

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 221, (Case No. 221)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, 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 September 12, 2016, when Claimant, Avery Mims (7985690), received a Serious Violation 30 Day Record Suspension one year review period for failure to stop short of a tamper while operating a regulator. The Carrier alleged violation of Maintenance of Way Operating Rule 6.50 – Movement of On-Track Equipment.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant’s record this discipline with all rights unimpaired and pay for all wage loss including overtime commencing September 12, 2016, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-16-0471) (Organization File No. 2410-SL13N1-16126)**

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.

The facts indicate that on July 29, 2016, the Claimant, Machine Operator, was operating a Regulator that was involved in an accident with a Tamper and because of that incident the

Claimant was directed to attend a formal Investigation on August 11, 2016, which was mutually postponed until August 17, 2016 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 stop short of a tamper while operating the regulator on the Fort Worth subdivision, on July 29, 2016 at approximately 1400 hours.

This investigation will determine possible violation of MWOR 6.50 Movement of On-Track Equipment.”

On September 12, 2016, Claimant was notified that he had been found guilty as charged and was assessed a discipline of a Level S 30 Day Record Suspension.

It is the position of the Organization that the Claimant was denied a “fair and impartial” Investigation because he had been prejudged which was shown by the fact that Mr. Olson, the Tamper Operator was not present at the Hearing and Carrier Witness Henderson only offered second-hand knowledge slanted against the Claimant as it came from the Charging Officer. Organization asked that because of the aforementioned errors the discipline should be removed without reviewing the merits.

Turning to the merits, the Organization asserted that the record shows that the Claimant was working on a separate track operating a Regulator two tracks away from Mr. Olson who was working on a Tamper. The Tamper under the direction of Mr. Olson came out on the Lead and entered into the Claimant’s work location and came to a stop without notifying the Claimant. The Claimant testified that in his 34 years of experience as a Machine Operator, it has always been standard practice when multiple machines were working in close proximity and one machine needed to move, that it communicates its move to the Machine Operator(s), what it was doing, whether or not it was coming to a stop and the location that it was stopping at. Mr. Olson did not communicate that information to the Claimant which was verified by Olson’s written statement. The Organization argued that the testimony given by the Claimant and Olson’s written statement confirmed that the Claimant was not at fault, but instead the accident was the fault of Mr. Olson’s actions. 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 were no procedural errors. It first argued there was no showing of prejudgment and because the Organization did not raise that argument at the Investigation giving the Carrier the opportunity to properly address it during the Hearing, the Organization had waived the right to raise such argument in its appeal after the Investigation was closed. Secondly, it argued that Mr. Henderson acquired information from the Division Engineer

about the incident and had first-hand knowledge from the Claimant when he interviewed Claimant following the incident, thus, he had relevant information that was not hearsay.

Turning to the record the Carrier asserted Claimant was part of a Surfacing Gang operating a Ballast Regulator and another employee was operating a Tamper in the same area. It argued the Claimant was informed by Mr. Olson that he was backing into the lead in order to go to another track to tamp. Claimant continued to work, backing his Ballast Regulator towards the lead and struck Mr. Olson's Tamper despite the fact that Mr. Olson had previously told the Claimant what he intended to do, therefore, the Carrier reasoned that the Claimant was careless when he backed into the Tamper. It further argued that Mr. Olson did not agree that he was at fault, he simply admitted he failed to inform the Claimant that he had stopped, not that he didn't inform Claimant he was moving to the lead track. It closed by stating that after having proven its charges it appropriately disciplined the Claimant 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 has not been persuaded by the Organization's procedural arguments. The Board has determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11 and the Claimant was afforded his "due process" Agreement rights. The case will be resolved on its merits.

The Organization argued that Mr. Olson should have notified the Claimant that he had stopped behind the Claimant's machine and because he didn't the accident was the fault of Olson whereas the Carrier argued that Mr. Olson explained his intentions to the Claimant and because the Claimant did not continue to keep aware of Olson's whereabouts the collision occurred.

Transcript Exhibit 4 was the written statement of Mr. Olson and it stated the following:

"On July 29th I Travis Olson was involved in an incident between myself and Mr. Mims. We were working the Yard and Saginaw lifting and lining the lead and turnouts. After I finished #10 I informed Mr. Mims on the regulator of my intent to reverse back on to the lead where he was working so I could go to #11. Mr. Mims acknowledged, so I began my move towards him. Once I was clear to throw my needed switches I got out of my tamper to do so.

On my way back to my machine I was notified that Mr. Mims and my machine collided. We were fortunate the only damage was a \$50.00 air filter I fixed it in ten minutes and was able to keep on working. Though I was clear on my intentions, I was not clear about being stopped behind Mr. Mims.

I apologize to all involved in this mess. I hope we won't be remembered for this day, but the countless hours we work giving our all, our best and doing it safely. God Bless."

(Underlining Board's emphasis)

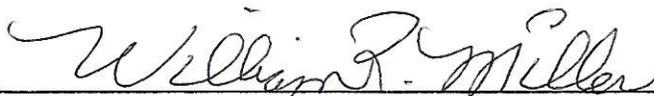
In the statement above the Carrier emphasized the underlined portion of the first paragraph as showing that Mr. Olson advised the Claimant of what he intended to do whereas the Organization argued that the underlined portion of the second paragraph showed that Olson failed to tell the Claimant that he stopped behind the Claimant's machine. Claimant testified, on page 13 of the transcript, and it was not refuted, that Olson should have come to the Claimant and had a "briefing" about being stopped and that was the historical practice on the property. Both parties are correct in their interpretations of Mr. Olson's statement.

However, the key portion of Mr. Olson's statement to resolving this dispute is where Olson wrote: **"...Mr. Mims acknowledged, so I began my move towards him..."** Olson's notification to the Claimant as to what he was going to momentarily do should have alerted the Claimant to the fact that he needed to remain aware of where the Tamper machine was. The collision was the result of the Claimant's lack of attentiveness and Mr. Olson's failure to tell the Claimant he had stopped his machine, therefore, the Carrier met its burden of proof that Claimant was guilty as charged.

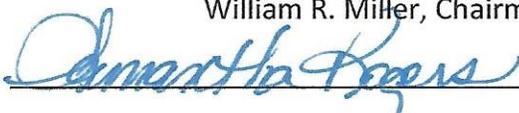
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately 35 years of service with no discipline in the last 32 years. Despite, Claimant's good work record the discipline assessed Claimant was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The Board finds and holds that the discipline will not be disturbed and the claim will remain denied because it was not contrary to PEPA, nor was it arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman and Neutral Member



Samantha Rogers, Carrier Member



David R. Scoville, Employee Member

Awards Date: 1/5/18