

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44283
Docket No. MW- 45801
20-3-NRAB-00003-200059**

**The Third Division consisted of the regular members and in addition Referee
I. B. Helburn when award was rendered.**

**(Brotherhood of Maintenance of Way Employes 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 Actual suspension and a one (1) year review period] imposed upon Mr. T. Klaybor, by letter dated September 18, 2018, for violation of MWOR 6.50.2 Approaching Road Crossings at Grade in connection with his alleged failure to yield right of way vehicular traffic resulting in a collision on August 14, 2018 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-19-D040-1/10-19-00096 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Klaybor shall have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime, expenses and benefits.”**

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.

At about 1500 hours on August 14, 2018 the Claimant, operating a hy-rail in a northwesterly direction, approached a grade crossing while traveling at a speed of 26-27 MPH according to DriveCam still shots. The Claimant opted not to activate a crossing gate, which he could have done from the vehicle. A truck drove into the crossing, hitting the hy-rail on the right rear (passenger) side, causing the hy-rail to leave the tracks and roll over. The truck driver was faulted for the accident. By letter dated August 15, 2018, the Claimant was informed that he was being withheld from service pending the results of an investigation "scheduled at 1000 hours, Friday, August 24, 2018, at the Centralia Yard Office, General Conference Room, 901 N. Chestnut, Centralia, IL, 62801, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to yield the right of way to vehicular traffic on August 14, 2018, when you were involved in a road crossing at grade collision while operating vehicle 29491."

By letter dated September 18, 2018 the Claimant was informed that he was being assessed a Level S Actual Suspension of thirty-four (34) days and a one (1) year review period because the Carrier concluded that he had violated MWOR 6.50.2 Approaching Road Crossings at Grade. On October 1, 2018, the Organization filed the above-noted timely claim on Inspector Klaybor's behalf. The claim was properly progressed on the property without resolution and thereafter referred to the National Railroad Adjustment Board for final adjudication.

The Carrier asserts that the claim should be denied. The record of the investigation contains the required substantial evidence proving that the Claimant "was not prepared to yield the right of way" and "did not even look to the east of the grade crossing until a mere two seconds before he crossed," still traveling at about 26 MPH. The Claimant could have activated the crossing gate, but did not. Trees limiting visibility to the east were an aggravating not a mitigating factor. Illinois law requiring the truck driver to yield right of way did not absolve the Claimant of the responsibility

to comply with BNSF Rules. The accident was serious, justifying the decision to withhold the Claimant from service.

The violation was serious, with the discipline in accordance with the Policy on Employee Performance Accountability (PEPA), including the reduced twelve (12) month review period. The Organization asks for leniency but that is the Carrier's prerogative, not the Board's. The Board is not to substitute its judgment for that of the Carrier. DriveCam video was unnecessary to show the accident as the eight (8) still shots provide the necessary evidence. The Claimant received a fair and impartial investigation as the Conducting Officer handled his duties professionally. Simply because Division Engineer Hunt issued the discipline following a review of the transcript and exhibits, does not mean that the Claimant was prejudged. DE Hunt had been briefed on the accident. Contrary to the Organization's unexplained contention, Rule 40.G was not violated.

The Organization insists that the Claimant did not receive a fair and impartial investigation due to the conduct of the Conducting Officer because the Claimant was improperly removed from service prior to the investigation and because the individual who rendered the discipline investigated the incident prior to the formal investigation and provided evidence to a key Carrier witness. These procedural defects alone require a sustaining award. Moreover, the Carrier has not provided the required substantial proof of the allegations. The Deputy Sheriff testified that the civilian driver was at fault, as that driver hit the Claimant's vehicle. The DriveCam video is not in evidence and the still shots were selectively entered into evidence. Testimony that the Conducting Officer said would be removed from the investigation transcript was not and Mr. Klaybor's guilt was predetermined. The suspension was excessive and unwarranted; punitive rather than corrective. Mitigating circumstances were not considered. The Policy on Employee Performance Accountability (PEPA) does not override just cause.

Before consideration of the discipline on the merits, the Board responds to the Organization's procedural contentions, which are not persuasive. There is no doubt that Division Engineer (DE) Hunt was briefed on the Claimant's accident, but the record does not support the contention that he investigated the accident. Clearly, DE Hunt supplied and discussed the Rules that possibly applied to the situation with Roadmaster Sansing, the Carrier's witness, but the Board does not view the discussion as prejudicial to the Claimant. The Board notes that one of the two Rules introduced by Roadmaster Sansing, Rule 1.1.2 Alert and Attentive was found not to have been violated. Nor can the Organization show prejudgment because of the decision to

withhold the Claimant from service pending investigation. Rule 40.B shows the parties' agreement that an employee may be held "out of service pending investigation in cases involving serious infraction of rules." The Organization cannot expect to successfully nullify agreed-upon language with the oft-made assertion that a Claimant was prejudged. The alleged violation was serious so that the Carrier's decision to withhold the Claimant from service complied with Rule 40.B. Moreover, the Board notes that the Claimant was treated the same as an employee who two years earlier was withheld from service following a grade crossing accident. PLB No. 7602, Award No. 68.

The Claimant has been disciplined for violating MWOR 6.50.2 Approaching Road Crossings at Grade, set forth below

"On-track equipment with manually activated track shunts may use the track shunts only to assist with movements over road crossings at grade.

On-track equipment (including those with activated track shunts) must approach road crossings at grade prepared to stop and must yield the right of way to vehicular traffic. If necessary, warn vehicular traffic to protect on-track equipment movement. The use of horns at crossings by roadway machines and hi-rail equipment is optional at the discretion of the operator."

De-activate manual track shunts when on-track equipment is approximately 100 feet past the crossing.

DriveCam evidence establishes the Claimant's speed at approximately twenty-six (26) MPH shortly before he entered the crossing and establishes that only at the last second did he see the oncoming civilian truck. The Claimant could not or did not stop in time to give the truck right-of-way. Nor did he activate the shunt, which might have prevented the accident. The answer to the Organization's contention that that the civilian driver being named the at-fault driver is found in PLB No. 7602, Award No. 68, a recent on-property award where the Board had to consider facts strikingly similar to those considered herein. Referee Clauss wrote as follows:

" . . . On the merits this Board finds that there is substantial evidence in the record of the rule violation. The evidence shows that Claimant was operating the tamper at a low speed as he approached the private crossing. He noticed a tractor moving in an adjacent field in the direction

of the private crossing and then it entered Claimant's blind spot. Although he saw the tractor moving towards the crossing, he did not slow enough to be able to avoid a collision when the tractor entered the crossing. Claimant struck the tractor.

Although the Organization argues that Claimant should be exonerated because the tractor operator was at fault, that argument misses the point. The tractor operator violated the Illinois vehicle Code. The tractor operator was not a Carrier employee. The Carrier rules exist irrespective of the local vehicle code. Alter though the farmer was at fault and citations may have been issued, those were issues for Illinois courts and not Carrier investigations. The fault of the tractor operator may affect which party is responsible for reimbursement, but does not affect the Carrier's rules."

The Board has reviewed the discipline and finds that the carrier has not abused its discretion with the imposed discipline.

The Board finds the reasoning of the prior award to be sound and we adopt it.

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 23rd day of October 2020.