

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 386, (Case No. 386)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
Jeffery L. Fry, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing October 6, 2021, when Claimant Jeffery W. Dickerson (0371963) was assessed a Level S 30 Day Record Suspension with a One Year Review Period for negligence and safety to himself and others when hooking up chains with operators help, proceeding to lift tote out of holding bay and swing over the head of an employee while performing Grapple Truck duties of loading and unloading off the Epoxy Tie Plugger, X6200062 in violation of MWSR 17.2.6.**
- 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 October 6, 2021, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-21-0295) (Organization File No. 2404-BN40N1-2155)**

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 was a Machine Operator on July 28, 2021, operating a Grapple Truck as a member of RP04 at MP 22.5 on the Beardstown Subdivision. It is alleged that on that date at approximately 0750 Claimant moved the Grapple Loader with a suspended load attached above the head of one of the Tie Epoxy Operators and because of that Claimant was directed to

attend a formal Investigation on August 12, 2021, which was mutually postponed until September 8, 2021, concerning in pertinent part the following:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged negligence and safety for yourself and others when hooking up chains with operators help, proceeding to lift tote out of holding bay and swing over the head of an employee while performing Grapple Truck duties of loading and unloading goop totes off the Epoxy Tie Plugger, X6200062.”

On October 6, 2021, 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 that Claimant was denied a “fair and impartial” Investigation because the Hearing Officer allowed the Carrier’s Charging Officer to question a witness attending on behalf of the Claimant and because of that it requested the discipline be set aside without reviewing the merits.

Turning to the merits, the Organization asserted Claimant never placed his co-workers in “harms way” and the testimony and written statements of those employees confirmed they were never in danger. It further argued Carrier Officer A. Adams vantage point of the alleged incident was approximately 250 to 300 feet away and was hampered by Carrier equipment and some overgrown vegetation. It concluded Carrier did not meet its burden of proof and it requested the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier the Investigation was held in a fair manner and there were no procedural errors and it asked that the claim be resolved on its merits.

Turning to the record it asserted that record shows that Claimant placed employee, Mr. Rush, in a dangerous position swinging a heavy load over Mr. Rush. It argued that Roadmaster Adams testified that he witnessed the event and there were no alleged obstructions that might have obstructed his view. It reasoned 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 argument that the Hearing Officer allowed the Charging Officer and witness for the Carrier to question an employee witness. Hearing Officer’s allowance of such behavior was irregular and is frowned upon as it could lead to abuse, but in this instance, it did not rise to that level, therefore, the case will be resolved on its merits.

Review of the Transcript reveals that on Page 9, Roadmaster Adams testified that after the alleged incident he did not talk to Operators Rush or Kane, that were working with the Claimant. Mr. Adams further testified on Page 13, that he did not see a load over Mr. Rush’s head. On Pages

13 and 14 of the Transcript Mr. Adams inappropriately alternated between being a witness and acting as a dual Hearing Officer questioning Witness Kane. Adam testified that it appeared that Employee Rush was darting away from danger of an overhead load and then Mr. Adams asked Employee Kane what he observed. Mr. Kane answered by stating that he did not see Mr. Rush darting nor did he see a load over Mr. Rush. Mr. Kane's answer was consistent with his previous testimony on Pages 9 – 12 wherein Kane stated he and others were not in danger. Additionally, a written statement from Employee Rush was introduced during the Hearing. Mr. Rush wrote a recollection of the incident and stated the following:

“While loading up totes with the grapple truck was brought to my attention that leadership thought we was in danger while loading. We was not in any danger, totes where not loaded overhead at any time.” (Underlining Board's emphasis)

Clearly Mr. Rush confirmed Claimant and Mr. Kanes' testimony that the load was not over Mr. Rush's head and no one in the crew was in danger. Mr. Rush and Mr. Kane's vantage point of the event was superior to that of Mr. Adams and there has been no showing that either individual had any reason not to make an accurate report of the incident. It is determined Carrier did not meet its burden of proof.

The Board finds and holds that the discipline assessed Claimant, in this instance, is to be removed from Claimant's Disciplinary Record and the Claim is sustained.

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



Jeffery L. Fry, Employee Member

Award Date: April 10, 2023