

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 519 – Award No. 519 – M. Rogers
Carrier File No. 14-19-0261
Organization File No. 2600-BN40N1-1956

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Heartland District 900 employee Mr. Micah Brandon Rogers (0273730) for reinstatement with all seniority rights restored and all entitlement to, and credit for benefits restored, including vacation and health benefits. The Claimant should be made whole for financial losses as a result of the violation, including compensation for:

- 1.) Straight time for each regular work day lost and holiday lost, to be paid at the rate of the position assigned to the claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service).
- 2.) Any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the Claimant was out of service.
- 3.) Overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or on overtime paid to any junior employee for work the Claimant could have bid on and performed had the Claimant not been removed from service.
- 4.) Health, dental, and vision care insurance premiums, deductibles, and co-pay that he would have not paid had he not been unjustly removed from service commencing, continuing forward and/or otherwise made whole.
- 5.) All notations of the dismissal should be removed from all Carrier records.

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, M. Rogers, had been employed by the Carrier since 2014. On July 31, 2019, the Carrier found Claimant guilty of failing to follow lock up pin up (LUPU) procedures on June 25, 2019, resulting in damage to the tamper he was operating. The Carrier determined that Claimant had violated Engineering Instruction (EI) 14.3.3 Maintaining Roadway Equipment and dismissed him from service.

The underlying facts of this case are not in dispute. At the time of the incident, Claimant was assigned as the Jackson 6700 Tamper Operator in Memphis, Tennessee. He was working in the Tennessee Yard on the Thayer South Subdivision. On that day, a management trainee was standing behind Claimant on the machine to observe how the tamper worked.

Carrier Roadmaster Joseph Mitchell testified at the investigation that at about 11:40 on June 25, 2019, he learned that the tamper 6700 had hit a crossing, resulting in about \$700 worth of damage to the machine. Claimant was the tamper operator, and they spoke when Mr. Mitchell arrived at the scene. He stated that Claimant told him he had made a mistake by not raising the work heads when he traversed back over a crossing, and that he had just not done the lock up/pin down procedure. Claimant gave a written statement, which was entered into the investigation record.

Claimant's foreman, Joseph Kilpatrick, who was present during the incident, also gave a written statement, which was also entered into the investigation record. He did not appear at the hearing. The statement recited that after Claimant gone over a crossing and resumed tamping, he noticed a low spot and told Claimant he needed to back up and go over it again. It stated that Claimant backed up and then he heard a noise and saw the tamper stop. He walked up and saw oil dripping, and Claimant was getting off the machine.

Claimant explained at the investigation that after he had two or three ties tamped, Mr. Kilpatrick called to him to come back and go over a low spot at the crossing where there was a joint. He stated that he had his machine in switch mode, which allows the machine to clear crossings, fixed objects, switches, yard rails and the like. However, the management trainee was asking questions, distracting him, so he did not complete the three-step procedure required to complete the lock up/pin down of the machine, and his work heads struck a high crossing board, causing the noise, and damage to the machine.

Claimant maintained at the investigation that "this would have never happened" but for the trainee distracting him, although he acknowledged that the trainee had not blocked his sightline. Claimant admitted that he "forgot about the small crossing" when he started to back up, did not hit the three buttons required to lock all the workheads, and that had he hit those three buttons the damage would not have occurred.

Claimant previously received a Level-S seven-day Actual Suspension with a one-year review period on August 8, 2017, for failing to maintain a safe braking distance while operating a ballast regulator. On September 21, 2018, Claimant received a Level-S 30-day Record Suspension with a three-year review period for using an electronic device for non-business reasons while operating Company equipment.

As an initial matter, the Organization contends that the hearing should have been canceled and the Claimant exonerated because the hearing notice contained an incorrect machine number. In support, the Organization cites Rule 13(c) of the South Agreement that requires the notice “to specify the charge for which investigation is being held.” The Carrier explains that even though there was a typographical error in the machine number, everyone in the investigation knew exactly which machine was at issue as well as what the Claimant was being charged with. Therefore, there was no procedural violation.

On the merits, the Carrier further asserts that it has proven Claimant’s guilt by substantial evidence. Claimant admitted that he forgot basic procedure for operating his equipment, causing the accident at issue. There is nothing to indicate that the presence of a management trainee should have caused an experienced employee to make such a mistake. Therefore, the Rules violations have been proven. As this was Claimant’s second serious violation within an active review period for a serious violation in 2018, he was subject to dismissal and that was not an arbitrary or excessive penalty.

The Organization makes several assertions on the merits, first that the crossing plank was improperly installed and poorly designed and maintained. In particular, the Organization argues that the crossing board was higher than it should have been—at least two inches above the top of the rail—causing the work heads to scrape across the top. Had Claimant hit a true road crossing edge, the tamper tools would have been broken and the machine would have come to an abrupt halt, which did not occur here. Additionally, the Organization contends, Claimant put the machine in switch mode before backing up over the board, and the machine’s computer mistakenly received input that the work heads would clear the crossing. Indeed, the only items broken were routinely replaced maintenance items.

Finally, the Organization argues that the trainee on board the machine distracted Claimant and prevented Claimant from hearing the workheads scraping the board as he was headed northbound. As a result, the Carrier has failed to prove the incident was Claimant’s fault and Claimant’s dismissal was unjustified.

We have carefully reviewed the record in its entirety. First, we find that the Organization’s procedural argument lacks merit as the notice requirement is intended to provide Claimant and the Organization with clear information concerning the charged incident, so that they may have the opportunity to present an effective defense. As the Carrier states, everyone knew exactly what was at issue here, and the incorrect vehicle number was a clerical error of no effect. There was nothing which denied Claimant his right to a fair and impartial investigation.

On the merits, Claimant admitted that he failed to properly perform the three-step lock up pin down procedure and that this was the cause of his workheads hitting the crossing sign, causing the accident. It is well settled that this admission is sufficient to satisfy the Carrier's burden of proof. His excuse that the presence of a management trainee on the machine caused his mistake is not convincing as a justification; employees must be able to perform basic operation of their machines notwithstanding a small interference. Accordingly, we find the Carrier has met its burden of proving his guilt by substantial evidence.

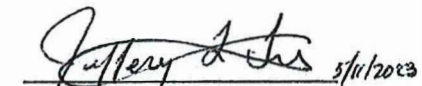
With respect to the penalty, at the time of this incident Claimant was a relatively short-term (five years) employee with two previous serious violations on his record. He was still within the three-year review period for the second, which, according to the Carrier's Policy for Employee Performance and Accountability (PEPA), subjected him to dismissal. The type of negligent machine operation which Claimant committed here could have led to far more serious consequences. We cannot say that the Carrier's decision that dismissal was warranted represents an unfair, arbitrary, or discriminatory exercise of its discretion to determine the appropriate disciplinary sanction.

AWARD

Claim denied.


DAN NIELSEN
Neutral Member


LOGAN McKENNA
Carrier Member


JEFFERY L. FRY
Organization Member

Dated this 16 day of May, 2023.