

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 365, (Case No. 365)**

**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 January 6, 2021, when Claimant Christopher D. Pack (1512508) was assessed a Standard Formal Reprimand for failure to lock up/pin up the rail follower resulting in striking a crossing in the Paoli siding on the Red Rock Subdivision on November 6, 2020, in violation of EI 14.3.3 and MWOR 6.50.3.**
- 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 January 6, 2021, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-21-0031) (Organization File No. 1547-SL13N1-20118)**

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 November 5, 2020, Claimant was the Machine Operator assigned to the Production Tamper on mobile Surfacing Gang TSCX1343. At approximately midnight, Claimant was traveling backwards over a crossing towards north Paoli. As Claimant traversed over the crossing (a fixed object) after coming to a full stop for a car, one side of the rail follower struck the crossing planks

causing damage to Claimant's machine and the planks and because of that Claimant was directed to attend a formal Investigation on November 20, 2020, which was mutually postponed until December 9, 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 lock up/pin up the rail follower resulting in striking a crossing in the Paoli siding on the Red Rock Subdivision on November 6, 2020."

On January 6, 2021, Claimant was notified that he had been found guilty as charged and was assessed a Standard Formal Reprimand with a One Year Review Period.

It is the Organization's position that Claimant testified without rebuttal that after finishing the surfacing work at the Paoli siding he followed all procedures before moving the machine. Claimant stated that he checked both sides of the machine and made certain that it was properly locked and secured for travel before moving. It pointed out that Foreman Sowers said in his written statement they had experienced some mechanical problems with the 424 Tamper and rail follower. It further argued that Roadway Equipment Supervisor, Mr. B. Stewart, confirmed in his testimony that the aforementioned machine could have been locked up and if severely jarred could come loose. It asserted that the Carrier did not meet its burden of proof because there was substantial evidence that the accident could have been the result of a mechanical malfunction. It requested that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that Claimant did not properly check his machine before moving it to another location and even if the rail follower had been jarred enough by rough track within a machine length of the crossing to bounce out of the hook, which was not proven, Claimant was still guilty of violating EI 14.3.3 and MWOR 5.50.3 because he did not follow the steps set out in these Rules for the safe operation of equipment over fixed objects. It argued that if Claimant truly believed that the rail follower could have bounced out of its locks, Claimant had a duty to verify that was not the case prior to passing over the crossing. Claimant did not do so, therefore, he was guilty as charged. 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 it is determined that the Investigation and appeal process met the guidelines of Rule 13(a) and Appendix No. 11.

Review of the record reveals that the Organization argued that Claimant fulfilled his duties of fully checking and securing his machine for travel after finishing his surfacing work at the Paoli

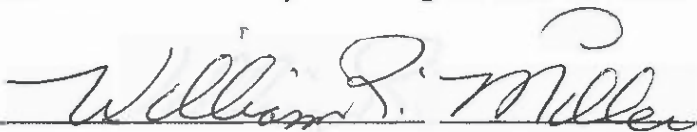
siding whereas the Carrier argued that Claimant must not have carefully checked the right side of the machine because it became unlocked. The charge specifically asserted: **"...alleged failure to lock up/pin up the rail follower..."** In the Carrier's denial letter it expanded upon its charge by suggesting that even if the rail follower had bounced out of its locks, Claimant had a duty to verify that was not the case prior to passing over the crossing. The question of whether or not the Claimant had a duty to recheck the rail follower before traversing the crossing will not be addressed in this instance because the Claimant and no other witnesses were ever asked during the investigation if the Claimant should have performed another check of his machine.

Claimant testified he carefully checked his machine on both sides and that was not effectively refuted. Roadmaster, Joshua Sanders, read into the Transcript on Pages 25 and 26, Foreman Sowers written statement wherein, Sowers wrote that the subject machine had mechanical problems in the past involving airlock hook. Roadway Equipment Supervisor, Mr. B. Stewart, also testified that the machine might have malfunctioned although it was unlikely. The Board is not persuaded that Claimant failed to lock up/pin up the rail follower, therefore, it is determined that the Carrier did not meet its burden of proof.

The Board finds and holds that Claimant's Disciplinary Record is to be cleared of the instant discipline and the claim is sustained with the removal of the Standard Formal Reprimand.

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.



William R. Miller, Chairman and Neutral Member



Michelle McBride, Carrier Member



Louis R. Below, Employee Member

Award Date: March 25, 2022