

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44562
Docket No. MW-46305
22-3-NRAB-00003-201029**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that

- (1) The discipline (dismissal) imposed upon Mr. J. Nelson, by letter dated January 21, 2020, for alleged violation of Amtrak’s Standards of Excellence, NORAC Rule 811 B, N and S and Maintenance of Way Safety Rules and Instructions 4219 A, B and E in connection with allegations that Claimant negligently struck the rear passenger side of a car with his track car at the grade crossing when traveling between Cedar and Willow #2 Track Wallingford, Connecticut (TCA 14314) on November 12, 2019 was arbitrary, capricious and constituted a violation of the Agreement (System File BMWE-157234-D AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Nelson shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be compensated for all lost wages.”**

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 Jerold Nelson was hired on November 26, 2007 and had established and held seniority as a Maintenance of Way (MOW) employee. On November 12, 2019, at about 12:10 AM, while operating a ballast regulator, the Claimant struck the right rear passenger door of a sedan at a grade crossing at North Plains Highway, Wallingford, CT almost immediately after the crossing gates unexpectedly went up before the ballast regulator had travelled through the crossing. The operator of the sedan, which was totaled, was transported to Yale New Haven Hospital with no life-threatening injuries. The track car was said to have sustained about \$1,000 in damages. A fence at the crossing limited vision down the track. Evidence about use of the ballast regulator's horn as the Carrier vehicle approached the crossing is conflicting.

By amended notice of investigation (NOI) dated December 5, 2019 the Claimant was directed to appear for a formal investigation on Monday, December 9 at 10:00 AM at the Amtrak Station in New Haven, CT. The NOI was specific as to charges and specifications. The investigation ultimately was conducted on January 9, 2020, time and location unchanged. By letter dated January 16, 2020, the Carrier informed Claimant Nelson of the conclusion that the charges had been proven and by letter dated January 21, 2020, the Claimant was dismissed from service for allegedly violating Amtrak's "Standards of Excellence" pertaining to Safety and Attending to Duties as well as NORAC Rule 811 B, N and S and MOW Safety Rules and Instructions 4219 A, B and E.

The Organization filed the above-noted, timely claim on Mr. Nelson's behalf. The claim was properly processed on the property without resolution and thereafter progressed to this Board for final and binding adjudication.

The Carrier contends that substantial evidence supports the determination that the Claimant was traveling too fast to stop and that, therefore, he failed to protect the

crossing and in so doing violated the above-noted Standards and Rules. The Organization's procedural arguments are without merit. Even if the common practice was for the track car not to stop, but instead to utilize the crossing gates, that practice did not absolve the Claimant of the responsibility to comply with relevant Standards and Rules. The Carrier notes that the crossing was not protected by an Amtrak employee other than those on the track car. The dismissal was appropriate; the Board is reminded not to substitute its judgment for that of Carrier management. The Claimant previously had been dismissed but returned to service because of attendance problems. He did not simply make a mistake and he was not treated disparately as the collision and the Carrier's disciplinary response occurred before the move to the Just Culture Policy. Should the Claimant be returned to service, he should not receive back pay because he refused the offer of a return to service after a lengthy unpaid suspension. Should he be awarded back pay, there should be a set-aside for any money earned while not in Amtrak's employ.

The Organization insists that the Carrier has not met its required burden of substantial proof and focuses on the past practice of utilizing the crossing gates while having employees relay gate status to operators of moving equipment. The past practice is supported by radio transmissions and a statement, introduced at the investigation and signed by fifteen (15) employees, with the statement reading as follows: "As an employee of Amtrak, while operating a machine or covering a crossing, I affirm that it is not common practice to have anyone stop and protect once we know that we have the gates and personnel in place as moves are being made." Also, prior to the accident the Claimant had traversed ten (10) crossings where the gates stayed down, thus creating an expectation for the eleventh (11th) crossing where the accident occurred. There is no evidence of a Rules violation and an accident does not equate to a Rules violation.

The Claimant was said to have been disparately treated compared to suspensions levied against two track inspectors who, on the wrong track, collided head-on with a passenger train, resulting in derailment and passenger injuries. The Claimant's termination was effective January 21, 2020 after the January 1, 2020 implementation of the Just Culture Policy, giving the Carrier the discretion to discipline the Claimant in accordance with the new policy. For all of these reasons, the dismissal was "unreasonable, arbitrary, capricious and discriminatory."

Below are the Standards of Excellence and Rules that the Claimant allegedly violated.

Safety: Amtrak's highest priority is the safety and well being of our employees and customers. Your help is essential in achieving that goal. You can begin by being sure that you understand and comply with all safety requirements related to your position. In many instances, it may be just a matter of using your common sense. Be aware of your work area and what you can do to ensure your own safety as well as the safety of others. Working safely is required of all employees, regardless of positions.

