

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44833  
Docket No. SG-46596  
23-3-NRAB-00003-210563**

**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: (  
(Connex Railroad LLC**

**STATEMENT OF CLAIM:**

**“Claim on behalf of A.F. Cole, for immediate reinstatement to his former position with compensation for all time lost, including overtime, with all rights and benefits unimpaired, and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 39, when it issued the harsh and excessive discipline of dismissal against the Claimant, without providing a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on May 12, 2020. Carrier's File No. 200404. General Chairman's File No. VTMI-06-14- 20D. BRS File Case No. 16380-Connex. NMB Code No. 119.”**

**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.

**Factual Background:**

The Claimant was charged with an alleged failure to report a vehicle accident, while a surveillance camera allegedly showed the Claimant's assigned vehicle back into another vehicle at a property not associated with VTMI, on April 24, 2020.

**Position of Organization:**

As the Organization sees it, The Carrier jumped to a conclusion that there was a collision without anything close to adequate evidence. Instead, it relied on opinions and conjecture instead of facts. None of the photographic evidence it has submitted, whether video or still shots, supports the notion of a collision. In the Organization's assessment, the Carrier cannot be allowed to build a case on speculation.

The Organization points out that the Carrier's photographs reveal no damage to the Claimant's vehicle and fail to show contact with another vehicle. Instead, the Carrier claims the damage done to the third-party vehicle was attributable to the Claimant because he was seen backing up. It maintains the only fact that can be gathered from the photographs is that the Claimant was in the vicinity of the damaged vehicle. It notes the entire record is void of an eyewitness, a police report, or information from anyone involved in the accident. While the pictures show damage to the third-party's vehicle, it is impossible to determine that the damage resulted from the Claimant's vehicle.

The Organization points to the Investigation where Carrier Officer Soto was questioned by the Hearing Officer:

Yates: Okay. Now we're watching the video here and I'm going to stop it right there. Can you see the owner's – the vehicle in this video?

A: I cannot.

Q: Okay. Is there any point in this video that you can see the Owner's vehicle?

**A: Not very well. (TR 25)**

**The Organization concludes the Claimant cannot be found guilty of violating the charged Rules. In support of its argument regarding the sufficiency of the Carrier's evidence, it cites Public Law Board No. 6500 Award No. 22 (Referee James E. Conway), which states in pertinent part:**

**The Carrier's sole evidence of rule violation here consists of testimony by Trainmaster Hale, who was not present when the injury occurred or when the equipment was inspected. Mr. Hale establishes the fact of injury, offers the 3 irrelevant pictures and indicates that a post-accident inspection revealed no defects on the engine doors. No eyewitnesses to the accident besides Claimant appeared. No knowledgeable Carrier Official supplies opinion testimony on the critical question of negligence. There is no hint of any prior pattern of repeated carelessness. Claimant states his hand simply slipped off the door handle. Carrier prudently does not expressly argue this proposition, but to accede to its position, given the paucity of probative evidence on this record, would require the Board to accept the suspicious notion that because there was an accident there was a rule violation. In our judgment that is an unreasonable and inflexible premise. The existence of injury cannot mechanically prove carelessness. A careful case-by-case analysis is required.**

**The video shows the Claimant opening the passenger door and getting something out of his car. It does not show what he got out or what he did with it. It apparently was white. As the Organization sees it, the notion that Claimant was wiping down his fender to reduce damage is nothing more than a fabrication. Claimant's testimony that he was getting hand sanitizer before entering a store must therefore be credited.**

**Position of Carrier:**

**The Carrier asserts it recreated the accident that pinpointed the Claimant as the person at fault for backing into the third-party vehicle. It follows that the Carrier concluded the Claimant failed to report the accident, and was untruthful. Based on these conclusions, the Carrier denied reinstatement.**

At the investigation, Mr. Soto opined that the Claimant went to check on damages to his vehicle and tried to hide them by cleaning with a white wipe. This opinion is based on his review of the video. In the Carrier's assessment, the damage was extensive enough that the Claimant would have felt the impact. It maintains that when the evidence is looked at in toto, it establishes that the Claimant ran into the vehicle in question, and attempted to hide the fact from his employer.

**Analysis:**

In order to assess discipline, the Carrier must provide substantial evidence to support its finding of the Claimant's culpability. The video establishes that the Claimant was in the vicinity of the damaged car. It shows that he backed up, got out of his car, opened the back passenger door, and took out something white. This is the essential thrust of the evidence provided by the Carrier.

This evidence fails to meet the requirement of being substantial. The video does not show Claimant's vehicle stopping in a way that is probative of impact. Without a showing of a sudden stop consistent with impact, the evidence cannot be deemed substantial. The Carrier's argument that he would have felt the impact because of the extent of the damage to the third party vehicle presupposes impact. Though the Carrier argues that the Claimant went to the back of his car to view or ameliorate damage, the video does not establish this. Further, the fact that the Claimant's vehicle sustained no damage weakens the Carrier's case.

Claim sustained. The Claimant shall be offered reinstatement subject to the Carrier's return to service policies. The Carrier shall remove the discipline from the Claimant's record, with seniority, vacation and all other rights restored. The Carrier shall make him whole for all time lost as a result of this incident, less any interim earnings from replacement employment. Lost overtime shall be compensated at the overtime rate. The Claimant's medical insurance shall be retroactively restored, with deduction from the backpay herein granted of any premiums which would have been withdrawn had his employment remained uninterrupted. To the extent the Claimant purchased replacement insurance during his time of separation, he shall be reimbursed for the premiums. His backpay shall be contingent upon his providing the Carrier with reasonable proof of income, including his tax records as well as proof of replacement insurance premiums and any claims paid under that insurance. Any discipline current at the time of his dismissal, including any on-going review period, shall resume in

applicability to the extent of its remaining duration at the time of his dismissal. Any other claims not expressly granted by this Award are hereby denied.

**AWARD**

Claim sustained.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
**By Order of Third Division**

Dated at Chicago, Illinois, this 31<sup>st</sup> day of January 2023.