-track equipment being operated by him and other on-track equipment stopped on the right of way.

(2) As a consequence of the Carrier's violation referred to above, Claimant shall be reinstated to his former position with all rights unimpaired, the discipline shall be removed from his personal file and he shall be compensated for all wages lost.

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

Claimant was hired as a Trackman on June 4, 1980 and was working as a Machine Operator at the time of his dismissal from service on April 6, 1995 for unsafe operation of a machine causing an accident on April 3, 1995 near Fountain, Alabama.

The April 21, 1995 investigation revealed that Claimant was operating Machine BNX 4700306 on April 3, 1995 when his gang was moving equipment from Fountain to MacMillan. According to Claimant, when he saw the two trucks in front of him stopped on the track he attempted to stop his machine by hitting the left-hand peddle to make a release, but his machine kept going. Claimant testified that he kept mashing the peddle back and forth but the brake never would reject to make it stop. Based upon his distance and the speed he was traveling, he decided that he would be safer remaining on the machine and bracing himself for impact rather than jumping. He noted that the horn did not work so he did not attempt to use it to warn the other men.

Claimant stated that the machine did not have a key so he could not turn it off, explaining that they used a screwdriver to crank it, and that the screwdriver was left in the tool box in the hole. Claimant testified that he did the best he could to try to stop the machine, but it would not stop. He was not sure the reason why, but indicated that a similar incident happened with the machine about a week before but he was able to get it stopped at that time. Claimant testified that he did not report the incident at the time since he figured something got caught in the valve or coil and that there was nothing wrong with the machine. He indicated that whatever may have been caught in the fluid could have come back through again later on. Claimant stated that he felt that he complied with all the rules for safe operation of the machine, except perhaps the

maintenance of the log book with respect to reporting the prior incident. Claimant asserted that he felt his machine was safe to operate when he took it out that day.

A three man inspection was conducted on the machine the following morning by Roadmaster Buzbee, traveling Mechanic Wright and Foreman Cox. Each testified that the machine would not start so that the inspection was conducted without the engine running. Buzbee noted that nothing was found to be wrong with it that would have caused the accident. Cox stated that when the machine is not running the brakes automatically lock up, and the hydraulics will not work. Wright testified that while working the travel lever manually it was not sticking, but indicated that it was not much of a test or an accurate indication of the conditions existing at the time of the accident since in order for the brakes or pedal to work, the engine has to be running.

Buzbee testified that during his investigation Claimant told him that the control had been sticking for about 3 weeks and must have stuck at the time of the accident. Buzbee recalled that the brakes were not the issue, but the travel pedal was, and that was what was focused on during the inspection. He admitted not knowing whether the travel would stick during operation since those were not the conditions under which the inspection was conducted. Claimant's personal record showed 5 on-duty injuries including this one and 33 days upon which he received compensation for such injuries.

Carrier argues that the investigation supports its conclusion that the Claimant did not act safely in various ways, relying especially on the Claimant's failure to report a previous similar incident and the fact that his

horn was not working, which violates Rule 30.2. The Organization contends that Claimant should not be held responsible for an accident caused by faulty equipment when he did everything within his power to attempt to stop the machine and comply with the rules. The Organization argues that the results of the 3 man inspection cannot be relied upon to negate any difficulties with the travel lever since the test was not conducted under the same moving conditions as when the accident occurred.

A review of the entire record convinces us that Carrier has sustained its burden of proving by substantial evidence that Claimant was guilty of failing to report a possible safety concern in his log book when the prior incident occurred. Claimant's explanation that he thought something was caught in the line or coil and that there was nothing wrong with the machine does not excuse his failure to report, especially when he understood that whatever happened could recur.

However, the record does not support the conclusion that the accident of April 3, 1995 was caused specifically by Claimant's failure to safely operate his equipment that day. The subsequent machine inspection cannot disprove the potentially faulty condition of the travel lever during engine operation, since the hydraulics involved with its functioning were not tested because the engine could not be turned on. While Claimant's culpability in not reporting the earlier incident could well have contributed to the potentially unsafe condition of the machine, his actions on April 3, 1995 do not reveal any rule violations or improper conduct per se.

Finally, it is clear that Carrier relied upon the fact that the Claimant had received 4 previous injuries in concluding that he was an unsafe operator and deciding to dismiss him from service. While the record

supports the existence of these injuries, there is nothing indicating that the Claimant was cited for any rule violations or received any discipline as a result of them.

The record reflects that the parties agreed to partially resolve this matter by returning Claimant to service on February 1, 1996 as a Trackman, and reinstating only his Trackman seniority. The Organization retained its right to pursue both lost wages as well as the reinstatement of Claimant's Machine Operator rights and seniority.

Under the circumstances of this case, the Board is of the opinion that Carrier sustained its burden of proving that some discipline was warranted in connection with the Claimant's failure to report a prior safety concern and properly maintain his log book. Absent proof that Carrier has consistently viewed this as a dischargeable offense, we do not find adequate support in this record for its decision to dismiss Claimant or to strip him of his Machine Operator seniority rights. Accordingly, we direct that the dismissal be converted to a 60 day suspension without pay, and that Claimant's Machine Operator seniority rights be restored and he be compensated for lost wages for the period commencing after his 60 day suspension until his return to service on February 1, 1996. We do not include in Claimant's reimbursement the difference between what he earned as a Trackman since February 1, 1996 and what he may have earned as a Machine Operator.

AWARD:

The claim is sustained in part. Carrier shall convert Claimant's dismissal to a 60 day suspension without pay, shall reinstate Claimant's Machine Operator

seniority, and shall compensate him for lost wages during the period between the end of his suspension and his return to service in February, 1996.

Margo R. Newman

Margo R. Newman
Neutral Chairperson

Thomas M. Rohling

Thomas M. Rohling
Carrier Member

E. R. Spears

E. R. Spears
Employee Member

Fort Worth, Texas
October 21, 1997

