

The Burlington Northern & Santa Fe Rail Company
- and -
Brotherhood of Maintenance of Way Employees

Public Law Board No. 7585
Case No. 11
Award No. 11
Carrier File No. 10-12-0285
Organization File No. C-12-D040-11
Claimant: James Turek

FACTS:

On November 22, 2011, Claimant James Turek was operating a Tripp Machine on the Hannibal Subdivision; the machine is used to extract and insert ties. He struck a steel bridge causing damage to the extractor arm. The Company's investigation determined that the cause of the accident was Claimant's failure to properly stow and lock the arm for travel. The Company imposed a Level S 30-day record suspension with a three year review period. He was previously given a Level S 30-day record suspension dated March 30, 2010 for failure to secure a turntable component in the stowed position, causing damage to an automatic spiker.

CARRIER POSITION:

In the Company's view, Claimant could have been dismissed for this incident. Claimant's supervisor, Roadmaster Martin Eador, testified that as a result of the impact, the left extractor arm had a broken fitting, broken cylinders and a bent extractor arm. He estimated the repair cost at \$11,500 to \$12,000. He recalled Turek admitted there was no other operator and said "I guess I must have not done something right." Eador determined that the arm was extended two feet from the stowed position at the time of impact. He recalled that prior to the accident, Turek announced on the radio that the machine was locked up and ready for travel. According to Eador, Turek never mentioned the possibility of a failed locking device at the time.

Mechanic Jerry Stanford testified the repair costs were approximately \$12,000. He claimed his investigation showed the lock was still operational after the accident. It would not completely lock due to the bent arm, he stated, "but if you ease the arm out to where it was not binding due to the arm being bent, the locks worked perfectly." There was no air leak, he said.

Stanford explained that lock failure was highly unlikely: "If it was locked and in position, unless you flip a switch and tell it to come, tell it to unlock, it will not unlock. It is air unlock," he stated, "and the weight of the, of the, um, the lock itself is what keeps it in place. It weighs so heavy, that lock mechanism is. It cannot bounce up. It will not." He

recalled prior trouble with the air valve, but testified it was repaired prior to the incident here concerned. He concluded that the only way for the arm to have been extended is if it was improperly stowed.

In the Carrier's view, a record suspension was entirely reasonable given Claimant Turek's prior suspension.

ORGANIZATION POSITION:

The Organization faults the Hearing Officer with being anything but neutral, and asserts the Carrier failed to respond to its request for information, specifically for the machine's log.

Claimant testified that he locked up and pinned up the arm and identified himself as ready for travel. In his view, the lock failed. He explained that when the switch is switched from work to travel, the locks and workheads become inoperable. He recalled going under a bridge and feeling a "big jolt." He denied doing anything wrong and said he feared wrongdoing at the time because he was shaken up. He described prior trouble with the arm. Claimant acknowledged that he did not tell Stanford or Eador that the locks had failed.

DECISION:

The Organization's request for information was reasonable and appropriate, however the Carrier did not respond. It claims it had no obligation to respond because there is no contractual provision for discovery. The question raised is whether the Carrier's failure to respond was prejudicial to the Organization's case. The Board can find no prejudice. Stanford was an objective witness with no motivation to slant his testimony and no evident bias. His investigation established the condition of the arm in question. Both Claimant and Stanford were familiar with the history of the machine and described its recent repair. Their testimony was not in contradiction. It follows that Claimant was not denied a fair and impartial hearing.

The Organization points out that the Carrier provided no documentation to support its allegation that the damage from the incident reached \$12,000. This lapse was not adequate to invalidate the discipline. The cost of the repair was not singularly determinative of the level of negligence involved, and was substantiated by two Carrier witnesses.

Claimant was the only operator at the time in question. He apparently thought and believed that the arm was secure because he announced it on the radio. However, the Company's investigation clearly showed that the locks were functional even after the impact of the bridge. This fact is not consistent with the malfunction Claimant described. Stanford's testimony established convincingly that the lock would not give way because

it takes a positive force to force it open due to its weight. This evidence is persuasive; no eyewitnesses are needed in order to reach the conclusion that Claimant Turek failed to properly secure the extractor arm before moving the Tripp Machine. Given his prior suspension for a similar offense, his Level S 30-day record suspension with a three year review period was not excessive.

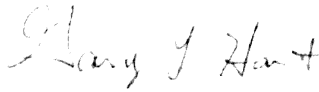
AWARD:

The claim is denied.

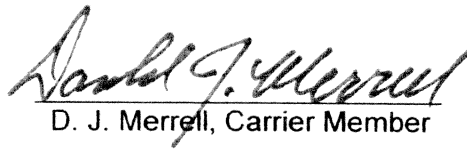
August 30, 2013; Cleveland, Ohio



Patricia T. Bittel, Neutral Member



Gary Hart, Organization Member



D. J. Merrell, Carrier Member