

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 118, (Case No. 118)**

**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 March 31, 2011, when Claimant Reggie R. Whitaker (1715879), was issued a Level S 30-day Record Suspension with a 3 year review period, concerning his failure to establish proper protection and/or hold or participate in job safety briefings as conditions changed on March 31, 2011. The Carrier alleged violation of MOWOR 6.3.2 Protection on Other Than Main Track, MOWSR 1.1 Job Safety Briefing, MOWSR 1.2 Rights and Responsibilities, and MOWSR 1.2.4 Coworkers Warned.**
- 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 March 31, 2011, and continuing forward and/or otherwise made whole."
(Carrier File No. 14-11-0145) (Organization File No. 120-13S1-1110(B).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 April 7, 2011, Claimant was directed to attend a formal Investigation on April 29, 2011, which was mutually postponed until May 6, 2011, 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 failure to establish proper protection and/or hold or participate in job safety briefings as conditions changed while working at Crossover 1429 project in the Mykawa Yard on Thursday, March 31, 2011 at approximately 1300 hours in violation of Maintenance of Way Operating Rule 6.3.2, Protection on Other Than Main Track, Maintenance of Way Safety Rule S-1.1, Job Safety Briefing and Maintenance of Way Safety Rule S-1.2, Rights and Responsibilities, including Rule S-1.2.4, Coworkers Warned...."

On June 6, 2011, Claimant was notified that he had been found guilty as charged and was assessed a Level S 30-Day Record Suspension with a three year probationary period.

The facts indicate that on March 31, 2011, the Division Engineer, Roadmaster and two Assistant Roadmasters arrived at a derailment site at Crossover 1429 in the Mykawa Yard, wherein an accident had happened the day before. The Carrier Officers approached the work group that was cleaning up the area and were stopped by the Foreman who gave them a job briefing. The Foreman told them they were working using a lookout form at which time the Division Engineer noticed the backhoe that was being operated by the Claimant was fouling the track. Because of that alleged safety violation the Officers removed the work group from service and subsequently a formal Investigation was called concerning the Claimant's conduct while performing services as a Backhoe Operator.

It is the Organization's position that a review of the transcript reveals that Foreman Vega was the employee in charge at the derailment site and Claimant was the Backhoe Operator assigned to assist the section forces in the clean-up of the area. It asserted the combined crew met in the Section's work truck for a job briefing at which time the Foreman/EIC (employee in charge) Vega, briefed the group that he had talked to the Yard Master and had permission to be working at that location and he (Vega) would be acting as Lookout. The plan for the job was the Section forces were going to walk a stretch of yard track picking up material and depositing it in the front bucket of the backhoe as it followed behind parallel to the tracks. The Claimant testified on page 23 of the transcript the Foreman instructed him to swing the boom across the track to knock a pile of dirt down during which time he fouled the track for about five seconds. It further argued that the Claimant thought the Foreman had secured permission for his backhoe to foul the track and according to it he acted in good faith. It argued the Carrier did not meet its burden of proof and because of that it concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that when Foreman Vega instructed the Claimant to swing his boom across the track and knock down a pile of dirt with the backhoe bucket the Claimant should have questioned that directive and voiced his opposition because during the job briefing

there was no discussion that the backhoe would be fouling the tracks. It argued he had a responsibility to assure that he was working safely so as to protect himself, his co-workers and equipment on the track and in this instance he failed to do such. 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 it is determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

The Board notes that this is a companion case to Award Nos. 115 and 118 which involves the same incident, but different Claimants.

The Carrier's argument is that the Claimant had the right to challenge Foreman Vega's directive as it was an unsafe act and he would not have been disciplined as he had a right to make a good faith challenge and he should have exercised that challenge because he knew they had not discussed his backhoe fouling the track whereas the Organization argued that the Claimant thought that the Foreman had secured permission to foul the track.

On page 23 of the transcript the Claimant was questioned about the incident as follows:

"Aaron Whitney: Did you have proper protection to foul the track with the piece of machinery?"

Reggie Whitaker: At the time I thought we did because, like I said, Mr. Vega anointed himself as the uh, look out, but now I know that we didn't have a flag.

Aaron Whitney: Uh-huh. Is it your responsibility before you foul a track to know your protection.

Reggie Whitaker: Yes, it is.

Aaron Whitney: And in the sense that the conditions had changed, you weren't fouling the track before when ya'll were picking up material?

Reggie Whitaker: We were not.

Aaron Whitney: When the conditions changed that you required you to, you know, foul the track, a job briefing should have been held. Is that correct?

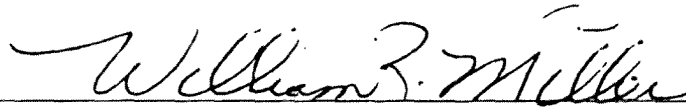
Reggie Whitaker: As the rules imply, yes." (Underlining Board's emphasis)

Claimant admitted in the aforementioned testimony that it was his responsibility to know his protection and he only thought he had protection and he further acknowledged that when the work conditions changed there should have been a job briefing. The Organization is correct that the Claimant fouled the track for a very brief time, however, that does not negate the fact that substantial evidence was adduced at the Investigation that the Claimant was guilty as charged.

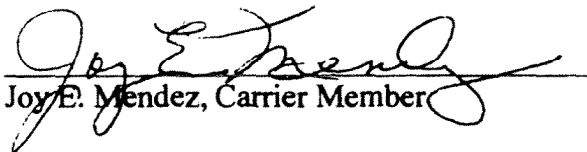
The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately five years of service with an unblemished record, however, Claimant's violation was serious because working without protection can lead to catastrophic results. The Carrier's discipline was corrective in nature and the Board finds and holds that the discipline assessed was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA) and it will not be rescinded because it was not arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Joy E. Mendez, Carrier Member



David D. Tanner, Employee Member

Award Date: May 21, 2013