

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45146  
Docket No. MW-47720  
24-3-NRAB-00003-221025**

**The Third Division consisted of the regular members and in addition Referee Diego Jesús Peña when award was rendered.**

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

**PARTIES TO DISPUTE: (**

**(BNSF Railway Company (former Burlington Northern  
(Railroad Company)**

**STATEMENT OF CLAIM:**

- (1) The discipline (dismissal) imposed upon Mr. K. Gaylor, by letter dated May 7, 2021, for alleged violation of MWOR 1.1.2, 1.2.7 and 1.1.3, in connection with his alleged failure to safely pass under a bridge resulting in a machine collision, was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-6751-J/11-21-0349 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant K. Gaylor shall now be reinstated to service, have his record cleared of the charges leveled against him and he shall be compensated in accordance with Rule 40G of the Agreement."**

**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**

Claimant Kevin Gaylor worked as a Group 2 Machine Operator in the Carrier's Maintenance of Way Department in Dayton's Bluff, Minnesota for 18 years prior to being dismissed for being inattentive and failing to report an accident to his supervisor timely. When the incident occurred, Roadmaster Kota Patton was the Claimant's supervisor, and the Claimant was not on any level of discipline.

On March 30, 2021, the Claimant was moving a grader to Dayton's Bluff Yard. The route he chose required him to travel on Positively 4<sup>th</sup> Street in Minneapolis, Minnesota and go under a low abandoned railroad bridge. No one else was traveling with the Claimant. He had traveled this route before, and knew he had to travel slowly because of the low hanging bridge. When approaching the bridge, he would travel no faster than 4 mph. He also knew he needed to make certain adjustments to avoid having the grader strike the bridge. Despite slowing down and making the proper adjustments, the grader struck the bridge at 8:20 AM, breaking a weld supporting the grader's wing. Upon striking the bridge, the Claimant stopped the machine, and backed it away from the bridge.

The Claimant sent a text message to Mr. Dennis Mills, the Roadway Equipment Supervisor charged with repairing damaged graders, minutes after striking the bridge. Mr. Mills received the text, but was away from the office. He responded by texting the Claimant to contact Mechanic Justin Stein. The Claimant immediately contacted Mr. Stein and told him that the "grader was broke." Mr. Stein told the Claimant to take the damaged grader into the repair facility. The Claimant secured the damaged parts of the machine so that it could travel, and then proceeded by another route away from the bridge to the Carrier's repair facility at Bridal Veil. Upon arriving at the repair facility at 9:46 AM, the Claimant sent a text message to Roadmaster Patton informing him that the grader had been damaged.

The following day, on March 31, the Carrier issued a notice of investigation. The investigation was conducted on April 14, 2021 in Minneapolis. On May 7, 2021, the Carrier dismissed the Claimant for (a) failure to remain alert and attentive to safety

while operating the grader on March 30 and (b) for failure to immediately report the machine collision to his supervisor.

**Carrier's Position**

The Carrier argues that dismissal was appropriate because the Claimant admitted his misconduct. It also maintains that the investigation was fair and impartial and that the discipline imposed was appropriate.

**Position of Organization**

The Organization believes that the Carrier's evidence was insufficient to satisfy its burden of proof. The Organization argues that when the evidence presented by the Carrier is compared and analyzed against the policies alleged to have been violated, the evidence is insufficient to find any policy violations, much less any misconduct worthy of dismissal. The Organization concludes by arguing the discipline imposed was excessive and unwarranted. It asks that the claim be sustained, and the Claimant be restored to his position.

**Analysis**

The Board sits as an appellate review forum in discipline cases. As such, it does not weigh the evidence *de novo*. The Board's function is not to substitute its judgment for that of the Carrier, nor decide this matter in accord with what the Board believes should have been decided had it been the Board's decision to make. Rather, the Board's inquiry is to determine whether sufficient evidence exists to sustain the discipline imposed by the Carrier.

In discipline cases, the burden of proof is on the Carrier. Public Law Board 5229, Award 8 explains the Carrier's responsibility in properly satisfying its burden of proof:

It is our view the Carrier has the burden to persuade, through the trial transcript and other contractually relevant and acceptable evidence, that claimant is guilty as charged. The degree of proof required is by substantial evidence, which is more than a mere scintilla but less than a preponderance. Unfortunately, there is no scale of 1 to 10 where evidence can be weighed by numbers, so in the final analysis, we do rely upon the determination of the trial officer as to matters of credibility and veracity,

tempered by our own careful study of the transcript to determine whether the trial officer's conclusions were based upon reasonably persuasive evidence. [Emphasis added.]

