

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 431 – Award No. 431 – Claimant: Fitzgerald
Carrier File No. 14-12-0024
Organization File No. 2600.13C2-1174.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing December 9, 2011, when Claimant, Alvin L. Fitzgerald (0062190), was disciplined with a Level S Actual Suspension effective November 9 through and including December 8, 2011, with a 3 year review for his alleged failure to maintain a safe braking distance causing a collision on November 8, 2011. The Carrier alleged violation of MOWOR 1.6 Conduct and MOWOR 6.51 Maintaining a Safe Distance.
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 wage loss commencing December 9, 2012, and continuing forward and/or otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Alvin L. Fitzgerald, has been employed by the Carrier since May, 2011. On November 8, 2011, the Carrier notified Claimant to attend an investigation "for the purpose of ascertaining the facts and determining (his) responsibility, if any, in connection with (his) alleged failure to maintain safe braking distance and alleged failure to operate machine to avoid incident when on November 8, 2011 at approximately 1130

hours at MP 249.3 on the Aurora Sub (he) operated anchor squeezer BNX5010255 which collided with the FCM toilet trailer which was being towed by #3 spiker causing approximately \$10000 dollars damage while assigned as machine operator TP07." Following the investigation, the Carrier found that Claimant had violated Maintenance of Way Operating Rules 1.6 Conduct and 6.51 Maintaining a Safe Braking Distance, and assessed Claimant a Level S 30-day actual suspension with a three-year review period.

The applicable Carrier Maintenance of Way Operating Rules provide, in relevant part:

1.6 Conduct

Employees must not be:

1. Careless of the safety of themselves or other
2. Negligent

6.51 Maintaining a Safe Braking Distance

On-track equipment operators are responsible for maintaining a safe braking distance between their on-track equipment and other on-track equipment, trains and engines.

The underlying facts of this case are not in dispute. On November 8, 2011, Claimant was working as a Machine Operator on Gang TP07. Claimant was operating a squeezer trailer, traveling backwards to a job site and towing a cart loaded with anchors when he collided with a spiker pulling the gang's portable toilet. Carrier Roadmaster Donald Jones, Claimant's supervisor, testified at the investigation that the accident resulted in approximately \$20,000 damage.

Mr. Jones explained that the squeezer is a small machine, about 16,000 pounds, and the spiker is medium-sized, about 30,000 pounds. He added that Claimant was traveling backwards at the time. Mr. Jones stated that there was light rain and some fog that day, and that hazard was discussed with the crew during the morning briefing. In particular, he testified, he told the crew members to watch their distance traveling backwards. Mr. Jones stated that the situation on the day of the incident was not uncommon. In fact, he stated, the gang traveled in that manner almost every day. He stated that Claimant was pulling a full load of anchors at the time of the incident, but that too was not unusual.

Mr. Jones added that after the incident Claimant mentioned he had earlier informed the Assistant Foreman that the brake pads on the right side of his vehicle were not all the way to the wheel; Mr. Jones had not heard about it before that time. Mr. Jones stated that following the incident Mechanic Supervisor Kevin Akeley and Mechanic Cody Evans checked Claimant's machine to determine if there were any problems with the brakes and found nothing wrong. He added that the machine was operational and the

brakes worked fine the rest of the day. It does not appear that the wagon was hooked up to Claimant's squeezer at the time of the test.

Mr. Jones testified that Claimant was qualified on the machine, and had spent a few days as a break-in period with Assistant Foreman Roy Donaldson, who gave Mr. Jones favorable comments about Claimant's performance on the machine.

Claimant gave two handwritten accounts of events, one in a Chicago Division Accident-Interview, Accident-Interview Form, and another on a plain piece of paper. The first provides, in relevant part:

I was traveling on a squeezer (sic) going backward to the starting location. The track was wet and slippery due to light rain. The machine was far away from me. I also was pulling a weagon (sic) full of anchor which was very heavy. As I started to slow down and stop, I wasn't able to stop. I believe the weather and the pullen (sic) of the weagon didn't help me stop. I saw the machine that was behind me . . . and I couldn't stop as I was stepping on my brakes. I ran into the machine behind me.

In the second statement, Claimant repeated that rail conditions were slippery due to light rain, he was trying to stop, his brakes would not slow up and he ran into the spiker behind him. He added that the brake pads on his right side were not all the way on the wheel, and he told an Assistant Foreman who replied that it should be OK.

Claimant testified at the investigation that at the time of the incident he was in his normal position, operating his machine, backing up to the gang's work site. He explained that there were light rain, and it was very slippery and cold. He stated that he was traveling very slowly, so much so that the Assistant Foreman asked if he was okay. He heard the operator of Spiker #3 tell him that they had stopped, and he responded. The spiker was out of sight, but when it came into view he had a long straight stretch to where the spiker was stopped. Claimant maintained that he began to apply his brakes about a half to three quarters of a mile from the other machine. Claimant explained that when he started to slow up, the machine would not slow up, and when he applied the brakes the machine seemed to go faster.

Claimant acknowledged that he knew for about half a mile that he could not stop the machine and did not let anyone know on the radio. He estimated that he was traveling at 20 to 22 miles per hour. He explained that he was trying to stop and thought the machine would eventually slow up.

