

**PUBLIC LAW BOARD NO. 5850**

---

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY COMPANY**

---

Case No. 543 – Award No. 543 – J. Akers  
Carrier File No. 14-19-0346  
Organization File No. 0493-SL13N1-1979

**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. James-Robert K Akers (1737469) for removal of the Claimant's Level S Combined Suspension (20 day actual suspension, 10 day record suspension), One (1) Year Review Period, and One (1) year machine disqualification, The Claimant should be made whole for financial losses as a result of the alleged violation, including compensation for straight time wages lost during the investigation. All notations of the issued discipline 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, J. Akers, has been employed by the Carrier since 2007. On October 11, 2019, following an investigation, the Carrier found Claimant guilty of failing to visually inspect and lock the work head on Tamper X5400262 on September 20, 2019, resulting in the tamper hitting a frog and damaging a work head. The Carrier determined that Claimant had violated Engineering Instruction (EI) 14.3.3 Maintaining Roadway Equipment and assessed him a combined Level S 20-day Actual Suspension and 10-day Record Suspension with a one-year review period.

At all times relevant, Claimant was working as a Machine Operator on surfacing gang TSCX0799 out of Springfield, Missouri. At the hearing, the Organization first objected to

continuing after the Hearing Officer entered the delivery confirmation of the Notice of Investigation to Claimant. According to Claimant, the notice was delivered to his old address and he did not receive it until his union representative notified him. The Organization asserted that Claimant was held out of service for a non-serious rule violation and never received a Notice of Investigation, which the Carrier should have hand delivered. The Organization asked that Claimant be returned to service and the charges dropped.

The Organization also objected to the Carrier witness, Springfield Terminal Roadmaster James Sadler, appearing telephonically, as it could not discern if the witness was alone or being coached. The Organization alleged that Mr. Sadler's absence infringed on Claimant's due process right to face his accuser. The Hearing Officer noted both objections for the record and asked if the Organization would prefer to postpone the hearing until Mr. Sadler could be present; however, the Organization declined since Claimant was out of service.

At the hearing, Claimant testified that on the day in question, the crew had been locked out while working. Once the mechanic arrived, they put all the tools up. Claimant entered the cab and turned all the power back on, then flipped the pumps on so that the machine would operate before bumping the work heads up and pushing the lock button inside the cab. He then exited the right side of the machine, picked up the rear rail follower, pinned everything up, then walked up the right side of the machine to the mask follower to pick up the shadow board. Claimant explained that he locks the work heads electronically then visually inspects them while picking up the remainder of the parts before traveling.

Claimant explained that gang Foreman Jordan Beck was near the front of the machine helping put the buggies away, as he does about 90 percent of the time. After the buggies were up, Claimant walked back down the left side of the machine and entered the machine from the left side. He explained that as he walked down the left side of the machine, he did not notice anything out of the ordinary and all the locks appeared to be functioning properly.

Once Claimant was in the machine, Mr. Beck instructed Claimant via radio to follow fellow employee Naylor Jones to the cab track. Claimant traveled in reverse through the switch while watching Mr. Jones in the machine behind him, stating that Mr. Jones was about 800 feet ahead. As he was traversing the switch, Claimant heard a crunch and immediately stopped and exited the machine. He saw that one of his work heads had caught the self-guarded frog, so he assessed the damage, moved the machine to where it needed to be tied up, and contacted his supervisor.

Claimant further explained that his machine was facing west, and he was backing up, traveling east on the track. He was traversing a left-handed switch and caught the frog on the northeast end of the bowl coming out of Track 25 onto the lead. He stated that the left inside work head would have also been susceptible to damage like on the outside work head while going over a self-guarded frog, but it was locked up. All four work heads are locked with the same button and cannot be locked up individually. The button used to lock the heads turns green when the heads are locked properly and red when they are not. Claimant stated that the button was green while he was traveling. He maintained that he never had an issue with the button being green and

the locks not functioning, nor with the work heads dropping below the lock when the lock was applied. Claimant testified that he had traveled about 2500 to 3000 feet from where he initially locked up the work heads to the frog.

Mr. Sadler testified at the hearing that he was Claimant's supervisor at the time of the incident. On September 20, 2019, at about 2:40 p.m., Claimant's foreman called Mr. Sadler and asked him to come to the cab track, where Carrier equipment is typically stored to clear the tracks for the day. Immediately after, Claimant called Mr. Sadler to report that he had struck a frog traveling the tamper toward the north cab track and that he thought his work head was hanging low when he struck the frog. When Mr. Sadler arrived at the scene of the incident, Claimant stated that he did not get out and visually inspect that his work heads were locked up before traversing the frog. The work head was indeed low and had struck a self-guarded frog, doing significant damage to the tamper.

At the hearing, Mr. Sadler entered Claimant's written statement following the incident and dated September 20, 2019, which stated:

At the end of the day on 9-20-19 work was done and I was traveling east on bowl Track 25 toward caboose track. As I came across 25 east frog my left outside work head caught the frog because it wasn't locked up properly. I should have checked again for lock up before going over the switch.

