

PUBLIC LAW BOARD 7702

CASE NO. 8

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BNSF RAILWAY COMPANY

CARRIER CASE NO. 11-11-0226

V.

BROTHERHOOD OF MAINTENANCE OF WAY  
EMPLOYES DIVISION / IBT

ORGANIZATION CASE NO. S-P-1583-C

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STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- 1) The discipline (dismissal) imposed upon Mr. G. Cox by letter dated February 25, 2011 for alleged violation of MOWOR 1.3.1 Rules, Regulations and Instructions, MOWSR S-1.2.3 Alert and Attentive, MOWS S-1.2.8 Reporting, MOWSR S-1.5.2 Inspection and MOWSR S-20.2.1 Overhead and Side Obstructions in connection with alleged failure to safely operate BNX 24- 0358 Loader by striking and causing damage to a switch stand in the Yard, Whitefish, MT at approximately 1430 hours on Monday, January 17, 2011 while assigned as relief machine operator working on the Kootenai River Subdivision was arbitrary, capricious and in violation of the Agreement (System File S-P-1583-C/11-11-0226 BNR).
- 2) As a consequence of the violation referred to in Part (1) above, Claimant G. Cox shall now receive the remedy prescribed by the parties in Rule 40G.

## FINDINGS:

The carrier and the employee or employees involved in this dispute are respectively the carrier and the employee or employees within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7702 has jurisdiction over the parties and the dispute involved herein.

Claimant G. Cox established and held in excess of thirty-three (33) years of seniority with the Carrier's Maintenance of Way department, having served as a foreman, motor vehicle operator, machine operator and trackman. During the course of his dedicated career, Claimant was an immensely well-liked and regarded employee, having received significant praise from both public citizens and Carrier employees

Claimant worked as a relief machine operator at the Carrier's Yard in Whitefish, MT. Throughout the workday, Whitefish, MT experienced significant and continuous snow fall and Claimant was directed to use a heavy duty front end loader (also referred to simply as a "loader") to assist in clearing the roadways of the Whitefish Yard.

As the workday drew to a close, Claimant continued using his loader to remove snow from the roadways and surfaces of the Carrier's yard. At one point, his loader made contact with a snow covered switch in the Carrier's yard. The collision occurred as Claimant went to retrieve a different snow plow attachment and he traversed the tracks towards the storage area. As he proceeded forward, his loader collided with a seldom used, hand drawn switch that was buried beneath the snow.

Following the collision, Claimant immediately surveyed the scene, determined that he had made contact with the snow-covered switch and determined that while it was still operable, it had sustained damage. He promptly secured the switch, flagged it as out-of-service and then located his immediate supervisor, Section Foreman J. McGarry for further direction. Due both to the absence of Claimant's roadmaster and the fact that such matters were typically relayed to the foreman, Claimant believed Section Foreman McGarry had to be notified of the incident.

After locating Mr. McGarry, they both returned to the switch and further ensured that it did not pose a safety hazard. After ensuring there was no safety hazard, Mr. McGarry then contacted his immediate supervisor, relief Roadmaster C. Brooks and informed him of the situation. At this point, Roadmaster Brooks was serving as a relief roadmaster while Claimant's normal roadmaster was absent. He was stationed some one-hundred and sixty (160) miles away from the Carrier's Yard in Whitefish, MT and did not view the collision or any subsequent events. After hearing what had happened, Mr. Brooks did not remove Claimant from service or even take the time to physically come to the Whitefish Yard and survey the scene. Instead, he simply requested that Claimant submit to a urine analysis and that he contact him. In response to the second request, Mr. McGarry informed him that he had directed Claimant to prepare to tie-down for the night.

Having believed that the matter was properly reported and taken care of and, on the basis of Section Foreman McGarry's direction, Claimant drove his loader to its tie-down location and prepared to end his workday. During his travel, Claimant's only form of communication was his loader's in-cab radio and at no time did Claimant receive any radio direction that he was to stop and contact Mr. Brooks. Instead, Claimant properly secured his loader and then (while not operating the machine) decided it was best to contact Mr. Brooks.

