

**PUBLIC LAW BOARD NO. 7585**

**Case No. /Award No. 63**  
**Carrier File No.: 11-16-0127**  
**Organization File No.: S-P-2027-G**  
**NMB 106**  
**Claimant: B. R. Miller**

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**BNSF RAILWAY COMPANY**

**-and-**

**BROTHERHOOD OF MAINTENANCE**  
**OF WAY EMPLOYEES DIVISION - IBT**  
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**FACTS:**

Claimant B. R. Miller was working as a tamper operator when a collision occurred with a split point derail at or near MP 256.6 (North Paymaster), River Subdivision, on August 26th, 2015. Finding violation of Rules 1.1.2 and 6.50.3, the Carrier assessed him a 30 day record suspension with a 36 month probation period, plus a 5 year disqualification period from the operation of Jackson 6700 production tampers. Organization protests this discipline as unwarranted and unreasonably harsh. The matter has been processed to review by this Board.

**CARRIER POSITION:**

The Carrier notes that Rule 1.1.2 requires operators to be alert and attentive, while Rule 6.50.3 requires operators to be sure all components of a machine will clear prior to passing over crossings, switches, derails or frogs. The Carrier maintains that to properly raise up the working heads of a machine, one must visually inspect the working head components and ensure that they are locked in place and cannot come down while traveling. In its view, Claimant failed to raise the working heads on his machine, so when he went in reverse, he backed through a split point derail and caused approx. \$3,600.00 of damage to his machine.

The Carrier points out that Claimant's statement constitutes an admission: he wrote that when he went into reverse, he "ripped off gun 2 work head by ripping the 4 sandwich pads in total 6 sandwich pads, 2 vibrator motors, 2 tool bits damaged." The Carrier argues that this admission negates any need for additional proof, and the incident was serious enough to warrant the discipline imposed.

## **ORGANIZATION POSITION:**

The Organization denies that Claimant admitted guilt. Rather, he truthfully related that his machine struck the derail. In the Organization's view, this does not constitute admission of any rules violation.

The Organization argues that prior to making his reverse movement, Claimant hit a power switch that should have raised his jack beam to clear the rail head as he progressed backward. The Organization maintains there is no explanation for the machine's failure to raise the jack beam at that point. The Organization maintains that had the surface crew foreman been present, the reverse movement could have been stopped without damage to machine. In the Organization's view, it is impractical and ridiculous to expect all machine operators to actually stop and observe the machine at every switch, derail, frog and crossing.

The Organization contends there were procedural problems with this case as well. In its view, Claimant was removed from his machine prior to investigation in a blatant display of pre-judgment. Also, statements were allowed into the record over the Organization's objection when they constituted hearsay and the witness was not present. It notes Claimant's undue and unreasonable disqualification resulted in a substantial and unjustifiable loss of compensation.

## **DECISION:**

The Board finds no prejudice to Claimant's case due to procedural error. Both the evidence and the Organization's objections to it are part of the record and available to influence the weight, if any, of the contested evidence. Also, Claimant's removal prior to investigation cannot be deemed procedural error. The Carrier is obliged to take steps toward preserving a safe workplace. Given the incident here involved, the Carrier was not required to keep an employee working as a tamper operator before having an opportunity to determine through investigation whether such a decision would be safe.

One of Claimant's duties is to be sure that all components of his machine are secure before moving his machine. The Board is not persuaded by the Organization's argument that this would require visual inspection prior to every switch, derail, frog or crossing in an operator's path. However, after unlocking components for use, the operator should not move the machine before making sure they are locked back in place.

This is a plain requirement of Rule 6.50.3. Jostling components upon movement predictably would cause any unsecured working parts to work loose, fall out of place and cause damage. The evidence is clear that this is indeed what happened on Claimant's tamper machine. The fact that he pressed a button to secure his working heads does not constitute compliance with the rule because he could not have "been sure" that components were locked in place without taking a look. Working heads were not, in fact, secure and when he reversed his machine, they came loose, causing damage. Had

Claimant been alert and attentive enough to check his components as required, the damage could have been avoided.

The Organization raises the issue of whether the Level S record suspension with 36 month review period and five year disqualification from the operation of Jackson 6700 production tampers was so Draconian as to constitute harsh and unreasonable discipline in violation of the parties' contractual standard. Claimant's error was clearly a lapse of safety, warranting Level S treatment. Given the nature of the incident, the Board sees no basis for finding either the 30-day suspension or the 36 month review period excessive.

As to the disqualification, the Carrier has adequate basis for its determination that Claimant has demonstrated incompetence in operating the tamper machine and should spend a period performing other duties. That said, the Board is troubled by a five year period of disqualification. We are not persuaded that such a long period is reasonably related to the incident or that Claimant could fairly be prohibited from requalifying for fully five years. We recognize that the Carrier is attempting to meet two goals here: operator safety and progressive discipline. However, there is no discernible rationale in this particular case for a disqualification period lasting longer than the 36-month review period. There is no discernible reason why Claimant should not be deemed qualified to resume his tamper duties once he is no longer under disciplinary review, subject to such ongoing training, qualification and testing requirements as the Carrier routinely deems appropriate.

**AWARD:**

The claim is sustained in part. The disciplinary suspension shall stand, however Claimant's period of disqualification from the operation of Jackson 6700 production tampers will be reduced to three years.


**ORDER:**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is to comply with the award on or before 30 days following the date the award is adopted.

January 18, 2018; Park City, Utah



Patricia T. Bittel, Neutral Member

A handwritten signature in black ink, appearing to read 'Zach Voegel'.

Zachary Voegel, Organization Member

A handwritten signature in blue ink, appearing to read 'James Rhodes'.

James Rhodes, BNSF Member