

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41491  
Docket No. MW-41521  
12-3-NRAB-00003-110090**

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

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

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. L. Stubbs, Sr., by letter dated February 4, 2010, for alleged violation of MOWOR 1.1.2 Alert and Attentive and MOWOR 1.6 Conduct when the vehicle he was operating struck the bridge guard at the east end of the Western Avenue Yard on December 21, 2009, while assigned as a grinder on Welding Gang #2, was arbitrary, capricious, unwarranted and in violation of the Agreement (System File C-10-D070-6/10-10-0209 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Stubbs, Sr. 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 arose as a result of an incident on December 21, 2009, involving L. Stubbs, Sr. who had six and one-half years of seniority as a Grinder. Early that afternoon, he was driving a section truck to deliver a drill in the Western Avenue Yard located in Chicago, Illinois. At some point, the road narrowed to an eight-foot wide corridor between railroad tracks on one side and a bridge overpass on the other. The overpass was cordoned off by a guard rail. The parties appear to agree that Stubbs' section truck was too wide to safely pass through this corridor without hitting the guard rail or the tracks. And Stubbs himself agrees.

What happened next is very much in dispute. According to Stubbs, he had not experienced any difficulties driving up to the point where the corridor began. He was aware of snow and some ice on the road. He slowed down because he realized his truck was too wide to pass through the corridor. As he placed his foot on the brake pedal, his foot slipped onto the accelerator pedal. (Stubbs believes this may have been due, in part, to the fact that the truck seat was broken. His contention does not appear to have been investigated and the Board has no way of knowing whether, and to what extent, a broken truck seat may have contributed to the accident.) He immediately put his foot back on the brake pedal. The result was that the truck skidded forward and sideways. His foot remained on the brake, but the skid caused the truck to hit the guard rail on the bridge. Because two of the truck wheels had passed over a rail, he was unable to drive away. He promptly reported the accident. When he left his truck cab and examined the area in which he had skidded, he contends there was a thick layer of ice beneath the snow. That contention was not disputed by the Carrier. He insists that he never intended to drive the truck through the corridor but, rather, to use some alternate path to deliver the drill.

According to the Carrier, it believes Stubbs' true intentions were revealed by what he told Roadmaster J. Robinson shortly after the accident. Robinson alleges that his questions were based on an "Incident Questions" form developed by the Carrier for

a “Derailment and/or signal violation.” Question 14 was, “Do you feel you are familiar with this yard subdivision, location?” And Robinson wrote down on the form Stubbs’ answer, “I was familiar, I was overconfident that I could fit between the bridge and the track.” (Emphasis added) The Carrier relies heavily on what it heard as an admission of wrongdoing, namely, that he could pass safely through the corridor even though he elsewhere appeared to recognize that it was unsafe to attempt to travel through the corridor in this section truck. It relies also on Roadmaster Lauderdale’s testimony at the formal Investigation which it believes corroborates what Robinson heard and wrote onto this form.

The Organization challenges this latter evidence and testimony for several reasons. It notes that Stubbs flatly denies making the statement quoted above, that Lauderdale’s testimony should not be credited because he was not present when Robinson interviewed Stubbs, that his attempt at corroboration was based on what he heard through an open telephone line, that Lauderdale’s testimony was in any event unpersuasive, and that Robinson never asked Stubbs to confirm in writing what he (Robinson) had written down with respect to his answer to the question quoted above. For these and other reasons, including Stubbs’ past disciplinary history, the Carrier believes it had “substantial evidence” to support its discharge action.

The Carrier concluded, following its preliminary and formal Investigations, that Stubbs had violated both Operating Rule 1.1.2 (Alert and Attentive) and Operating Rule 1.6 (Conduct). It issued a notice of discharge to Stubbs on February 4, 2010. The Organization protested on several grounds: that the Carrier (1) “failed to carry its burden of proof on the merits” (2) “failed to make proper credibility findings in this case . . .” and (3) “failed to properly offer Claimant [Stubbs] alternate handling on this issue, under the Carrier’s PEPA/SIAP policy.”

It is important, at the outset, to identify the precise nature of the Carrier’s charge against Stubbs. An accident occurred while he was driving a service truck; he lost control of the truck because of snow/ice on the road, and skidded into the guard rail on one side of the bridge. It was later estimated that the damage to the truck and guard rail would cost \$3,200.00 to repair. Moreover, given the width of the corridor Stubbs was approaching and given the width of his service truck, he knew that his truck could not be safely driven through the corridor. To this point at least, there is no disagreement.

