

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY

Case No. 434 – Award No. 434 – Claimant: Whitaker
Carrier File No. 14-12-0210
Organization File No. 100-13N1-1234.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing March 30, 2012, when Claimant, Roy A. Whitaker (1779818), was disciplined with a Level S 30-day Record Suspension with a 3 year review period for his alleged failure to use outriggers as required by BNSF or in accordance with the manufacturers written instructions and to place steering wheel cover over the steering wheel when the boom and outriggers were deployed while working as a Truck Driver on March 13, 2012. The Carrier alleged violation of EI 15.4 Vehicle Equipped with Cranes and MOWSR 17.2.3. Outriggers.
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, if applicable, of seniority, with all rights unimpaired; the reinstatement of lost vacation time; and for the payment of all wage and expense loss, commencing March 30, 2012, 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, Roy A. Whitaker, has been employed by the Carrier since 2008. On March 22, 2012, the Carrier notified Claimant that an investigation had been scheduled "for the purpose of ascertaining the facts and determining (his) responsibility, if any, in connection with (his) alleged failure to use outriggers as required by BNSF or in accordance with the manufacturers (sic) written instructions, and (to) place steering wheel cover over the steering wheel when the boom and outriggers are deployed, on March 13, 2012 at approximately 0930 hours at approximate (sic) MP 12.3, while performing duties as a Truck Driver on Gang TSEC0537, on the Venus Subdivision." The notice alleged that Claimant had committed violations of Maintenance of Way Safety Rule 17.2.3 Outriggers and Engineering Instruction 15.4 Vehicle Equipped with Cranes. Following the investigation, the Carrier found that Claimant had committed the misconduct alleged and assessed him a Level S 30-day Record Suspension with a three-year review period.

The applicable Carrier Rules provide, in relevant part:

Maintenance of Way Safety Rules

S-17-2.3 Outriggers

Comply with manufacturer's requirements for deployment of crane outriggers unless a written exception has been issued by the manufacturer to BNSF. Manufacturer's requirements can be found in the operator's manual and/or on the load chart(s) which are required to be on the crane at all times.

Engineering Instructions

15.4 Vehicles Equipped with Cranes

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All vehicles equipped with cranes must be equipped with a standardized steering wheel cover with a message reminding the driver to stow boom and outriggers prior to travel. The truck driver must place the cover over the steering wheel when the boom and outriggers are deployed.

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Stow Alarm Systems. Where a boom truck is equipped with a stow alarm system, verify that the alarm is functioning properly during routine vehicle inspections. If alarm systems are found to be defective, immediately initiate corrective action . . . for repair.

Do not disable or circumvent stow alarm systems.

The underlying facts of this case are not in dispute. On March 13, 2012, the driver's side outrigger on Claimant's vehicle sustained damage as a result of having moved when the outrigger was deployed and not stowed in the up position. Carrier Roadmaster Mark Degano was notified of the incident the next day and observed and took photographs of the vehicle; the photographs were entered into the hearing record. He explained that the outrigger was in the down position, with the bolts broken off and the outrigger moved to the back of the vehicle and attached only by the hydraulic hoses. Mr. Degano stated that the cost estimate for the repairs was \$1512.82.

Mr. Degano stated that a simple walk around the truck could have prevented the incident. He added that the boom cover is a reminder for the driver to store his boom and check his outriggers, and is an additional method of prevention.

Claimant testified at the investigation that at the time of the incident the boom was in the cradle, the outrigger on the passenger side was up, and the outrigger on the driver's side was buried in mud, making it invisible. Claimant admitted, however, that it was his responsibility to ensure that the outriggers were up before driving.

Claimant maintained that he had placed the proper steering wheel cover, with the message, "Danger. Do Not Operate—Verify Boom Stowed—Verify Outriggers Stowed" on the steering wheel. Claimant explained at length the multiple steps he took to ensure that everything was stowed properly before he moved the vehicle, including at least two walks around the vehicle, checking with all of the other workers to confirm that everything was stowed, and carefully monitoring the alarms. He maintained that he was in four feet of grass, and the shiny portion of the outrigger was buried in the mud, making it very difficult to see that the outrigger was still deployed.

Claimant also testified that his vehicle was equipped with sensors on the outriggers to verify when they are in the up position, but maintained that the alarm failed, even though it had been checked and three days earlier and worked properly, as it did when he performed his inspection that morning.

Claimant testified that his Foreman, a Backhoe Operator, and two Track Inspectors were in the area at the time, but none of them noticed that the outrigger was down. Claimant stated that as he moved he looked out his mirrors and saw that the outrigger had popped out of the mud and grass and knew that it was down. He maintained that he was the one paying attention and fulfilling his responsibilities, making sure everything was properly stowed, and he caught the situation before he drove the vehicle down the road.

Claimant's personal record shows a Level S 30-day Record Suspension, with a 12-month review period, issued September 29, 2009 for exhibiting quarrelsome and discourteous behavior.

