

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 180, (Case No. 180)**

**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 R. Scoville, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing July 25, 2014, when Claimant, Herman Cooke (1162270), was disciplined with a Standard Formal Reprimand with a 1-year review period for his alleged failure to properly operate equipment resulting in collision and damage to equipment on June 27, 2014. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 6.51 Maintaining a Safe Braking 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, if applicable, with seniority, vacation, all rights unimpaired and pay for all wage loss including overtime commencing July 25, 2014, continuing forward and/or otherwise made whole.”
(Carrier File No. 14-14-0307) (Organization File No. 2400-SF13C2-1430)**

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 all 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.

The facts indicate that on June 27, 2014, the Claimant was operating equipment that was involved in a collision and it was alleged that the Claimant did not follow Carrier Safety Rules and because of that allegation the Claimant was directed to attend a formal Investigation on July 7, 2014, 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 properly operate equipment resulting in collision and damage to equipment on June 27, 2014.

This is to advise CHRIS A. GLORIA is being withheld from service pending results of investigation.

This is to advise HERMAN COOKE is being withheld from service pending results of investigation."

On July 25, 2014, Claimant was notified that he had been found guilty as charged and was assessed a Formal Reprimand with a One Year Review Period.

It is the position of the Organization that the Carrier violated Rule 40(c) when it gave the Claimant only four days advance notice of the Investigation rather than the required five days which denied the Claimant and the Organization the fully allotted time for gathering information and/or preparing an adequate defense. Additionally, the Organization argued that the Claimant was held out of service 20 days (which was a monetary penalty over and above the reprimand) after the scheduled Investigation. The Organization argued that because of the aforementioned procedural errors the discipline should be removed without reviewing the merits.

Turning to the merits, it argued the evidence and testimony presented by the Carrier did not prove its allegations. The Organization asserted that the transcript instead shows that the Claimant operated his machine in a safe manner and followed all Carrier Rules and procedures. It argued that testimony indicates that when the Claimant stopped his Tie Plugger behind the machine ahead of him that had come to halt he alerted the machine in front of him confirming the stop and further communicated with the Speed Swing that was behind him to inform him he was stopped. It further argued that Mr. Gloria who operated the trailing machine had not informed the Claimant that he intended to travel within 50 feet of the Claimant's machine which was out of the norm. The Organization asserted that the Claimant would not have seen that because he was sitting, wearing his seat belt on his machine facing south the opposite direction from the location of the Speed Swing whose operator was sitting facing north. It further reasoned that because of radio chatter Mr. Gloria did not hear the radio communication and approximately 30 to 40 seconds later Mr. Gloria's machine collided into the back of the stopped Tie Plugger operated by the Claimant. It concluded there was no basis for discipline and requested that the discipline be rescinded and the claim be sustained as presented.

It is the Carrier's position that there was no showing that the alleged four days delivery of the Notice of Investigation rather than a five days advance notice prejudiced the Claimant. It further argued that the Organization was incorrect when it asserted that the Claimant was held out of service for 20 days after the scheduled Investigation and it offered a copy of the Claimant's Personnel Activity Tracking System (PATS) which showed the Claimant worked and received regular and overtime pay from the date of the incident on June 27, 2014 through and including July 25, 2014. It requested that the case be resolved on the merits of the dispute.

Turning to the record the Carrier argued that the transcript shows that the Claimant failed to follow the Rules when he did not ensure that the Operator of the machine behind him, the Swing Master, was aware the Claimant had stopped and ran into the back of the Claimant's machine. It further argued that after having proven its charges it appropriately disciplined the Claimant. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and will first address the Organization's procedural argument that the Claimant was not given proper advance notice of the formal Investigation. **Rule 40. INVESTIGATION AND APPEALS, Paragraph C states:**

"C. At least five (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire. The notice must specify the charges for which investigation is being held. Investigation shall be held, as far as practicable, at the headquarters of the employee involved."

(Underlining Board's emphasis)

The Organization is correct the Claimant was entitled to no less than five days advance written notice of the Investigation. It is clear that the Carrier did not deny that it failed to comply with the specific language of Rule 40(C) instead it argued that its error did not harm the Claimant. The Agreement guaranteed the employee a right to "due process" that afforded him at least five days advance written notice of the Investigation and because that guarantee was not granted the Claimant the Board finds and holds that the discipline must be set aside without addressing the merits. However, if the Board had addressed the merits we would have determined that we were not persuaded that the Carrier met its burden of proof as it appeared that the Claimant followed all Carrier Safety Rules and the accident seemed to be the result of radio chatter that hindered the employee in the trailing machine from hearing the Claimant's instructions that he had stopped his equipment. The Board finds and holds that the discipline is set aside and the


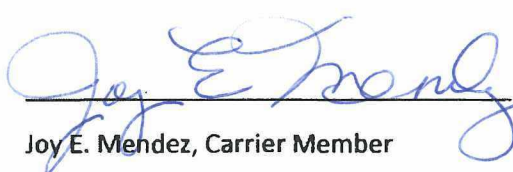
Claim is sustained in accordance with Part 2 of the Claim. During the on-property-handling of the case the Carrier offered evidence that the Claimant lost no monies because of being held out of service. The parties are instructed to review Carrier records to determine whether or not the Claimant lost any monies and if he lost any monies he is to be made whole in accordance with Rule 40 (G). We reiterate that the Formal Reprimand is rescinded.

AWARD

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member



Joy E. Mendez, Carrier Member

David R. Scoville, Employee Member

Award Date:

