

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41459
Docket No. MW-41697
12-3-NRAB-00003-110348**

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S thirty (30) day record suspension and a one (1) year probation] imposed upon Mr. M. King by letter dated February 4, 2010 for alleged violation of Maintenance of Way Safety Rule (MOWSR) S-12.1.1 Operate the motor vehicle in a careful and safe manner and MOWSR S-12.8.1 - Backing - Vehicles in connection with his alleged failure to operate a vehicle in a careful and safe manner when driving a vehicle backwards that struck a power pole at approximately 1115 hours on December 23, 2009 on the right of way maintenance road near Mile Post 36.5 on the Bayside Spur, Line Segment 50, Everett Yard at Everett, Washington while working as grapple truck driver (TCGX0119) headquartered at Interbay (Seattle), Washington on duty 0630 hours, December 23, 2009 was improper, unjust, on the basis of unproven charges and in violation of the Agreement (System File S-P-1486-G/11-10-0209 BNR).**

(2) As a consequence of the violation referred to in Part (1) above, Claimant M. King shall now receive the remedy prescribed by the parties in Rule 40(G)."

FINDINGS:

The Third 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.

This case involves a Level S 30-day record suspension and one year of probation imposed on M. A. King for his alleged "failure to operate a motor vehicle in a careful and safe manner, when, while driving backwards, [his] vehicle struck a power pole" The Organization protests the discipline on three different grounds. It asserts that the Carrier "failed to sustain its burden of proof on the merits;" the discipline imposed, even assuming guilt, was "grossly disproportionate to the alleged offense;" and the Carrier committed certain "procedural due process violations" which, in any event, justify setting aside the discipline.

The essential facts are for the most part, not in dispute. King, an experienced Truck Driver, was asked to make a delivery to an area with which he was not familiar. His supervisor told him to secure driving instructions from another employee who described the route to follow in order to avoid having to back up. That was important because of certain limitations of the roadway to his destination. King had no difficulty getting to his destination. He noted, however, that he had to travel on a narrow, gravel road and that he passed a power pole along the way, which was in the middle of the road. He made the delivery. Then, he attempted to follow the route given him, which meant continuing in the same direction of the

road to avoid any need of backing up. However, he soon realized that his truck was too wide to allow him to follow the recommended route and get off of the Carrier's property. And, in his view, the truck was also too wide to allow him to turn his truck in the opposite direction to make a U-turn.

King believed the only way to return was to back up his truck on the road he had been traveling on. That meant a back-up of roughly three-quarters of a mile. He began to do so, using the side view mirrors on the truck and driving slowly. His vision from his rear-view mirror was partially blocked. And on one side of the road there was an embankment with a steep ten to 15 foot drop. He successfully avoided the edge of the embankment by driving several feet toward the center of the road. But he evidently did not remember the power pole in the middle of the road or, if he did, he did not allow himself enough leeway. The result was that the right rear of his truck collided with the pole. Both the truck and the pole were damaged.

King got out of the truck, saw the damage, and promptly reported what had happened to supervision. When Roadmaster Heille arrived on the scene, he questioned King, who admitted that he had not seen the pole as he backed up. King's description revealed that he had not gotten out of the truck at any point following his delivery until the accident happened. Nor had he sought help from anyone to serve as a ground lookout to advise him of any obstruction as he backed out.

Given this information, the Carrier conducted a preliminary investigation, which led to a formal Hearing. And, as mentioned earlier, the Carrier found King guilty of violating the following Operating and Safety Rules:

"S 12.1.1. General Requirements

Every company driver must . . . Operate the motor vehicle in a careful and safe manner

S 12.8.1 Backing

Position the vehicle, when possible, to avoid backup movement.

Before backing, inspect areas to the rear to verify that no personnel or obstruction are in the path of movement.

When backing vehicle . . . other than automobiles and pickup trucks:

- Position someone near the back of the vehicle to guide movement, when available**
- Stop if the person guiding the movement disappears from front view”**

The Organization protested the discipline. When the parties were unable to resolve their differences, the Organization appealed the dispute to the Board.

There are three distinct claims by the Organization on King’s behalf. It believes that any one of the three, if correct, warrants setting aside the discipline.

First, the Organization contends that the Carrier failed to prove the safety violation in question. However, King’s own testimony at the Investigation plainly establishes his guilt. He admitted that he backed his truck into a power pole; he admitted that his vision through the side mirrors of the truck did not provide him with a clear view of what was directly behind him as he backed up; he admitted that he did not request ground help to guide him in what was a difficult back-up move of some three-quarters of a mile; he admitted that he did not get out of the truck at any time during the back-up move prior to the collision in order to check on whether there were any obstructions in his path. Given these circumstances, our conclusion is that he did not operate his vehicle in “a careful and safe manner.” Disciplinary action was justified.

King’s care in realizing that he could not safely drive away following the delivery, in the manner recommended to him, seemed reasonable. His decision to

back up may also have been reasonable. His initial backing up, prior to striking the power pole, may have been skillful. But none of these admirable attributes serve to relieve him from his responsibility for attempting such a difficult and questionable move without trying to secure ground help. He made no such effort even though the Safety Rules call for such help, or at least a real effort to obtain help.

Second, the Organization contends that the discipline imposed was “excessive” given the circumstances King was facing. Our comments in the preceding paragraphs recognize those circumstances. But the Safety Rules allow a Driver a good deal of discretion in deciding when to stop, when to take extra precautions, when to seek help. It seems obvious that King, in a display of self-confidence, overestimated his own ability and underestimated the dangers he faced. The Safety Rules call for the Driver to be cautious when potentially dangerous moves are made. King chose action over the obvious need for caution.

He failed to seek advice from supervision as to what course of action was appropriate. And he failed to leave the truck to check (or double-check) what was behind him as he backed up. Such inaction could potentially have resulted in personal injury to others or even more substantial equipment damage. The fact that his carelessness did not have such serious consequences does not detract from the seriousness of his offense. We believe the discipline imposed was well within the Carrier’s range of discretion. The “Policy for Employee Performance Accountability” does not call for a different conclusion.

Third, the Organization contends that an “incomplete transcript” and certain alleged Agreement “due process” violations regarding the behavior of the Conducting Officer at the Hearing warrant nullifying the discipline. The Board carefully examined the record made by the parties at that Hearing and finds no persuasive grounds for the relief sought by the Organization. Accordingly, the claim is denied.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of October 2012.