During their conversation, Mr. Brooks directed Claimant to provide a written statement of the facts surrounding the collision. As such, Claimant promptly record the facts and provided a written statement, which stated that:

TRANSCRIPT EXHIBIT B:

"On the afternoon of Monday, January 17th 2011, around 14:30 - 15:00 mtn I G. L cox was operating the whitefish loader on the south road parallel to the round house lead track. I noticed a MOW employee plowing the road using the pick-up truck with the 'V' blade attachment. Not wanting to interfere with his plowing, I crossed the loader over the track behind the south fuel track frog and heel block area. Looking at the amount of snow remaining on the road I thought I would get the snow blade attachment for the loader and return to help. It was at that moment of looking toward the road that I cut too close to the North fuel track switch stand and damaged it.

After hitting the switch stand, I stopped and checked it for damage. I found that it did work, but the switch base (left side) was broken, the target was broken off, and the handle was bent. I then put an out of service tag and lock on the switch and went looking for a point clamp and report the damage.

FYI, the switch is operable and useable for emergency use. Such as getting to the track panels if needed parked on the North warehouse track."

Following the delivery of that statement, a hearing was scheduled to ascertain the facts and determine Claimant's responsibility, if any, for violating any Company rules.

As a result of the investigation, Claimant was dismissed for violating Maintenance of Way Operating Rule (MOWOR) 1.3.1 Rules, Regulations and Instructions, MOWSR S-1.2.3 Alert and Attentive, MOWSR S-1.2.8 Reporting, MOWSR S-1.5.2 Inspection and MOWSR S-20.2.1 Overhead and Side Obstructions.

Carrier Argument:

On January 17, 2011, Claimant failed to operate the Whitefish loader in a safe manner because he was not alert and attentive. Employees in the railroad industry have an obligation to be vigilant in their alertness and awareness of their surroundings and any potential hazards. Claimant violated one of the most sacrosanct tenets of railroad work when he failed to look where he was going and struck a switch stand.

The Organization has attempted throughout the handling of this claim, to minimize the seriousness of the infraction by emphasizing the replacement cost of the damaged switch stand. Because the replacement cost of the switch, the Organization argues, is modest, the discipline should also be. But it is not the amount of damage caused by the rule violation that determines the severity of the incident, it is the incident itself.

Here, we have a long-term employee that was admittedly familiar with yard he was working in. Claimant freely admitted to running over the switch stand while operating the loader. Again, there is no dispute surrounding those facts.

Because of that alleged violation, and because this was Claimant's second serious rule violation in a 12-month period, he was dismissed from service in accordance with the Company's Policy for Employee Performance Accountability (PEPA).

The record clearly supports the Company's position that the Claimant violated the rules as charged and as a result received the appropriate punishment.

#### Organization Argument:

The charge was that the Claimant had failed to promptly handle and report the matter after the collision. During the entirety of the investigation, Claimant never denied that his loader struck the switch, but he vehemently denied that the collision was related to any unsafe or reckless behavior and he further denied that he had acted inappropriately following the collision.

The facts are undisputed: while operating a loader during a heavy snow storm, Claimant made contact with a switch. This collision caused damage to the switch which required repair, but it did not render it inoperable nor did it cause significant damage. Following the collision, Claimant did not attempt to hide or cover up what had happened and instead did exactly what was expected of him. He tagged the switch, ensured it was safe and contacted his immediate supervisor, Section Foreman McGarry to report the matter.

The Organization submits that the Carrier failed to meet its required burden in this case. The Carrier was obligated to present substantial evidence that Claimant violated multiple rules while operating his loader on January 17, 2011. The evidence and testimony in the record confirms that while Claimant did in-fact strike the switch, he was hardly being reckless or inattentive. Contrary to the Carrier's position, the record reflects that an accident took place there was a heavy snow fall and Claimant did not see the snow covered switch. Regardless of the Carrier's outlandish position that if Claimant would have gotten out and surveyed the scene he would have discovered the switch stand, the record fails to show Claimant acted in an unreasonable or reckless manner. Furthermore, the record conclusively destroys any contention that Claimant did not act appropriately following the collision. There is zero (0) dispute that he properly tagged the switch, ensured it was safe or that he informed his foreman of the matter. As such, the Carrier did not and cannot sustain its burden on this case and the discipline of Claimant was in clear violation of the Agreement.

