

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 142, (Case No. 142)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

**William R. Miller, Chairman & Neutral Member
Joy E. Mendez, Carrier Member
David D. Tanner, Employee Member**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing May 1, 2013, when Claimant, Terry G. Morris (6450589), was disciplined with a Level S 30-day Record Suspension with a 3 year review period for his alleged failure to lock up and pin up his machine on May 1, 2013, on the Fort Worth Subdivision. The Carrier alleged violation of Engineering Instruction (EI) 14.3.3 Maintaining Roadway Equipment.**
- 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, with seniority, vacation, all rights unimpaired and pay for all wage loss commencing May 1, 2013, continuing forward and/or otherwise made whole."
(Carrier File No. 14-13-0264) (Organization File No. 90-SF13N1-1354)**

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

On May 8, 2013, Claimant was directed to attend a formal Investigation on May 21, 2013, which was mutually postponed until June 12, 2013, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility,

if any, in connection with your alleged failure to lock up pin up your machine on the Fort Worth subdivision at approximately mp 278.5 on Wednesday, May 1, 2013 at approximately 1118 hours."

On June 20, 2013, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30 Day Record Suspension with a three year review period.

It is the Organization's position that the record shows that on the date of the incident Claimant was working as a Production Tamper Operator operating a Jackson 6700 Production Tamper Machine and while traveling the machine down the track to a tie up location his rear buggy, which had been raised and was up in the cradle, somehow came loose on the right hand side and fell down. The Organization argued that the buggy came out of the hook because of a mechanical malfunction and was no fault of the Claimant. It asserted that the Claimant and his Foreman made sure before placing the machine in the travel mode that it was clear of track and/or ground and did so in accordance with all Carrier Rules. It further argued that the Foreman rode with the Claimant for approximately one mile and when he exited the machine to go to his vehicle he made another inspection of the machine and testified that nothing was askew (See transcript pages 24 - 27). Additionally, the Organization inferred by the testimony of Roadmaster, Larry A. Wilson, on page 13 of the transcript that the machine malfunctioned as Mr. Wilson testified as follows:

"The Mechanic that installed the device did inspect it as he, after he got done and put it up, and said it was, the issue was corrected and it was fixed."

The Organization concluded that the Carrier failed to meet its "burden of proof" and it requested that the discipline be rescinded and the Claim be sustained as presented.

It is the position of the Carrier that a review of the transcript reveals that Roadmaster Wilson testified after completing work on May 1, 2013, the Claimant stowed the buggy on his machine, but he did not properly pin up and lock the buggy and as a result, the buggy fell while traveling and damaged the machine. It further argued Roadmaster Wilson also testified on page 24 of the transcript the Claimant told him he did not visually look and see that the buggy was locked and pinned and the Claimant admitted the same thing on page 40 of the transcript, therefore, according to the Carrier the record shows that the Claimant was guilty as charged. Lastly, it argued the discipline was appropriate and it asked that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

There is no dispute between the parties that on the date of the incident the Claimant operated a Jackson 6700 Production Tamper Machine and when moving the machine to a tie up location in the traveling mode the buggy that is located beneath the main body of the machine fell and damaged the machine. The Organization argued that the accident was the result of a mechanical malfunction whereas the Carrier argued that the Claimant failed to make a proper visual check of the machine.

The Question at Issue is twofold: The first question is whether or not there is evidence to show that the machine malfunctioned and if there is no evidence that the machine was not working properly the second question to be addressed is whether or not the Claimant properly performed his duties prior to moving the 6700 Tamper.

Turning to the first question the Organization relied upon page 13 of the transcript to show that the machine was not in perfect working condition and was the cause of the accident, however, on page 14 of the transcript Carrier Officer Wilson was questioned about the Claimant's machine as follows:

"Marlon Gaunt: Okay. Was there anything wrong with it prior to the incident?"

Larry A. Wilson: Not that I'm aware of.

Marlon Gaunt: So uh, to your knowledge there was no- nothing faulty with the hook. They were operating properly prior to this uh, machine striking the crossing. Is that correct?

