

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 95, (Case No. 95)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, 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 August 25, 2011 when Claimant S. F. David (6591630), was Dismissed for collision with a Ballast Regulator machine while operating a Track Stabilizer machine on July 25, 2011. The Carrier alleged violation of GCOR 1.6 Conduct, MOWOR 6.51 Maintaining a Safe Braking Distance and MOWSR 1.2.3 Alert and Attentive.**
- 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 pay for wage loss commencing when Claimant was withheld from service and continuing forward and/or otherwise made whole."
(Carrier File No. 14-11-0194) (Organization File No. 170-1313-112.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 July 25, 2011, Claimant was directed to attend a formal Investigation on August 2, 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 collision with a Ballast Regulator Unit number X0600299 while operating a Track Stabilizer on TSCX0002, causing

personal injury to another employee at MP 56.7 on the Gallup Subdivision on Main 2 at approximately 7:45 AM on Monday, July 25, 2011.

This investigation will determine possible violation of GCOR 1.6 Conduct, MOWOR 6.51 Maintaining a Safe Braking Distance, and MOWSR 1.2.3 Alert and Attentive."

On August 25, 2011, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the Organization's position that the Claimant was disciplined and prejudged before the Investigation as he was taken out of service prior to the Hearing. It further suggested there may have been improper coaching in the preparation of witness Haley's statement and on that basis Claimant was denied his right to a "fair and impartial" Investigation and the claim should be sustained without even reviewing the merits. However, if the merits are examined it argued that the transcript indicates that the Operator of Ballast Regulator Unit, Mr. W. Haley was not certain that he notified the Claimant on the correct channel that he had stopped his machine. According to Organization the Claimant was attentive to moving his machine while reviewing the roadbed ballast as to whether it had been properly stabilized when last worked on and because he received no call from Haley the collision occurred. It further argued that the record does not conclusively prove that the "stop call" was made on channel 66 or 87 or that it was even made. It reasoned because of that the Carrier did not meet its burden of proof. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that on the date of the incident Claimant was not attentive to the safe operation of Track Stabilizer Machine he was operating when it collided with a Ballast Regulator causing personal injury to a co-worker and substantive damage to the Ballast Regulator. It argued that the record indicates that the Claimant admitted in his statement and in his testimony several times that he was guilty of running his machine into the other machine operated by W. Haley. It further argued that the discipline was appropriate and 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 that the Claimant was denied his "due process" Agreement rights. It is determined that the Investigation and appeal process met the guidelines of Rule 40 the Discipline Rule of the former BN Agreement.

Review of the transcript reveals that multiple witnesses including the Claimant testified that there was no brush or obstructions that hindered the Claimant's view of the track he was traveling when the accident occurred. Roadmaster Devine was questioned about the incident on page 36 of the transcript as follows:

"Sheri Ellis: And, in your words Mr. Devine, what did, how, how did Mr. Stanley, uh, or I'm sorry, Mr. David, um, how did he describe the incident that happened? What was his statements to you?

Justin Devine: Uh, Mr. David's statements to me, uh, he says he was traveling, he was on channel 66. Uh, when he got past the overpass he was looking around to see what needed to be broomed, what had been broomed, uh, about the ja-, the day's work activities. He said he got distracted and he never heard, uh, Mr. Haley say that he was at a stop and that he had never applied the brakes before running into the regulator. *(Underlining Board's emphasis)*

On pages 49 and 50 of the transcript W. Haley testified that he tried to call the Claimant on channel 66 and 87 to notify him that he was stopped, to no avail. On page 25 of the transcript Division Assistant Roadmaster, Southwest, J. Papenfuhs was asked the following:

"Sheri Ellis: Mr. Papenfuhs, what does Rule 6.51 indicate to you, which is Maintain a Safe Braking Distance, what does it indicate to you that is the responsibility of the Operator?

Jeremy Papenfuhs: It's the responsibility of the Operator to be able to stop at half the range of vision.

Sheri Ellis: So, Mr. Papenfuhs, if a radio had for some reason become disabled or was on the wrong channel, is there still some responsibility for that Operator to be able to stop his equipment before impact on another?

Jeremy Papenfuhs: Yes Ma'am, he should maintain a speed where he is capable of stopping at half the range of vision. *(Underlining Board's emphasis)*

Devine testified that the Claimant told him he was distracted at the time of the accident. Haley testified that he attempted to call the Claimant on Channel 66 and 87 to tell him he had stopped, without success, and Papenfuhs testified that even if the radio had malfunctioned the Claimant should have been able to stop without collision if he had been watching ahead. None of those witnesses testimony was effectively refuted. The record further reflects that the Claimant's machine was brake and stop tested and the brakes were found to be functioning properly. On page 57 of the transcript the Claimant explained why he did not see Haley's stopped machine when he stated the following:

"Stanley David: If I'm facing south, it's right here on my right side, and

the, uh, parking brake also. So, that would probably be the normal position to sit, but that day I had the seat unlocked. I had my seatbelt on and I was checking out the ballast looking backwards where we worked the other day... So I was facing that way looking at the shoulder to see how much rock I had to go and mop. And, when I turned, it was too late, the regulator had already stopped. I did not hear him or anything." (*Underlining Board's emphasis*)

Claimant clearly admitted that while moving his machine he was relying upon an oral command to stop and was not watching ahead. On page 61 of the transcript the Claimant was questioned as follows:

"Sheri Ellis: Mr. David, whose responsibility was it to stop short of the regulator on July 25th?

Stanley David: Me.

Sheri Ellis: And, did you stop short of the regulator?

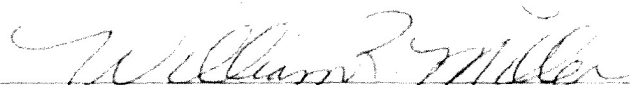
Stanley David: No. (*Underlining Board's emphasis*)

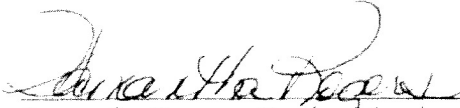
The record is clear that substantial evidence was adduced at the Investigation that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately 36 years of service with a good work record, however, this was his second accident involving his failure to maintain a safe braking distance in just over two years. The incident in this case was of a serious nature and the Board does not excuse the Claimant's behavior, however, in this instance it finds and holds that based upon the Claimant's long service time and the unique circumstances of the dispute the discipline was excessive and is reduced to a lengthy suspension which is progressive and corrective in nature and in accordance with the spirit of the Carrier's Policy for Employee Performance Accountability (PEPA). Claimant will be returned to service with seniority intact, all benefits unimpaired, but with no back pay and one Level S Violation on his record subject to the applicable review period. Claimant is forewarned that he needs to be careful to abide by all Carrier Rules, Safety Rules and Policies upon return to service.

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


Samantha Rogers, Carrier Member


David D. Tanner, Employee Member

Award Date: 9/24/2012