Finally, the Organization submits that the discipline in this matter was clearly arbitrary and

unwarranted under the terms of the Agreement. The record reflects that Claimant was a long term, hardworking employee who performed his duties in the proper and expected manner. Regardless that an accident occurred, Claimant acted professionally and handled the matter in a way the Carrier purportedly expects of its employees. Yet, in this case, the Carrier fired Claimant, regardless of his hard-work, dedication or years of service. As such, the Carrier's dismissal of Claimant was obviously inappropriate under the Agreement.

This Board, first, must take note of the fact that in PLB 7702, Case No. 7, the discipline issued to Claimant Cox was overturned by this Board. As such, the use of that discipline to now justify two (2) serious infractions as a reason for dismissal in this case is no longer appropriate.

After a review of the entire record and giving weight to the evidence provided, the evidence, here, does not support the charges.

The Carrier did not meet their burden on several accounts. The most notable was the Claimants uncontested testimony. The Carrier did not prove that the accident was a careless act or due to unsafe and reckless behavior nor did they prove that the amount of snow did not play a major factor in the accident that occurred.

Based on the record, this Claimant, a long term employee, did everything correct as would be expected of any employee with the Claimant's seniority and experience in a similar situation. The discipline in this case is found to be arbitrary, capricious and unreasonable.

#### AWARD:

The Claim is hereby sustained.

In accordance with Rule 40 G. INVESTIGATIONS AND APPEALS

The Claimant shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline and/or suspension



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Marc A. Winters  
Neutral Member

Dated: November 27, 2015



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Joseph Heenan  
Carrier Member



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Kevin Evanski  
Organization Member

PUBLIC LAW BOARD 7702

CASE NO. 10

Interpretation of Case No. 8 Award

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BNSF RAILWAY COMPANY

CARRIER CASE NO. 11-11-0226

V.

BROTHERHOOD OF MAINTENANCE OF  
WAY EMPLOYEES DIVISION / IBT

ORGANIZATION CASE NO. S-P-1583-C

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The Award for PLB 7702, Case No. 8 was adopted on November 27, 2015.

That Award states:

The Claim is hereby sustained.

In accordance with Rule 40 G. INVESTIGATIONS AND APPEALS

The Claimant shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline and/or suspension.

The Organization has claimed that the proper remedy has not been applied by the Carrier and requests that the Board interpret the meaning of the Award as to the appropriate remedy.

The Organization argues that the Carrier has refused to make the Claimant whole for the monetary loss he suffered during the period he was improperly withheld from service by the Carrier. More specifically, the Organization claims that the Carrier reimbursed the Claimant at the wrong rate of pay.

Based on the evidence provided, the Claimant was a Group 2 Machine Operator. However, at the time of his dismissal Claimant was assigned and working as a Sectionman. The Carrier based the back pay award on the Sectionman rate which had been the Claimant's assignment at the time of Claimant's dismissal. That calculation is an incorrect way to determine back pay for the time Claimant was improperly withheld from service.


The correct way and most used, in labor arbitration is to formulate or calculate the time Claimant would have remained assigned as a Sectionman and then calculate the time he would have worked in his assigned classification as a Group 2 Machine Operator during the time period the Claimant was improperly withheld from service and then base the back pay calculation on both rates and times assigned.

Based on the above interpretation, the calculation of the proper back pay award will be remanded back to the parties to determine the appropriate rates and times assigned to each classification. The Claimant will then be reimbursed accordingly. A common method to be used in this type of calculation is to review the pay of a similarly situated employee who had performed the same assignments with the same rates such as the person who replaced the Claimant if all variables apply.




Marc A. Winters  
Neutral Member

Dated: November 27, 2017



Corey Kellam  
Carrier Member



Kevin Evanski  
Organization Member

Date: December 13, 2017

Date: December 13, 2017