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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42865
Docket No. SG-43315
18-3-NRAB-00003-150532**

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of B.A. Coleman, for any mention of this matter to be removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of a Level S (Serious) 30-day record suspension with a one-year review period to the Claimant, without providing him a fair and impartial investigation and without meeting its burden of proving the charges in connection with an Investigation held on April 1, 2014. Carrier’s File No. 35-14-0039. General Chairman’s File No. 14-023-BNSF-188-SP. BRS File Case No. 15261-BNSF.”

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 Claimant was assessed a Level S 30-Day Record Suspension with a one-year review period for failure to be alert and attentive at the time of a vehicular accident. The Organization protested the discipline as unjust. The parties to said dispute were given due notice of hearing. Failing to resolve the matter, the Organization referred this dispute to the National Railroad Adjustment Board ("NRAB") for arbitration. This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

On the day of the incident, Signal Construction Supervisor Andrew Lathim was driving back to the jobsite after lunch. When he came around a corner, he saw the Claimant's truck in a ditch. According to Lathim, Claimant said he was looking at ducks when he ran off the road into a culvert. The quote for the damage to the vehicle was \$6,337.41.

Lathim described the ditch as very deep, stating that if the Claimant had not stopped, he would likely have rolled his vehicle with the possibility of serious personal injury. He described it as a busy area, though no one was in the area at the time. The Carrier notes that the Claimant himself admitted it was a serious violation. TR 79.

The Carrier asserts this record clearly supports the Company's position that the Claimant violated MWOR 1.1.2 and MWSR 12.1, and as a result received the appropriate punishment.

The Claimant stated he was driving through a goose nesting area where he had been briefed not to hit the geese. "I see a bird take flight to the left of me, down by the river. I look over and literally, instantly, I'm in the ditch. So, what I was doing was, in my mind is, "Oh, shit, is that a-" Excuse my language. "Is that a goose? Am I going to hit this goose?" That's why I looked over, and when I looked over, I mean, I was immediately in the ditch." TR 70 He stated it caught his attention as it took flight. He said he went off the road so quickly because of the softness of the shoulder. He claimed to have been alert and attentive the entire time.

In the Organization's view, the Claimant cannot reasonably be found to have been anything but alert and attentive under these facts. He had been advised not to

harm the geese, and could not follow this advisory without knowing where the goose was. The Organization further notes he was an 18-year employee with no other discipline on his record. It maintains in prior, similar cases, the discipline invoked was a Standard Reprimand, yet the Claimant received a more severe penalty. It asserts there are many awards establishing that the mere fact of an accident does not mean there has been a rules violation.

At hearing, the Claimant said he looked to the left where a bird was taking flight. This establishes that the Claimant was distracted by the bird and took his eyes off the road. If the Claimant was going at the relatively slow speed he described, and if he had simply glanced sideways and immediately reverted his gaze to the road, it is relatively unlikely that his vehicle would have had time to leave the pavement altogether; there was a sizeable berm before the asphalt ended. In addition, photographs show the left side of the vehicle at least three and maybe four feet off the road. Assuming conservatively that the tires were six feet apart, this means the right-hand side of the truck was a full ten feet off the road. Even assuming the truck slid laterally in the mud, this positioning of the truck when it stopped indicates this case was not a matter of a quick, sideward glance. This was not a case where only two tires left the pavement; all four were well off the road in the mud.

Under these circumstances, the Board must conclude that the Claimant suffered a lapse of attentiveness to his driving when looking at the bird. It follows that the Carrier properly found a rules violation. The damage to the truck was not insubstantial. The Board is aware of the Claimant's long service and good record. However, these mitigating circumstances must be weighed against the severity of the safety breach. The Board is persuaded that Claimant was seriously distracted at the time of the accident. Under these circumstances, the Carrier was within its rights to impose the 30-day suspension with one-year review period.

AWARD

Claim denied.

ORDER

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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 10th day of January 2018.