

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41456
Docket No. MW-41565
12-3-NRAB-00003-110086**

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 three (3) year probation period] 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 dump truck he was operating was involved in an accident on November 19, 2009 when turning into the BNSF entrance while driving westbound on Ogden Ave., while assigned as a truck driver, was arbitrary, capricious, unwarranted and in violation of the Agreement (System File C-10-D040-16/10-10-0210 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.

On November 19, 2009, L. Stubbs, Sr., was working as a Truck Driver hauling ballast in a large truck of greater than 16,000 pounds of gross weight. His last delivery that day was from Union Avenue in Chicago to the Carrier's Cicero Yard. He approached Cicero Yard on Ogden Avenue, a four-lane highway in that area, two lanes to the west and two lanes to the east. He was driving westbound in the left lane. In order to get off at the Cicero exit ramp, he needed to change lanes twice, first to the right lane and then after establishing his truck in that lane, a further move to the exit lane. It was 5:00 P.M. or so when he reached this particular area and traffic was heavy.

According to Stubbs, the first of the moves was no problem. He checked his rear-view mirror and when the opportunity presented itself, he moved into the right lane. He claims that he established the truck's position in the right lane and then again sought to make a move into the exit lane. Actually, the police diagram of the accident scene reveals that he was already at the exit ramp when the latter move occurred. Stubbs insists that he had once again checked the rear-view mirrors to be sure the exit lane was clear. He testified that he saw no problem in moving from one lane to another. However, before he completed his move, a Cadillac sedan drove into the truck just behind the truck's passenger seat. The Cadillac sedan was traveling very fast and was unable to avoid the collision. Neither Stubbs nor the Cadillac driver was injured. But the Carrier's truck suffered substantial damage, which the Carrier estimated would cost \$5,800.00 to repair. The Cadillac sedan was "totaled."

The police appeared on the scene shortly after the collision. They photographed the two vehicles, and took Stubbs' statement, which reads in part as follows:

“... [I] was hit by a speeding vehicle on the right side [of my truck] as I was coming down Ogden Ave. westbound and was turning right into the westbound Ogden . . . ramp . . . [I] had slowed down to enter the ramp, checked both [side and rear-view] mirrors for traffic . . . Ogden [Ave.] was clear on both sides . . . of the truck. I began to turn up the ramp and was hit [by] the vehicle . . . [which] was speed [ing]. . . .”

There were lines of skid marks on the road, which strongly suggested that the Cadillac driver was moving at a high rate of speed and sought, unsuccessfully, to stop his car short of a collision.

The Carrier determined, following a formal Investigation, that Stubbs had not been sufficiently “alert and attentive,” and that he had been “careless.” It relied on Safety Rules 1.1.2, 1.6.1, and 1.6.2. It assessed Stubbs a “Level S 30-day record suspension” and placed him on probation for a period of three years. The Organization protested the discipline. And when the parties were unable to resolve their differences, it appealed to the Board.

The core issues here are whether Stubbs was “careless” in how he drove his truck at the time in question and, if so, whether his “carelessness” was the cause, in whole or in part, of the collision. The parties offered conflicting views of what happened. The Organization contends that Stubbs took care to check his rear and side-view mirrors so as to assure himself that he could safely move out of the right lane and into the exit lane (ramp). It insists that he was not “careless.” The Carrier disagrees, alleging that the location of the two vehicles at the moment of the collision shows that he could not have checked the exit lane (ramp) immediately before driving onto it because, had he done so, he would have had to have seen the Cadillac sedan. The Carrier believes, in other words, that the collision was due in large part to Stubbs’ failure to exercise an appropriate degree of care.

The Carrier’s case is supported by “substantial evidence.” First, the police appeared on the scene shortly after the collision. From what they saw and from what they were told by the drivers, the police drew a picture (a diagram) of the positions of the two vehicles at (or immediately after) the moment of impact. That diagram, which was introduced as an exhibit at the formal Investigation, indicates that Stubbs’ truck was struck by the Cadillac after only part of it had moved into the exit lane (ramp).

The accuracy of the diagram was not challenged at the Investigation. Hence, it is reasonable to conclude that Stubbs would have been able to see the oncoming Cadillac in the exit lane had he looked at the side mirrors as he claimed.

True, the Cadillac driver was probably moving at an excessive speed, for even after he became aware of Stubbs' truck and applied his brakes, he could not avoid a collision. The skid marks from his tires suggest that the driver may have been traveling too fast, and thus contributed to the likelihood of an accident. But even if that was true, it would not excuse Stubbs' carelessness in not being aware of the oncoming Cadillac. Stubbs' claim that "traffic" was "clear on both sides," which includes the exit lane, is simply not persuasive.

Moreover, the police diagram shows that Stubbs' move to the right lane occurred at or about the same time that he reached the exit ramp, although he never was actually on the exit ramp. Had he moved to the right lane earlier, he certainly could have made the necessary further move to the exit lane much earlier. He offered no real explanation for not doing so. Instead, he sought to make this transition when he was already quite close to the ramp with little time available to check for traffic. He simply failed to allow himself enough leeway to position himself to exit the highway at the Cicero ramp. He never really established a position for his truck in the exit lane.

True, the police apparently did not ticket Stubbs for a violation of State, County or City regulation. But such restraint, whatever the reason, does not require the Board to rule in Stubbs' favor. The laws and ordinances applicable to a driver's behavior are not the same as the disciplinary standards under a collective bargaining agreement. Even had the police determined that Stubbs was guilty of a driving violation, that finding would not be binding on the Board.

Our ruling is that Stubbs was guilty of "careless" operation of the Carrier's truck and that the assessed discipline was justified.

The other arguments raised by the Organization in defense of Stubbs are also unconvincing.

The disciplinary action taken against Stubbs was not "excessive." During the foregoing period between December 2004 and November 2009, he had been suspended

for misconduct on six occasions – once for careless driving, once for failing to properly load a Carrier vehicle according to governmental regulation; twice for absenting himself without proper authority, and twice for sleeping in a Carrier vehicle while assigned as a Truck Driver. The instant suspension for careless operation of a Carrier vehicle is the seventh offense within a relatively brief period. Stubbs has yet to demonstrate that he can respond to progressive discipline.

The Carrier did refuse to invoke the Safety Incident Analysis Process when requested to do so by the Organization. But that refusal did not violate any of Stubbs' contractual rights. Prior Awards have held that the SIAP is a matter within the Carrier's discretion. And the evidence does not reveal that this Management refusal was an abuse of such discretion. Finally, the Organization notes the error made in the police diagram of the collision. The police mistakenly labeled the Cadillac as being driven by Stubbs and the Carrier truck being driven by the Cadillac owner. This mistake, however, must have been immediately apparent to anyone familiar with this dispute. It could not have affected the Carrier's decision and did not adversely affect Stubbs' rights. It does not warrant overturning the assessed discipline. Accordingly, the claim is 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 16th day of October 2012.