

**NATIONAL MEDIATION BOARD  
PUBLIC LAW BOARD NO. 7048  
AWARD NO. 360, (Case No. 360)**

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

**vs**

**BNSF RAILWAY COMPANY**

William R. Miller, Chairman & Neutral Member  
Michelle McBride, Carrier Member  
Louis R. Below, Employee Member

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- 1. The Carrier violated the Agreement commencing November 3, 2020, when Claimant Jose Trevino (0303271) was assessed a Level S 30 Day Record Suspension for failure to ensure the boom was secured resulting in the boom coming into contact with multiple utility lines while driving down the public roadway causing damage to the boom truck and private/public utility infrastructure on August 19, 2020, near Alvarado, TX, on the Venus Subdivision in violation of MWSR 12.0, VPR 1.0 and MWSR 17.2.5.**
- 2. As a consequence of the violation referred to in part 1, the Carrier shall remove this discipline with all rights unimpaired and pay for all wage loss including overtime (if applicable) commencing November 3, 2020, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”  
(Carrier File No. 14-20-0410) (Organization File No. 2409-SL13N1-2010)**

**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 Claimant and Welder A. Middleton were working on a bridge defect on the Venus Subdivision on August 19, 2020. At approximately 1310 hours, Mr. Middleton (driver)

and the Claimant (passenger) began traveling in the boom truck (BNSF vehicle #28750) to Alvarado to the location of the other gang members. A private citizen noticed their vehicle had struck several power lines and waved them down to prevent further damage.

It was at this point Claimant and his coworker noticed that the boom had taken down several power lines. They called 911 and then reported the incident to Structures Supervisor T. Draper. Manager Engineering M. Keim reported to the location of the incident to meet with the first responders and assess the scene. Mr. Keim took statements from witnesses individually and collectively as a group to determine the extent of damages.

In the briefing and in their written statements given to Supervisor Keim, both employees claimed they never received an alarm. Both alleged they did not know anything was wrong until they saw wires hanging and a person waving at them. Claimant further stated he complied with all Rules and procedures. Claimant stated he completed the pre-trip inspection and tested the stow alarm and everything was in proper working condition. Claimant acknowledged he was the one in charge of stowing the boom and he did so properly.

During conversation regarding the incident, Supervisor Keim learned that the flag indication for the stabilizer arm had been damaged the day before allegedly causing the proximity sensor to work intermittently which might have caused the stow alarm to fail and should have been noted on the pre-trip inspection and because of that Claimant was directed to attend a formal Investigation on September 3, 2020, which was mutually postponed until October 7, 2020, concerning in pertinent part the following:

**“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to ensure the boom was secured resulting in the boom coming into contact with multiple utility lines while driving down the public roadway causing damage to the boom truck and private/public utility infrastructure on August 19, 2020 near Alvarado, TX on the Venus Subdivision.”**

On November 3, 2020, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30 Day Record Suspension with a One Year Review Period.

It is the Organization's position was denied a “fair and impartial” Investigation and appeal process because of the multiple roles played by the judging officer who was the chief witness against the Claimant, therefore, making it impossible for the Decision Officer to be unbiased. It asserted the discipline should be set aside and the claim sustained without reviewing the merits.

Turning to the merits, the Organization argued that the Claimant properly stowed the boom before traversing the public highway. It argued that before the boom struck any powerlines it had passed under other lines without incident which leads to a logical conclusion that Claimant stowed the boom and then the boom malfunctioned or a powerline was too low. It offered a statement (Exhibit 25) at the Investigation from Boom Truck Driver R. Figueroa who stated he had an experience wherein he was driving down the road and the stored energy from his boom made the boom move and break the cradle which the Organization suggested could have been the same reason for the boom on the Claimant's truck lifting upward and hitting the lines which was no fault of the Claimant. Additionally, it argued it is possible that one of the powerlines might have been hanging too low and it snagged the boom out its cradle. It concluded that the Carrier did not 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 there were no procedural flaws in the handling of the Investigation and appeal process and there was no problem in Mr. Keim having issued the discipline. It requested that the claim be resolved on its merits.

Turning to the record, the Carrier contended that the Claimant failed to note any defects during the pre-inspection. It argued it contacted the crane manufacturer Palfinger USA which stated that the boom could not elevate on its own and there was no evidence to prove the wires were hanging too low and it asserted that the police issued a warning to Claimant for the machine being over-height. Carrier further argued that after proving Claimant's guilt it appropriately disciplined Claimant. It asked that the discipline not be disturbed and the claim remain denied.

The Board has reviewed the transcript and record of evidence and will first address the Organization's procedural arguments that the Judging Officer improperly held multiple roles as being a witness against Claimant and the Judging Officer. In Award Nos. 30, 55 and 58 of this Board it was determined that the "trier of facts" was also a prosecution witness who reviewed all testimony which was inherently unfair as he judged the credibility of witnesses' testimony including his own. In Award No. 30 the Board determined in pertinent part:

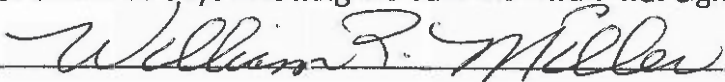
**"...The Agreement guarantees the employee a right to "due process". That right was not afforded the Claimant because the decision maker assumed the role of judging witnesses' credibility including his own. On its very face the process was fundamentally flawed and unfair and could have easily been corrected by having someone other than one of the witnesses against the Claimant act as the judging officer. Therefore, the Board finds and holds that the discipline must be set aside without even addressing the merits...."**

The facts are clear that the Judging Officer also acted as a primary witness against the Claimant. That dual role was improper because it denied Claimant "due process" since the decision maker assumed the role of judging witnesses' credibility including his own. The Board will follow the aforementioned property precedence, therefore, it is determined that the discipline is set aside and the claim is sustained without reviewing the merits.

The Board does not offer any opinion on the merits, but exercises the option to advise the Claimant he should be careful in the future to adhere to all current Carrier Rules and Policies because possible violation of some of those Rules could have disastrous consequences.

**AWARD**

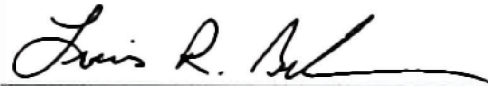
Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member



Michelle McBride, Carrier Member



Louis R. Below, Employee Member

Award Date: March 25, 2022