Mr. Sadler explained that following the incident, he spoke with Claimant and looked over the machine, at which point he noticed that the work head that struck the frog was not in its proper place for LUPU. He was not aware of any inquiry into other possible causes of the work head drifting down given that Claimant admitted to not visually inspecting the work heads before traversing the frog and admitted that the work head was not locked up properly. Additionally, he explained that as the Machine Operator, Claimant is supposed to report any issues to a supervisor and to the Roadway Equipment team as well as noting it in the daily maintenance log, none of which were done.

Mr. Sadler explained that the far outside left work head sustained damage after the Claimant, operating in reverse, hit a self-guarded frog. The guide rods that allow the work head to move up and down were bent and needed to be replaced. The track itself was without issue. At the hearing, Claimant stated that neither the work head assembly nor the baskets were damaged because the donut gaskets and tamping tools sustained most of the impact, as they are made to do. Claimant further explained that the machine had about 1780 hours on it when he last operated it. There was no damage to the other three work heads on the tamper. Mr. Sadler testified that he did not notice if they appeared to be locked and did not recall any conversation with Claimant in which Claimant told him or showed him that the remaining heads were locked up properly.

Mr. Sadler further testified that abiding by Engineering Instruction (EI) 14.3.3, Item 9, which covers proper maintenance of roadway equipment, would have prevented the incident. Mr.

Sadler explained that when Claimant was traveling through the switch, he did not comply with the LUPU procedures listed. EI 14.3.3, Item 9 states, in pertinent part:

9. For Lock Up Pin Up (LUPU) and track travel for on-track equipment the Operator is responsible for the safe operation of equipment over fixed objects.

a. Operator Instructions

- LUPU is required prior to traversing any fixed objects, which include, but are not limited to road crossings, turnouts, DED's, and AEI's.  
\* \* \*
- Secure and lock all working components, such as wings, work heads, clamp frame, plows, brooms, cutter heads, and hoisting and swing components.
- When plotting with production tampers, Operators must ensure that all components not required for plotting are LUPU and all equipment will clear before traversing any fixed objects.
- Coordinate with a qualified employee (must be MO2 Qualified on the equipment making the move) to visually ensure that all components are secure and locked up/pinned up before flagging the machine over fixed objects, hazards, or excessive rail end mismatches.
- When a qualified employee is not available, the Operator must dismount to visually verify that the machine is fully locked up and pinned up and all other machine components will not come in contact with the fixed object to be traversed.
- While in travel mode LUPU procedures must be implemented.

The Hearing Officer distributed copies of the EI during the investigation from a folder that had previously been placed in the hearing room. The Organization and the Hearing Officer noted that a page was missing from the rule, and Mr. Sadler submitted it to print on location at the investigation. The Organization objected to the folder with incomplete copies having been left for distribution and use as exhibits during the hearing, which the Hearing Officer noted before proceeding with the investigation.

Mr. Sadler also testified that machine operators, including Claimant, receive training on safety devices such as lock up pin up (LUPU) procedures. He explained that the MO2 component of machine operator qualification involves going out to look at the machine and identifying each segment of it, including the LUPU pieces. He did not recall whether Claimant was in his work group at the time he completed the machine operator training.

Mr. Sadler explained that the Engineering Instruction was not a critical decision but disagreed with the Organization that it constitutes a non-serious rule violation. The Organization introduced the Carrier's Operation Testing Guide as an exhibit, noting that there is no number in the table of contents referencing LUPU. Mr. Sadler explained that LUPU failures are very serious issues that can cause much worse injuries than machine damage, and that failure to LUPU would fall under the "All Other Failure" test in the Operation Testing Guide.

Regarding his written statement that he should have “checked again for lock up before going over the switch,” Claimant stated that the general practice is to bump the work heads up while crossing a switch because they tend to bleed down. He explained that they will rest on the lock, but if the lock is worn, they could bleed down past the lock. He stated he should have bumped the heads up again and watched them from inside the cab. He further stated that he had not noticed any unusual wear on the locks aside from everyday wear and tear. Claimant asserted that his LUPU procedure complied with EI 14.3.3 Item 9.

Claimant previously received a Formal Reprimand with a one-year review period for failing to stop short of a derail, resulting in a derailment, on April 22, 2014. On May 18, 2016, Claimant received a Level S 30-day Record Suspension with a three-year review period for his misuse of a hand-held electronic device while operating a Company vehicle. Claimant received another Level-S 30-day Record Suspension with a three-year review period on July 19, 2016, for failing to operate on-track equipment at the proper speed.

The Organization first asserts several procedural issues. First, the Organization argues that the Carrier’s witness not being present during the investigation violated Claimant’s due process right to confront his accuser and prevented the Organization from knowing if the witness was being coached. Second, the hearing officer, rather than a witness, entered the relevant rule into the record. This rule was actually an Engineering Instruction that did not contain the rule listed on the hearing notice and had simply been left in the hearing room for the hearing officer to enter.

The Organization also alleges that the Carrier witness attempted to enter false information into the record. Claimant’s written statement did not state that that he failed to complete a visual inspection and lockup, but merely that he should have “checked again.” The Hearing Officer ignored this, and the Organization asserts that the outcome of the hearing was prejudged based on Claimant’s written statement.

