

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41873
Docket No. MW-41880
14-3-NRAB-00003-120187**

The Third Division consisted of the regular members and in addition Referee William R. Miller 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 [Level S thirty (30) day record suspension and a three (3) year review period commencing December 7, 2010] imposed upon Mr. R. Martens for alleged violation of MOWOR 1.1.2 Alert and Attentive for alleged failure to be alert and attentive when operating a backhoe that backed into a signal maintainer's vehicle at approximately 1345 hours on October 20, 2010 at or near Mile Post 539.8 on the Black Hills Subdivision was arbitrary, capricious, unwarranted and in violation of the Agreement (System File C-11-D040-12/10-11-0145 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Martens 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.

The undisputed facts indicate that on October 20, 2010, the Claimant was regularly assigned as a Machine Operator with Gang TMOX3261, and on that date the Claimant's assigned machine was a backhoe, which was equipped with a tamping attachment that was connected to the articulating arm at the rear of the machine. The Claimant's task for October 20 was to use his backhoe to assist with the undercutting of the track surface, removing the spoils and then placing and tamping new ballast near Mile Post 539.8 on the Black Hills Subdivision. At approximately 1:45 P.M. the Claimant's backhoe made contact with a parked Carrier vehicle, and because of that incident, the Carrier subsequently chose to bring charges against the Claimant.

On October 25, 2010, the Carrier directed the Claimant to report for a formal Investigation on November 3, which was mutually postponed until December 2, 2010, concerning, in pertinent part, the following charge:

“ . . . for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to be alert and attentive while operating a leased backhoe, resulting in you backing into a Signal Maintainer's vehicle #23727 causing damage to the vehicle at approximately 1345 hours on October 20, 2010 at/or near MP 539.8 on the Black Hills Subdivision, while assigned as a Group 2 Machine Operator on Gang TMOX3261, temporarily headquartered at Newcastle, Wyoming.”

On December 7, 2010, the Claimant was notified that he had been found guilty as charged and was assessed a Level S 30-Day Record Suspension with a three-year Review Period.

It is the position of the Organization that the Carrier failed to meet its required burden of proof in this dispute. It argued that the Carrier was obligated to present substantial evidence that the Claimant failed to properly plan his job activity, or that he failed to be alert and attentive of the safety of himself and other employees. It asserted that while the record shows that a collision took place, there was no evidence presented that the Claimant failed to comport with the Rule with which he was charged on October 20, 2010. It further argued that the only direct evidence in the record is that the Claimant planned his work, took a safe and reasonable course of action and was alert and paying attention as he discharged those duties. Lastly, it argued that if the Carrier had proven its charges, which it did not do, the discipline assessed by the Carrier was excessive for the Claimant who had approximately 17 years of commendable service. It concluded that the Carrier did not meet its burden of proof and it requested that the discipline be set aside and the claim sustained as presented.

It is the Carrier's position that there were no procedural errors in the handling of the Claimant's case and the record shows that on October 20 the Claimant was not alert or attentive to his duties as he backed his backhoe into the side of a Carrier pickup. It argued that the damages were clear and not of a minor nature as evidenced by photographs taken of the vehicle. It further argued that if an employee had been between the Claimant's backhoe and the pickup which the Claimant admitted to striking, the Claimant's violation of MOWOR 1.1.2 could have had catastrophic results. The Carrier further asserted that the discipline was issued in accordance with its Policy for Employee Performance Accountability (PEPA) and that the Claimant was already on a Level S, Conditional Suspension for his violation of Rule 1.5, concerning a first time violation, positive drug screen and was actually granted leniency with the issuance of this Level S 30-Day Record Suspension and three-year probation. It closed by asking that the discipline not be disturbed.

The Board thoroughly reviewed the transcript and record of evidence and determined that the Investigation was "fair and impartial" and the Claimant was afforded his "due process" Agreement rights.

On the date of the incident under charge, the Claimant, a Group 2 Machine Operator, was operating a backhoe and at approximately 1:45 P.M., the Claimant

had just finished dumping some ballast on the shoulder of the track and began to back up.

During the Investigation, the Claimant was questioned about the incident as follows:

“David Grove: Did you back into the vehicle?”

Robert S. Martens: Yes I did.

David Grove: How can it not be guilty then?

Robert S. Martens: I, I'm stating that I was being alert and attentive.

David Grove: Mr. Martens, if you were alert and attentive, how did the tamper on the backhoe strike the vehicle behind you?

Robert S. Martens: I looked behind me, and when I turned to the left, the only mirrors on the backhoe is a small one inside the cab, and when I saw the pickup I stopped, and at that point, I had contacted the vehicle.

David Grove: You did back into the vehicle in the backhoe?

Robert S. Martens: Yes I did.

David Grove: So once again, did you or did you not comply with that rule?

Robert S. Martens: I'm, was al-, being alert and attentive and doing my best.

David Grove: Mr. Martens, by your best, striking the vehicle is acceptable then?

Robert S. Martens: No sir." (Emphasis added)

The Claimant testified that he was alert and attentive when he backed his backhoe into a parked vehicle. However, the record shows that he did not check around his vehicle to verify if there was anything in the vehicle's path. The Claimant further testified that he looked over his left shoulder, and seeing nothing, he began to backup and when the Claimant had backed about 20 feet, he saw in his rearview mirror that there was a pickup truck parked behind him on the right side. If the Claimant had walked around his vehicle before moving it and/or had he looked over both shoulders, he would have seen the pickup. Substantial evidence was adduced at the Investigation to warrant the conclusion that the Carrier met its burden of proof that the Claimant was guilty as charged.

The only issue remaining is whether the discipline was appropriate. At the time of the incident, the Claimant had approximately 16 years of service and had a conditional suspension assessed ten months earlier for a positive drug screen. The instant offense was of a serious nature. Therefore, the Board finds and holds that the discipline will not be disturbed because it was neither contrary to the Carrier's Policy for Employee Performance Accountability (PEPA), nor was it arbitrary, excessive or capricious.

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 June 2014.