The Carrier first states that there is no merit to the Organization's argument that the Carrier committed a procedural error by charging Claimant with a violation of EI

15.4, which did not go into effect until April 2012. The Carrier states that the most recent revision to the Engineering Instructions, dated August 1, 2011, changed the Rule number from 15.5 to 15.4 but did not change the substance of the Rule, which remains the same.

On the merits, the Carrier states that its witness, Roadmaster Degano, summed up the events of March 13, 2012, when Claimant's Rules violations caused approximately \$1500 damage to the outrigger because Claimant moved his truck with the outrigger deployed and not stowed in the up position. Moreover, had Claimant properly placed his steering wheel cover, he would have remembered to check the outrigger before moving, the Carrier asserts. Both of Claimant's actions, the Carrier contends, violated Carrier rules.

The Carrier asserts that the Organization's list of excuses for Claimant's conduct is not persuasive. The record clearly shows that Claimant failed to follow established, required procedures, and the Carrier has met its burden of proving his guilt by substantial evidence. The Carrier concludes that the discipline assessed was appropriate given the seriousness of Claimant's violation and his personal record, and urges that the claim be denied.

The Organization raises procedural and substantive objections to the discipline assessed against Claimant. First, the Organization states that the Carrier charged Claimant with violation of a Rule that was not in effect on the date, time and location listed in the investigation notice. Moreover, the Organization states, MOWSR S-17.2.3 deals with manufacturers' requirements for deployment of crane outriggers, and the Carrier never provided any information that Claimant failed to follow those instructions. Further, the Organization objects to the fact that the Hearing Officer called a recess during Claimant's testimony, in direct violation of his own instructions, over the objections of the Organization representative.

On the merits, the Organization first points out that the Carrier's only witness, Mr. Degano, did not in fact witness any of the relevant events, and admitted that all of the evidence he presented was hearsay. Moreover, the Organization states, Claimant explained that the combined issues of uncontrolled vegetation, saturated ground conditions and failure of the outrigger alarm system, factors the Carrier did not dispute, led to a situation where all members of the work group observed that the outriggers were properly stowed. The Organization asserts that there was no evidence that Claimant violated Carrier Rules as alleged.

The Organization concludes that the Carrier has failed to meet its burden of proof, and, even if it had, the discipline assessed was excessive in proportion to the asserted offense. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. First, we find no evidence of any procedural irregularity which deprived Claimant of his right to a fair and impartial investigation. In particular, the Organization has not refuted the Carrier's contention that it was only the numbering, and not the substance, of the applicable Engineering

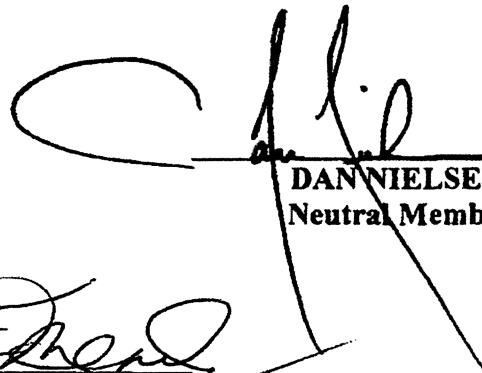
Instruction which became effective after the date of the relevant events, so the requirements Claimant was accused of violating were in effect at the time of the incident. In addition, the recess called by the Hearing Officer did not take place during Claimant's testimony, but rather simply after Claimant stated his name for the record, and there is nothing to demonstrate that it denied Claimant his right to a fair and impartial investigation.

On the merits, it is undisputed, as Claimant admits, that he drove his vehicle with an outrigger down and not stowed properly, causing extensive damage. His claims that the ground conditions made it impossible to see if the outrigger was stowed, that other workers thought the outrigger was properly stowed, and that his alarm system failed, were not supported by testimony from any of his supposed witnesses. Moreover, it is difficult to understand how he could have done two visual walk around inspections and still have failed to notice that the outrigger was not stowed. Whatever the conditions, it was Claimant's responsibility, as he acknowledged, to take all necessary steps to ensure that the outrigger was stowed before he moved the vehicle. He failed to do so, and his guilt of that offense has been proven by substantial evidence.

However, we conclude that the Carrier has not proven that Claimant failed to properly utilize the steering wheel cover as alleged, as there is simply no evidence, only conjecture, to support the conclusion that it must have been off or this incident would not have occurred. That allegation will be removed from Claimant's personal record. However, the failure to stow the outrigger is the primary violation in this case, and it is sufficiently serious to support the discipline assessed. We find no reason to overturn the Carrier's decision as to penalty.

AWARD

Claim sustained in accordance with Findings.


DANNIELSEN
Neutral Member


JOY MENDEZ
Carrier Member


DAVID TANNER
Organization Member

Dated this 15th day of October, 2013.