In response to the Organization’s procedural arguments, the Carrier maintains that the investigation was fair and impartial. First, telephonic testimony has been well-accepted as arbitral precedent in railroad hearings. Mr. Sadler had planned to be out of town before the incident occurred and the Organization would not agree to postpone the investigation. Second, Claimant was not prejudged by the Hearing Officer entering evidence into the record. Simply because Mr. Sadler appeared telephonically and the Hearing Officer presented Mr. Sadler’s evidence in his stead does not mean Claimant was prejudged, nor is such conduct improper.

The Carrier also asserts that, despite the Organization’s argument to the contrary, Mr. Sadler’s testimony was factual. The Organization’s interpretation of Claimant’s written statement to mean that Claimant did visually inspect does not align with Claimant’s testimony, and the Organization refused to acknowledge Mr. Sadler’s testimony about what Claimant actually told him after the incident. Lastly, Claimant was sufficiently notified of the hearing and he and his representative had ample time to prepare. Arbitral precedent is clear that mere technical violations do not constitute grounds for reversal, especially when there is no showing of prejudice to Claimant.

On the merits, the Carrier asserts that it provided substantial evidence of Claimant's guilt and that the claim should be denied. It contends that Mr. Sadler's testimony and Claimant's written statement both prove that Claimant failed to follow proper lock up pin up procedures, and that Claimant admitted he failed to visually inspect the machine to ensure the work heads were fully secured. Indeed, Claimant testified that he only visually inspected the work heads during his initial lock up pin up while preparing to travel the tamper. He never claimed that he or another qualified employee inspected the work heads before he traveled over the frog.

The Carrier further asserts that serious rule violations are not limited only to operating rules or safety rules, and all violations are determined by the circumstances of the situation rather than the policy or instruction being violated. The rule Claimant violated, EI 14.3.3, is intended to prevent this type of incident from happening even in the case of a machine malfunction. Therefore, an independent investigation into whether something went wrong with the machine itself is unnecessary. Had Claimant either dismounted to inspect the work heads or had another qualified employee flag him over the frog, damage to the work head could have been avoided even if the machine had malfunctioned.

Additionally, the Carrier maintains that the damage to the tamper and to the frog was not normal wear and tear but directly related to Claimant's failure to follow proper procedures, despite Claimant's testimony. Indeed, Mr. Sadler testified otherwise, and the Hearing Officer concluded that Claimant's testimony was less credible. It is well-established that such a determination is within his duties. Finally, Rule 13(b) states unequivocally that the Carrier has the right to withhold an employee from service pending an investigation in cases involving a serious rule violation without notification in writing or included on the investigation notice, despite the Organization's arguments.

The Organization argues that the Carrier failed to provide substantial evidence of Claimant's guilt. Though the Carrier alleged that Claimant failed to visually inspect and lock up the work head, Claimant's written statement and hearing testimony demonstrated that he used correct lock up procedure and completed a visual inspection. Despite being the one to obtain the statement from Claimant, Mr. Sadler's testimony was inconsistent with this, and the Hearing Officer ignored it. It is still not known what caused the left outside work head to drift low enough to hit a self-guarded frog. If the cause was a failure to follow proper lock up pin up procedure, the left inside work head would have also hit the frog, which it did not, and no other work head was unlocked. For these reasons, the Organization requests that the claim be sustained.

First, contrary to the Organization's arguments, we see no evidence of any procedural irregularity which denied Claimant his right to a fair and impartial investigation.<sup>1</sup> On the merits, Claimant admitted that he failed to visually confirm that the work heads on his machine were fully

---

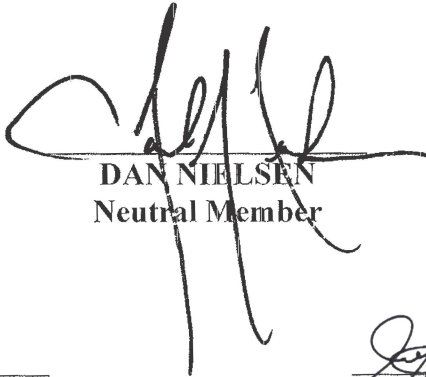
<sup>1</sup> While the Organization analogizes the lack of notice here to the lack of notice in Case 548, the two cases are materially different. Here it was clear that this was a disciplinary proceeding, while in that case the Claimant and the Organization discovered for the first time at hearing that there was also an issue of disqualification.

locked up before traveling through the switch. It is well settled that such admissions are sufficient to satisfy the Carrier's burden of proof. In light of this, we must deny the claim.

With regard to discipline, this was a serious violation which could have resulted in far more serious consequences. The penalty assessed was in accordance with the Carrier's Policy for Employee Performance and Accountability and we see no reason to overturn it.

**AWARD**

**Claim denied.**

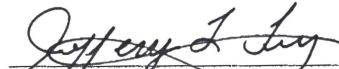


**DAN NIELSEN**  
Neutral Member



---

**JOE HEENAN**  
Carrier Member



---

**JEFFERY L. FRY**  
Organization Member

**Dated this 29th day of March 2025.**