The Carrier believes that it satisfied its burden in proving that the Claimant violated the following policies:

1. Maintenance of Way Operating Rule (MWOR) 1.1.2, Alert and Attentive: "Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury."
2. MWOR 1.2.4, Furnishing Information: "Employees must not withhold information, or fail to give all the facts to those authorized to receive information regarding unusual events, accidents, personal injuries, or rule violations."
3. MWOR 1.1.3, Accidents, Injuries and Defects: "Report by the first means of communication any accidents, personal injuries, defects in tracks, bridges, or signals, or any unusual condition that may affect the safe operation of the railroad. Where required, furnish a written record promptly after reporting the incident."

The employee on whom the responsibility must naturally falls must assume authority until the proper manager arrives.

When an accident occurs at a road crossing, do not cut trees, weeds or make any changes to the scene until representatives from the Claims Department have investigated.

The Board has carefully reviewed the record, particularly the transcript of the April 14, 2021 investigation, and the parties' submissions. The Board finds insufficient evidence supporting the Carrier's charges in its notice of dismissal.

The investigating officer concluded that the Claimant's inattentiveness allowed and caused the grader to strike the bridge. The only witness with personal knowledge of what occurred at the bridge was the Claimant. His supervisor, Roadmaster Patton, was not at the bridge at the time the accident occurred and did not testify at the investigatory hearing. Another manager, Mr. Kyle Cobb, testified for the Carrier in

place of Roadmaster Patton. Mr. Cobb testified to what Roadmaster Patton told him about the situation, and admitted to the investigating officer that he had no personal knowledge of how the Claimant operated the grader on the day in question.

The Claimant testified that he had driven graders and other vehicles under this bridge and knew to slow down. While he admitted that the grader struck the bridge, there was insufficient evidence that he was inattentive while driving the grader under the bridge. He testified that he slowed the grader to “walking speed,” which he explained was not faster than 4 mph. His decision to slow down the grader reflects an awareness of the challenge created by the bridge and a good faith attempt to operate the machine safely given the circumstances. The Board rejects the Carrier’s belief that simply because the Claimant admitted that the grader struck the bridge that he was automatically negligent or inattentive.

The investigating officer also concluded that the Claimant withheld information and failed to report the incident timely. The evidence at the investigation established that immediately after striking the bridge the Claimant texted the supervisor charged with repairing damaged vehicles, Mr. Mills. Because Mr. Mills was on vacation, the Claimant then reported the damage to Mechanic Stein, the person Mr. Mills delegated in his absence. A little more than an hour after the accident, upon delivering the damaged machine to the repair yard, the Claimant notified his supervisor of the accident. MWOR 1.2.7 does not require that an employee report an accident to their immediate supervisor, but rather to “those authorized to receive information regarding...accidents.” In some cases, the person authorized to receive information regarding a covered situation may be the immediate supervisor. But in this case, the Claimant was justified in reaching out to Mr. Mills and Mechanic Stein. The Board concludes that the evidence supporting its belief that the Claimant violated MWOR 1.2.7 and 1.1.3 is insufficient and not reasonably persuasive.

The Carrier failed to satisfy its burden of proof. The Claimant’s dismissal is hereby rescinded and any mention of it is to be expunged from his records. The Claimant shall be reinstated without any loss of seniority or benefits and returned to service. In addition, the Claimant is entitled to compensation for all lost wages including any overtime that he would have been offered and likely would have worked from the date of his dismissal to the date that he is returned to service. Any monies earned or paid to the Claimant, except earnings from investments and income streams that he was receiving before he was dismissed from other sources that continued after his dismissal, are to be deducted from the lost wages owed to him. The Claimant is further entitled to

be reimbursed for any and all out-of-pocket healthcare expenses that he incurred during the aforementioned period, which would have been covered by the Carrier-provided healthcare insurance coverage that he was under at the time of his dismissal.

**AWARD**

Claim sustained in accordance with the Findings.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant 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 22<sup>nd</sup> day of February 2024.