

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 113, (Case No. 113)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Joy E. Mendez, Carrier Member
David D. Tanner, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing September 22, 2010, when Claimant, Ron E. Wall (6412118), was assessed a Level S-30 Day Actual Suspension with a 3 year review period for squirting hand sanitizer at co-worker which resulted in personal injury on September 21, 2010. The Carrier alleged violation of MOWOR 1.1.1 Maintaining a Safe Course, MOWOR 1.6 Conduct, MOWOR 1.7 Altercations, and MOWOR 1.2.9 Horseplay.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated with seniority, vacation, all rights unimpaired and wage loss commencing September 22, 2010, and continuing forward and/or otherwise made whole." (Carrier File No. 14-10-0224) (Organization File No. 160-1313-108.CLM)**

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 September 22, 2010, Claimant was directed to attend a formal Investigation on September 28, 2010, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged squirting hand sanitizer at Robert Martinez which resulted in personal injury, at approximately 3:50 PM on Tuesday,

September 21, 2010, in MOW Tool House in Belen, New Mexico, while working as a Machine Operator on TMOX3001.

This investigation will determine possible violation of MOWOR 1.1.1 Maintaining a Safe Course, MOWOR 1.6 Conduct, MOWOR 1.7 Altercations, and MOWSR 1.2.9 Horseplay."

On October 22, 2010, Claimant was notified that he had been found guilty as charged and was assessed a Level S with a 30-Day Actual Suspension and a three year probationary period.

The facts indicate that on September 21, 2010, Claimant squirted a hand sanitizer in the direction of his co-worker R. Martinez that resulted in a eye injury and because of that incident the formal Investigation was called.

It is the Organization's position that the Claimant was denied a "fair and impartial" Hearing as he was pre-judged as being guilty and on that basis alone the claim should be sustained without reviewing the merits. However, if the merits are examined it argued that the record shows that the Claimant attempted to use the hand sanitizer and it was not working properly. Claimant took it apart, cleaned it and then reassembled it and then inadvertently hit the plunger to hard while it was pointed towards Mr. Martinez and accidentally squirted him. It further argued that all witnesses at the Hearing testified that it was an accident and there was nothing intentional about the event. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that there were no procedural errors involved in the handling of the Claimant's case and he was not denied a "fair and impartial" Investigation. It asserted that the Claimant was involved in horseplay when he squirted his co-worker in the eye with hand sanitizer which the Claimant admitted to. It argued that even though the Claimant does not remember any laughter the testimony from his co-workers proves there was laughter and horseplay involved that resulted in an injury. It further argued that Claimant exhibited carelessness in his behavior that subjected a co-worker to injury. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and is not persuaded by the Organization's procedural argument and it is determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

There is no dispute that the Claimant squirted hand sanitizer in co-worker R. Martinez's eye. The question at issue did it happen intentionally because of horseplay or was it accidental.

On page 13 of the transcript Roadmaster Sherri Ellis was questioned about her interviews of the various witnesses of the incident as follows:

"Kevin C. McReynolds: Did you interview Mr. Wall?"

Sherri Ellis: Um, again, Mr. Wall came in and spoke to me about the incident?

Kevin C. McReynolds: What did he say?

Sherri Ellis: That he was messing around with a hand sanitizer that he had it in his hand and that it had somehow squirted and hit Mr. Martinez who was sitting, uh, directly across from him."

A statement from Track Supervisor G. Gonzalez was entered which stated in pertinent part:

"...I heard Ron Wall was playing with a hand sanitizer and squirted Bob Marinez in the eye. I did not see it happen." *(Underlining Board's emphasis)*

Gonzalez's statement cannot be given serious consideration to the theory that the Claimant was involved in a horseplay incident as it is second-hand hearsay. Review of the record further shows that all of the other witnesses testified that they did not believe the Claimant intentionally squirted the sanitizer in Mr. Martinez's eyes. Claimant was questioned on page 57 of the transcript as to whether there was horseplay involved in the incident as follows:

"Kevin C. McReynolds: Laughter is generally associated in my experience working the railroad as horseplay. Was there horseplay involved in this?"

Ron E. Wall: No horseplay whatsoever, no.

Kevin C. McReynolds: Uh, the rule references altercation and includes in there the work practical jokes. Jokes are generally associated with laughter. Is that what was going on here?

Ron E. Wall: There was no practical joke. It is what happened just all I stated happened. It doesn't make sense. It's, uh, I, that product is not meant for your eyes. Why would somebody shoot that in your eye?

Kevin C. McReynolds: Was a little careless on your part that it happened do you think?

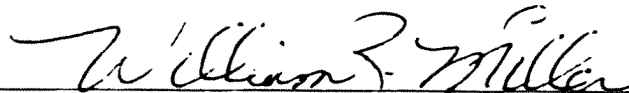
Ron E. Wall: Probably so, yes. I think carelessness would be my,
(Underlining Board's emphasis)

Review of the testimony indicates that Roadmaster Ellis testified the Claimant was "messaging around with a hand sanitizer" which is not contrary to the Claimant's testimony that he took the sanitizer apart in a effort to make it work. The record indicates there was some laughter because of the incident, but close examination of the entire testimony does not indicate that the Claimant was involved in horseplay or the squirting of the hand sanitizer in Mr. Martinez's eyes was intentional, however, the Claimant did admit in the aforementioned testimony that he was careless of the safety of a co-worker, therefore, it is determined that substantial evidence was adduced that the Claimant was guilty of violating MOWOR 1.1.1 and 1.6 Item 1, but he was not guilty of violating MOWOR 1.7 and MOWSR 1.2.9.

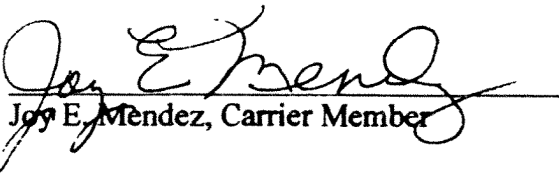
The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 17 years of service with a good work record with no discipline in over ten years. The Board finds and holds that the incident was serious, but because the incident was accidental the discipline was excessive. The discipline is reduced from an Actual 30-Day Suspension to a 30-Day Record Suspension which is corrective in nature and in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The Claimant is to be made whole for all loss of monies in accordance with Rule 13(f) from September 22 through October 21, 2010.

AWARD

Claim partially 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 & Neutral Member



Joy E. Mendez, Carrier Member



David D. Tanner, Employee Member

Award Date: MAY 21, 2013