Larry A. Wilson: That is correct."

Additionally, the record shows that the Claimant and his Foreman both of whom operated and/or rode on the 6700 Tamper never testified or even inferred that there were any mechanical problems with the Claimant's machine on May 1, 2013, whereas, the Carrier witness testified the machine did not need repair until after the accident. The Board is not persuaded that the Claimant's machine malfunctioned on the date of the incident, therefore, the Board will address the second question.

On pages 8 and 9 of the transcript Carrier Officer Wilson was questioned and responded as follows:

"Marlon Gaunt: Tell me then um, what's the procedure for stowing the buggy?"

Larry A. Wilson: Well, you have to s-stop your machine, put your brakes on, get off the machine. There's two buttons on the side of the machine. You raise the, raise the buggy. You put the locks in place. You, you push the button to

lock it, and then you walk around and visually inspect that locks are actually locking the buggies up." *(Underlining Board's emphasis)*

Mr. Wilson's aforementioned testimony was not refuted and on page 10 of the transcript the questioning of Mr. Wilson continued as follows:

"Marlon Gaunt: And you stated you discussed uh, the incident with him and he stated that he had not checked it at this time. Is that correct?"

Larry A. Wilson: He did state to me that he did not visually look and see that it was locked and pinned up." *(Underlining Board's emphasis)*

On page 40 of the transcript the Claimant was questioned as follows:

"Marlon Gaunt: ...Mr. Morris just finished uh, his description of the incident, and I want to, I want to clarify a few things. Um, so obviously you've uh, you've been operating this machine for quite some time. You've uh, raised it up into the hooks several times. You know the procedure. Um, couple questions I have. Number one is, when you did raise this buggy up under the machine, into the hooks, did you physically look at the hooks to make sure the machine was hooked.

Terry G. Morris: I did not look at the hooks...." *(Underlining Board's emphasis)*

On page 41 of the transcript the Claimant suggested that even though he did not physically inspect the undercarriage of the machine to see if the buggy was locked he used an alternative method of shaking the machine by raising and lowering the receiver arm to make sure the buggy was secure. Review of the testimony reveals that no one else testified that the Claimant's alternative method for securing the buggy was a safe method or took the place of a visual inspection and when Claimant's witness Foreman Martin was questioned on that issue he responded as follows:

"Marlon Gaunt: Did you look to see that the hooks were actually in place before this machine traveled?"

Euel W. Martin: No, sir, I did not.

Marlon Gaunt: Okay. But you stated you looked at the machine and you said everything looked like it was up off the rail.

Euel W. Martin: Correct.

Marlon Gaunt: But you didn't physically see that it was hooked?

Euel W. Martin: No, I did not.

Marlon Gaunt: Okay. And again, that's not your responsibility, is it?

Euel W. Martin: No.

Marlon Gaunt: Whose responsibility is that?

Euel W. Martin: Machine Operator.

Marlon Gaunt: Who is, on this-


Euel W. Martin: Terry Morris. *(Underlining Board's emphasis)*

The record is clear Roadmaster Wilson and Foreman Martin both testified that it was the Claimant's responsibility to make a visual check of the Jackson 6700 Tamper Machine to make sure that the buggy was properly hooked and it is equally clear that the Claimant never denied he had that responsibility, therefore, substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that the Claimant was guilty as charged.

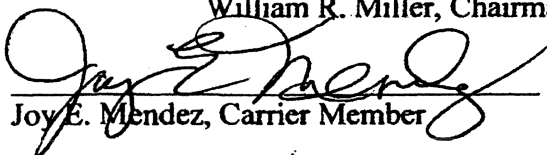
The only issue remaining is whether the discipline was appropriate. At the time of the offense Claimant had approximately 35 years of service. However, this was his Second Serious Level S Discipline event within a 12 month review period, therefore, the Board finds and holds that the discipline will not be disturbed and the claim will remain denied because it was not contrary to the Carrier's Policy for Employee Performance Accountability (PEPA), nor was it arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Joy E. Mendez, Carrier Member



David D. Tanner, Employee Member

Award Date: July 10, 2014