Claimant added that the heavy load he was carrying worked against him. He described the load as approximately 15,000 to 25,000 pounds of anchors. He stated that there was no supplemental brake system on the wagon, so his machine was required to bear the brunt of hauling the additional load. Claimant explained that during the time he had been operating the machine, he did not haul that kind of load if he was traveling forward, but he did do so if he traveled backwards.

Claimant maintained that he had actually operated the machine for only about seven days. He stated that his training consisted of having the Assistant Foreman show him how to squeeze the anchors and how to switch going forwards and backwards. He contended that his total training took about 30 minutes.

Claimant attributed the incident to the machine failing to brake. He denied that the hazardous travel conditions, or wet rail, had been discussed in the briefing at the start of the day. He stated that this was his second day operating the machine in the rain. Claimant maintained that on about the third day he was running the machine he told the Assistant Foreman about the problem with the brake pads. He stated that a mechanic was present but he did not tell him directly. However, he acknowledged that the machine stopped properly for the three weeks he had been running it prior to this incident.

Claimant's personal record shows no previous discipline.

The Carrier states that case is not complicated, and, in fact, the Organization does not argue that the accident did not take place. The Carrier notes Mr. Jones' testimony that the Anchor Squeezer Machine Claimant was operating collided with the Spiker Machine towing the portable toilet for Gang TP09, causing damage to the three pieces of equipment totaling approximately \$20,000. The Carrier points out that Claimant admitted in his statement that he could not stop his machine and collided with the other one.

The Carrier states that, as has been held by various arbitration boards, Claimant's admission is sufficient to satisfy the Carrier's burden of proving Claimant's guilt by substantial evidence. The Carrier asserts the argument that wet rail prevented Claimant from operating his machine safely has no merit, as weather hazards had been discussed in the morning safety briefing. The Carrier notes that Claimant is a relatively new employee, hired in May 2011, and cannot lose focus when it comes to protecting employees and equipment on the track. There is no question, Carrier urges, that Claimant violated Carrier Rules as alleged. The Carrier concludes that it properly determined that Claimant's Rule violation was of a serious nature, and the discipline assessed should not be disturbed.

The Organization states that the Carrier's chief witness acknowledged that the machine Claimant was operating at the time of the incident was approximately half the size of the one usually assigned to pull the on-track trailer. Moreover, the squeezer usually pulls a portable toilet behind the machine, but on the day at issue a large heavy anchor trailer was attached to the squeezer, estimated as weighing 15,000 pounds, about the same weight as the vehicle towing it, with no supplemental braking system on the trailer.

The Organization notes that Claimant was traveling backwards and atmospheric conditions came into play, as the Assistant Foreman asked Claimant if everything was all right because he was traveling so slowly. Further, as Claimant testified, the spiker was

out of sight when Claimant first attempted to slow his machine, only to find that it seemed to go faster. The Organization asserts that the unequal weight distribution, combined with the light rain falling at the time, led to the unfortunate incident. The Organization notes Claimant's testimony that when he attempted to begin slowing down, well before he reached the spiker, his machine felt only as if it were speeding up.

The Organization points out that although the Carrier performed a "stop test" with the mechanics on the scene and found the squeezer did stop, but the test was not performed at travel speed. Moreover, it did not include the additional weight of the trailer full of anchors.

The Organization does not dispute that a collision took place. However, it asserts, the mitigating factors must be taken into account. Claimant was hauling an extremely heavy load in an undersized machine, in less than optimal conditions. The Organization concludes that the Carrier has failed to prove that Claimant engaged in misconduct, and, even if he had, the discipline assessed is extreme, unwarranted and unjustified. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no procedural irregularity which warrants vacating the discipline in this case. On the merits, there is no dispute that Claimant collided with another vehicle. The Organization offered numerous reasons that Claimant should not be held accountable, but we do not agree. While he was a new employee, the testimony of the Carrier's witness establishes that he was trained on the vehicle, that there was nothing unusual about the manner in which Claimant was required to operate, and that the inclement weather conditions were addressed in the daily briefing. While it is true that the brake test was not conducted with the same load Claimant towed, there was no evidence, before or after the incident, that the brakes failed to operate properly. Moreover, even if, as Claimant asserted, he was aware of a problem with the brakes, he failed to take the proper action to correct the situation.

The Organization and Claimant blame the load and the weather for this incident. The record, however, demonstrates that Claimant failed to properly account for these factors, a conclusion strengthened by the fact that he did not warn anyone of his supposed brake failure when he was still a half mile away from the other machine. The Carrier has met its burden of proving Claimant's guilt by substantial evidence.

As for the penalty, Claimant failed to properly stop his vehicle. There was certainly the potential for injury to the employees involved, and the incident resulted in extensive damage to Carrier property. He committed a serious offense. We cannot say that the Carrier's decision that an actual suspension was warranted represents an unfair, arbitrary or discriminatory exercise of the Carrier's discretion to determine penalties.

AWARD

Claim denied.



DAN NIELSEN
Neutral Member



JOY MENDEZ
Carrier Member



DAVID TANNER
Organization Member

Dated this *5th* day of *October*, 2013.