The Carrier insists, however, that Stubbs intended to drive the truck through the corridor knowing the road was impassable and that the accident happened as he drove into the corridor. It asserts that Stubbs, given these circumstances, should not even have approached the corridor, and that his failure to be “alert and attentive” to these risks was properly construed as “negligence.” The Organization, on the other hand, insists that Stubbs was fully aware of the risks, that he had no intention of driving through the corridor, that he put his foot on the brake pedal to stop the truck just before the point at which the road narrows, that he intended to stop and find another path to where he wished to go, and that he then skidded to one side of the road and lost control of his truck because he was on a hidden slab of ice. It argues that, given these circumstances, the accident cannot be said to have been caused by Stubbs’ “negligence.”

It should be apparent, from what we have already said, that this case turns largely on credibility. After a close review of the record evidence and reasonable inferences drawn therefrom, the Board finds Stubbs’ testimony flawed in several critical respects.

First, he testified that he knew as he drove toward his destination that the road ahead of him would come to the so-called corridor which was “impassable.” He knew too that there was a way to circumvent the corridor, through a path available at some point before reaching the corridor. He chose instead to drive up to the point where the corridor began. He never explained why he drove further than was necessary other than to mention that he could always have backed up his truck to reach the alternate path with the help of someone signaling him from the ground. His action strongly suggests that he really did intend to drive through the corridor as the Carrier asserts.

Second, that intention to go through the corridor, accepting the large risk involved, was illustrated by the question/answer exchange between Roadmaster Robinson and Stubbs shortly after the accident. Robinson asked whether he was familiar with the area involved; Stubbs answered, “I am familiar, I was overconfident that I could fit between the bridge and the track.” Those words are tantamount to an admission that he drove into an area he knew to be “impassable.” Such behavior reveals that Stubbs was “negligent.”

Third, Robinson was a persuasive witness. During the preliminary investigation, he asked Stubbs a number of questions and wrote down his answers. Unfortunately he did not ask Stubbs to read or otherwise confirm what he had written down. But

nothing in the record evidence, including the transcript of the formal Investigation, serves to undermine Robinson's credibility. And Stubbs did not really challenge the accuracy of Robinson's account of the other questions and answers. Nor is there any evidence to suggest that Robinson harbored some ill-will toward Stubbs. The Board accepts Robinson's testimony.

Fourth, it is worth noting that the Organization's March 9, 2010 letter protesting the discharge nowhere asserts that Stubbs was innocent of any wrongdoing. Rather, the major reason for its appeal was that "the discipline assessed is excessive . . . because . . . the charges against Mr. Stubbs was not all his fault . . . referring to a broken driver's seat on the truck and the snow/ice condition of the road. But it should be emphasized again that the primary cause of the accident was Stubbs attempting to drive his truck in an area he admittedly knew to be "impassable." That constituted "negligence." The fact that the immediate cause of the accident was a slab of ice on the road does not excuse the fact that he should not have been at the entrance of the corridor and he should not have attempted to drive through the corridor.

Given such "negligence," discipline was plainly justified. The remaining question is whether discharge was an excessive penalty. Stubbs was hired in May 2003 and discharged in December 2009. During his relatively brief period of employment, he received two suspensions for violations of the Carrier's attendance policy, four record suspensions in connection with his truck driving duties, and finally a discharge for the negligence described above. Consider, for instance, the final two to three months of his employment. In early October 2009, his failure to load a vehicle properly prompted a record suspension; in mid-November 2009, his truck collided with another vehicle due to his "careless and negligent" work, prompting a 30-day record suspension; in the latter part of December 2009, his negligence in the instant case prompted his discharge. And the protest against the mid-November 2009 discipline has already been denied by the Board in Third Division Award 41456. It seems clear that the Claimant has not responded positively to past discipline. Under these circumstances, the Board cannot find that discharge was an excessive penalty.

The Organization raises other procedural objections to the discharge. First, it asserts that ". . . the Carrier failed to make proper credibility findings in this case, and thus its ultimate finding of guilt, based thereupon, is without proper foundation." This argument, however, ignores the fact that credibility was at the heart of this dispute from the very outset. Both parties must have realized that. True, the Carrier's notice of discharge did not expressly refer to "credibility," but a thorough reading of the

transcript reveals that the parties had quite different views as to how and why the accident occurred. Any failing in how the notice of discharge was written certainly did not prejudice the Organization's defense of Stubbs.

Second, the Organization asserts that “. . . the Carrier failed to properly offer Claimant alternative handling under the Carrier's PEPA/SIAP Policy.” Many prior Board Awards have made clear that whether this Policy should be invoked is a matter within the Carrier's discretion. The Carrier's refusal to do so was not, under the circumstances, an abuse of that discretion. Given the totality of the circumstances in this case, the claim must be denied.

**AWARD**

Claim denied.

**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 13th day of December 2012.