Attending to Duties: ... As an Amtrak employee and, therefore, the company's most important resource, you have an obligation to perform your duties properly and in accordance with the standards set for your particular job. This requires that you remain alert to your duties at all times. Any activity or behavior that distracts or prevents you or others from attending to duties is unacceptable."

NORAC Rule 811 states in relevant part: "Track cars must approach highway grade crossings prepared to stop. They must give highway traffic the right of way."

MOW Safety Rules and Instructions, Rule 4219 states in relevant parts that operating equipment must approach a crossing "prepared to stop and sound warnings" (Part A); that with a vehicle stopped at a crossing, the track car operator must "Stop equipment. . .and allow vehicle to pass over the tracks, if necessary signaling the driver to do so" (Part B); and where a crossing is protected by gates, stop the on-track vehicle and protect the crossing until highway traffic has cleared (Part E summarized).

Several preliminary observations are in order. The question of the Claimant's honesty or dishonesty has not been factored into the Board's decision. Nor has the Board considered the Claimant's previous discipline for absenteeism, as that had nothing to do with safety issues. The record shows that a briefing record signed by the Claimant indicates that safety rules were discussed. The record further establishes that on-track vehicles do not consistently trigger crossing gates that operate to protect crossings as these vehicles approach. The Amtrak Police investigative report indicates that the crossing was not protected by an Amtrak employee in addition to the crossing gates. The precise speed of the track car at the point of impact with the sedan is his Foreman pilot estimated speed at between 10-20 MPH, but it is obvious that the speed was too great to allow the track car to stop short of the sedan. The video, taken from a McDonald's across a parking area from the point of the collision, shown on the property and at the Board hearing, was too far away to be useful to the Board. There

is far more than the required substantial evidence showing that the Claimant was operating the ballast regulator at too great a speed, whatever the speed was, to stop before hitting the Mitsubishi sedan and dragging it approximately one-hundred (100) feet. Therefore, the Claimant must be found to have violated the above-noted Safety Standards by failing to comply with all safety requirements and by failing to perform all duties properly. In addition, he violated NORAC Rule 811 and MoW Safety Rules and Instructions, Rule 4219 because he was not prepared to stop and did not protect the crossing.

Because of the violations the question this Board must consider is whether there is sufficient mitigation to justify a reduction of the dismissal to lesser discipline since there is no basis for sustaining the claim in full. The Board notes the evidence that the Claimant received a safety briefing, that he had to have known that the heavy ballast regulator could not be stopped almost immediately if traveling at other than a near crawl and that there was no indication that the crossing was protected both by gates and an employee. The Board further notes evidence adduced during the investigation that crossing gates do not always work correctly with at least some single pieces of machinery. Either the Claimant radioed ahead, got no response and consequently had to assume the crossing was not human-protected or assumed that the crossing gates would offer sufficient protection. The Claimant and his Foreman pilot indicated that the track car's horn was used, but witnesses at the scene heard no horn. The Board also notes the existence of a fence that obscured the vision down the tracks of vehicle drivers attempting to cross the tracks. All of these facts should have alerted the Claimant to be particularly aware as he approached the crossing.

The Organization's reliance on the statement signed by the fifteen (15) employees, introduced during the investigation is, in the Board's view, misplaced. That statement reads: "As an employee of Amtrak, while operating a machine or covering a crossing, I affirm that it is not common practice to have anyone stop and protect once we have the gates and personnel in place as moves are being made" (Board emphasis).

The accident occurred at a crossing when both "gates and personnel" were not in place. The Organization cannot convince the Board that the Claimant was strictly complying with past practice. And, simply because, as good fortune would have it, the Claimant traversed the previous ten (10) crossings without incident, he had no right to cut corners and ignore safety considerations at the eleventh (11th) crossing. The railroad industry is inherently dangerous. Cutting corners where the safety of property, Amtrak employees and the public is a primary concern is a prescription that

enhances the possibility of property damage, serious injury and even death. Reasonable safety rules, such as NORAC Rule 811, must be strictly and consistently followed. Nor is the Board convinced that mistakenly setting down on the wrong track is the equivalent of failing to protect the crossing. Too many rules were ignored for the Board to characterize what happened as simply an accident.

The incident occurred prior to the formal implementation of the Just Culture Policy. While the Carrier had the discretion to apply the policy, that policy includes the possibility of dismissal as well. Dismissal has occurred in the industry following serious violations of safety rules and procedures. Public Law Board 6779, Case 15; Special Board of Adjustment 928, Award 550; Special Board of Adjustment 5119, Award 2; Public Law Board 4863, Award 128. The Board does not find the dismissal to be arbitrary, capricious or discriminatory within the context of Referee Daugherty's tests of just cause (Third Division Award 8341) and, therefore, does not find reason to modify the dismissal.

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 8th day of October 2021.