

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 14083
Docket No. 13985
14-2-NRAB-00002-140016

The Second Division consisted of the regular members and in addition Referee Joseph M. Fagnani when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen-Division of TCU/IAMAW
(BNSF Railway Company)

STATEMENT OF CLAIM:

- “1. That the Burlington Northern Santa Fe violated the terms of our current Agreement, in particular Rule 35(a), when on December 27, 2012, Carman Justin McGowan was issued discipline in the form of a 30 day Level S Record Suspension and a three (3) year probation for alleged failure to inspect the area to the rear of the vehicle and alleged negligence in reporting an incident on November 3, 2012.
2. That accordingly, the Carrier be ordered to expunge the personal record of the Claimant, Carman Justin McGowan, of all reference of the discipline assessed.”

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was assigned as a Carman at the Carrier's Alliance Car Facility in Alliance, Nebraska. The Claimant was assessed a 30-day record suspension with a three-year probationary period following a formal Investigation in connection with the following:

“ . . . your alleged failure to inspect the area to the rear of the vehicle to ensure that no obstruction was in the path of movement and negligence in reporting the incident to the proper manager on November 3, 2012, at approximately 0500 while employed as a Carman at the Alliance Car Facility. The date BNSF received first knowledge of this alleged violation is November 05, 2012.”

The underlying facts are that on November 5, 2012, the Claimant was working as part of a two-man utility crew with Carman Jason Trickler. The evidence of record indicates that at approximately 5:00 A.M., the Claimant was a passenger in a company truck being operated by Carman Trickler, when Trickler pulled across a crossing, abruptly stopped and began backing up about ten to 15 feet. Both the Claimant and Carman Trickler testified that while backing up, they heard a thump or felt a bump and that when they exited the truck to inspect the area, they saw an orange cone next to a blue flag pole that was not upright. There was video presented at the Investigation showing a company truck backing up and making an abrupt stop and the driver and passenger exiting the truck and inspecting the rear of the vehicle and the blue flag stand lying down on the ground. Video was also presented showing the blue flag stand in an upright position several hours prior to the video showing the truck backing up.

While the Organization took the position that the videos do not establish that the truck involved in the video was that occupied by the Claimant and Carman Trickler, or that the truck actually hit the blue flag pole, the Board finds that the record evidence, while not totally conclusive, is of a substantial and credible nature so as to support the Carrier's determination that the truck was indeed the truck being operated by Carman Trickler with the Claimant as the passenger and that the truck did hit the blue flag pole.

However, the Board does not find that the evidence of record supports the Carrier's determination that the Claimant violated Mechanical Safety Rule S-12.8, which requires that prior to backing up, the area to the rear must be inspected to insure a clear path and that someone, in this case the Claimant, should have been

positioned near the back of the vehicle to guide the movement. While the Claimant does not deny that he was not positioned at the rear of the vehicle prior to the reverse movement, both Claimants' testimony as well as the video evidence show the truck abruptly stopping and being reversed before the Claimant would have had a chance to exit the vehicle and guide the movement. Also, Carman Trickler testified that he did not stop the vehicle in such a manner so as to allow the Claimant the opportunity to exit the truck and provide the necessary protection. Accordingly, the Board finds that the portion of the charge relative to the Claimant's alleged failure to inspect the area to the rear of the vehicle cannot be upheld.

Relative to the charge that the Claimant was negligent for failing to report the incident to the proper Manager, the Board notes that there is no dispute that neither the Claimant nor Carman Trickler reported that they had knocked down the blue flag pole. The Claimant testified that when he exited the truck with Carman Trickler after hearing a thump, he observed that the blue flag pole was lying on the ground and also observed an orange cone next to the flag. After discussing this matter with Carman Trickler, who was senior to him, the Claimant testified that he deferred to Carman Trickler's assessment that the truck had only hit the cone and that the blue flag pole had been previously hit by another vehicle or piece of equipment. While the Claimant may have demonstrated poor judgment in not realizing that the truck may have also hit the blue flag pole, the Board does not find that the Claimant willfully attempted to cover up this incident by not reporting it to the appropriate management Official. Based on the particular facts in this case, the Board finds that the Carrier's determination that the Claimant was negligent in not reporting the incident cannot be upheld.

In summary, the Board finds that the Carrier failed to sustain its burden of proof and rules that the assessed discipline should be removed from the Claimant's record.

AWARD

Claim sustained.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 25th day of November 2014.