

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42364
Docket No. MW-42480
16-3-NRAB-00003-140116**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [standard ten (10) day record suspension and a one (1) year review period commencing on January 20, 2012] imposed upon Mr. P. Mulholland by letter dated March 9, 2012 for alleged violation of MOWOR 1.1.1 Maintaining a Safe Course and MOWOR 1.1.2 Alert and Attentive in connection with charges of alleged ‘failure to be alert and attentive while operating Snow Dozer BNX 06-00401 when plowing snow you clipped the crossing at MP 1150.7 near Marias, MT causing damage to the wing at approximately 1430 hours on Friday, January 20, 2012 while assigned as Machine Operator on the Hi Line Subdivision.’ was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File B-M-2540-M/11-12-0250 BNR).**
- (2) The discipline [standard ten (10) day record suspension and a one (1) year review period commencing on January 20, 2012] imposed upon Mr. P. Robison by letter dated March 9, 2012 for alleged violation of MOWOR 1.1.1 Maintaining a Safe Course in connection with charges of alleged ‘failure to be alerta (sic) and attentive while operating Snow Dozer BNX 06-04-01 (sic) when plowing snow you clipped the crossing at MP 1150.7 near Marias, MT causing damage to the wing at approximately 1430 hours on**

Friday, January 20, 2012 while “assigned as Machine Operator on the Hi Line Subdivision.” was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement.

- (3) As a consequence of the violation referred to in Part (1) above, Claimant P. Mulholland shall now receive the remedy prescribed by the parties in Rule 40G.
- (4) As a consequence of the violation referred to in Part (2) above, Claimant P. Robison shall now receive the remedy prescribed by the parties in Rule 40G.”

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 January 20, 2012, the Claimants were operating an on-track snow dozer, BNX06-00401 at a crossing at MP 1150.7 near Marias, MT on the Hi Line Subdivision. They slowed the machine as they approached the crossing and attempted to raise the plow mechanism, but the left wing did not clear the crossing and was damaged. The Carrier found this to be a violation of MOWOR 1.1.1 and 1.1.2 and issued the discipline at issue in this case.

It is the Carrier’s position the Claimants were trained on how to operate the machines properly. One of the Claimants admitted the way to avoid the incident would have been to raise the wing before the crossing. Local management reduced the 30 day record suspension to 10 days. It follows that the Organization is seeking leniency, when it is well established that the Board does not have authority to extend leniency; it is discretionary with the employer.

The Carrier maintains there was no procedural flaw in this case. It was not unfair to deny the Organization's request for a copy of the videotape prior to the investigation, as there is no obligation to provide information prior to the investigation in the parties' Agreement. The Carrier also asserts that if the Organization felt it could not cross examine a witness by telephone, it could have requested an adjournment to bring the witness in. Instead, it cross examined the witness by telephone with no prejudice to its case.

It is the position of the Organization that the Claimants were alert and attentive even though they hit the crossing while plowing snow. By its terms, MOWOR 1.1.2 is designed to prevent injury, and there was none in this case so the rule does not apply. The Organization argues that just because an incident occurred does not mean someone was inattentive. The Carrier must prove more than there simply was an accident. The Claimants showed they were alert and attentive by slowing down, but they could not see the edge of the crossing buried under the snow.

The Board does not find the Organization was prejudiced by the Carrier's nonproduction of the videotape prior to hearing because a recess was available. It also finds it was not a denial of due process to allow testimony to be received by telephone because there was ample opportunity for cross examination.

The Claimants failed to raise the wing to go over the crossing, resulting in damage. Though the accident may not have occurred but for the snow, the Claimants should have been aware that snow would hamper their ability to judge the distance from the crossing to the wing. These failures constituted a violation of the duty to remain alert and attentive. The penalty was reasonable under the circumstances.

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 30th day of August 2016.