

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41874
Docket No. MW-41902
14-3-NRAB-00003-120100**

The Third Division consisted of the regular members and in addition Referee William R. Miller 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 commencing on May 24, 2010] imposed upon Mr. D. Niles by letter dated May 24, 2010 "for alleged violation of MOWOR 1.1.1 - Maintaining a Safe Course, MOWOR 1.1.2 - Alert and Attentive and MOWSR S-12.8.1 - Backing - Vehicles, in connection with his involvement in a vehicle incident on April 6, 2010 at or near Stevenson, Washington while working as a traveling mechanic (WTMX0149) and assigned to RP-20 when he made a reverse movement in BNSF company vehicle #19914 resulting in damage to a personal vehicle was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File S-P-1541-C/11-10-0429 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Niles 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 April 6, 2010, the Claimant was working as a Traveling Mechanic in the vicinity of Stevenson, Washington. On that date the Claimant made some purchases at a local NAPA auto parts store. When departing the location in his company vehicle, he made a reverse movement and collided with an automobile that was parked behind him. Based upon that incident the Carrier subsequently chose to bring charges against the Claimant.

On April 7, 2010, the Carrier directed the Claimant to report for a formal Investigation on April 15, 2010, which was mutually postponed until April 28, 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 involvement in a vehicle incident on April 6, 2010, at or near Stevenson, Washington, while working as a Traveling Mechanic (WTMX049) and assigned to RP-20, including failure to maintain a safe course, failure to be alert and attentive, and failure to ensure that no obstructions were in the path of movement, when you made a reverse movement in BNSF company vehicle #19914, resulting in damage to a personal vehicle.”

On May 24, 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 one-year Review Period.

It is the position of the Organization that the Claimant was denied a "fair and impartial" Hearing because the Notice of Investigation was not precise and the conduct of the Hearing Officer was inappropriate. It argued that the Hearing Officer asked leading questions of the Carrier's primary witness against the Claimant to secure the answers that he was looking for and was essentially offering testimony by eliciting "yes" or "no" answers from the Carrier witness. It asserted that the Hearing Officer acted as a prosecutor rather than as an impartial trier of the facts. It asks that based upon those procedural errors the discipline should be set aside without reviewing the merits because the Hearing was unfair and the transcript was tainted.

Turning to the merits, the Organization argued that the record shows that when the Claimant was departing from the auto parts store on April 6, his vehicle made contact with a third party's vehicle that was parked behind his truck. It asserted that the collision caused a small indentation in the vehicle's front bumper that was almost unnoticeable, while the Claimant's vehicle sustained no damage. It pointed out that the Claimant went back into the store and sought out the owner of the vehicle to inform him about what had happened. After observing the slight dent, the owner told the Claimant not to worry about it because he had already planned on replacing the bumper inasmuch as it had extensive preexisting damage and was of poor quality. The owner told the Claimant that he had no intention of progressing the issue; nonetheless, the Claimant reported the incident to his immediate Supervisor, who arrived at the scene and took photographs of the location where the vehicles were involved. The Organization suggested that the Claimant was rewarded for his honesty by being disciplined. It further argued that while the Claimant took responsibility for backing into the other vehicle, there was no proof offered that the Claimant operated his vehicle in an unsafe manner, or that he failed to be alert and attentive. 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 32 years of unblemished 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 there was no showing that any alleged procedural irregularities prejudiced the Claimant in any manner. It requested that the case be resolved on the merits of the dispute.

Turning to the record, the Carrier asserted that the evidence shows that on the date of the incident the Claimant made some purchases at a local NAPA auto parts store and when leaving the location in his Company vehicle, he backed into an automobile that was parked behind him. It argued that the transcript substantiated that the Claimant admitted to having struck a member of the traveling public's automobile and because of those actions, the Claimant violated MOWOR 1.1.1, MOWR 1.1.2 and MOWSR S-12.8.1. It closed by stating that the Claimant was disciplined in accordance with its well-advertised progressive discipline policy and it asked that the discipline not be disturbed.

The Board thoroughly reviewed the transcript and record of evidence and considered the Organization's procedural arguments. We do not find them persuasive. The Investigation was "fair and impartial" and the Claimant was afforded his "due process" Agreement rights.

The record substantiated that the parking area at the Napa Auto Parts store in Stevenson, Washington, consisted of three parking spaces that were parallel to the street. The Claimant parked the tool truck in the center parking space; the space in front of the center space was occupied and the space behind was unoccupied when the Claimant arrived at the store. Upon his departure, the front and back spaces were both occupied.

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

"Bobby Keys: When you exited the parts store, did you notice that another vehicle had pulled up directly behind you?

Darrell L. Niles: No.

Bobby Keys: Did you realize it when you backed your truck up, that you had struck another vehicle with the rear of your truck.

Darrell L. Niles: Yes.”

In the testimony above the Claimant admitted that he did not notice the truck parked behind him. Subsequent questioning of the Claimant continued as follows:

“Bobby Keys: Mr. Niles, Rule 1.1.2 of the BNSF Maintenance of Way Operating Rule reads as follows. 1.1.2 Alert and Attentive, employees must be careful to prevent injuring themselves or others. They must be alert and attentive while performing their duties and plan their work to avoid injury. Do you understand the provisions of this rule?

Darrell L. Niles: Yes.

Bobby Keys: Do you feel that you have complied with the provision of this rule?

Darrell L. Niles: In this case I, I would have to say yes and no.”

In the aforementioned testimony the Claimant further admitted to violating Rule 1.1.2. Later on, the Claimant was questioned and responded as follows:

“Bobby Keys: Mr. Niles, Rule 12.8 of the BNSF Maintenance of Way Safety Rules, reads as follows. S-12.8, 12.8.1 Vehicles, position the vehicle when possible to avoid back up movement. Before backing, inspect areas to the rear to verify that no personnel or obstructions are in the path of movement. When backing vehicles, including vans, but other than automobiles and pickup trucks, position someone near the back of the vehicle to guide movement,

when available. Sound the horn three short blasts in vehicles not equipped with backup alarms. Stop if the person guiding the movement disappears from view. Do you understand the provisions of Rule S-12.8?

Darrell L. Niles: Yes.

Bobby Keys: Do you feel that you have complied with the provisions of this rule?

Darrell L. Niles: Some of those provisions were not applicable in this situation, and some of the provisions I did comply with, and some of them I did not comply with."

Lastly, the Claimant admitted in the aforementioned testimony that he violated Rule S-12.8.1.

It is clear that 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 32 years of unblemished service. Although the accident caused minor damage and the Claimant is to be commended for his honest handling of the situation, it does not eliminate the fact that the offense was considered to be serious. 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.

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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 June 2014.