

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45330
Docket No. MW-48080
25-3-NRAB-00003-230483**

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

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

PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The discipline (dismissal) imposed upon Mr. D. Seeley, by letter dated January 31, 2022, for alleged violation of Maintenance of Way Operating Rule (MWOR) 6.50 Movement of On-Track Equipment and MWOR 1.1.2 Alert and Attentive for alleged failure to properly approach a crossing prepared to stop within half the range of vision with Hy-rail Vehicle Number 29478 resulting in being struck in the passenger door by a third party vehicle causing damage to both vehicles and derailment of the hy-rail vehicle on the Casco Subdivision CR5, Mile Post 94.62, DOT 061254G, on December 6, 2021 at approximately 1000 hours as identified via DriveCam Event EWNA75205 was unfair, without just cause, excessive and prejudged (System File T-D-7001-J/11-22-0223 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant D. Seeley shall now:

‘... be immediately returned to service, and that he be paid for all losses as a result of this violation.

Therefore, due to this excessive and prejudged discipline, Mr. Seeley must be immediately paid for his lost time while withheld from (sic) service and day to attend investigation, including any and all overtime paid to the position he was assigned to work, any expenses lost, difference in pay, and we also request that Mr. Seeley be made

whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the letter received by the Organization on February 2, 2022 letter from Steve Mihalik.

As a remedy for the violation, the suspension shall be set aside, and the Claimant shall be made whole for all financial and benefit losses as a result of the violation. Any benefits lost, including vacation and health insurance benefits (including coverage under the railroad industry National Plan), shall be restored. Restitution for financial losses as a result of the violation shall include compensation for:

- 1) Straight time pay for each regular workday lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the claimant at the time of suspension from service (this amount is not reduced by any outside earnings obtained by the claimant while wrongfully suspended);
- 2) Any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service.
- 3) Overtime pays for lost overtime opportunities based on overtime for any position claimant could have held during the time Claimant was suspended from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the Claimant not been suspended from service;
- 4) Health, dental and vision care insurance premiums, deductibles, and co-pays that he would not have paid had he not been unjustly suspended.”

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

On October 13, 2021, Claimant was assessed a Level S Record Suspension with a 12-month review period for obstructing the DriveCam in his vehicle.

On December 6, 2021, Mr. Seeley was operating as a track inspector on the Casco subdivision. At approximately, 1000 hours, Mr. Seeley collided with a private citizen's car at the public cross at the public crossing near MP 94.62.

By letter dated December 8, 2021, the Carrier directed the Claimant to report for a formal investigation. An investigation was held on January 6, 2021 to determine the facts of the incident. Following the investigation, BNSF determined that the Claimant violated MWORs 6.50 (Approaching Road Crossings at Grade) and 1.1.2 (Alert and Attentive). This was the second serious rule violation within an active review period. Discipline was assessed under with BNSF's discipline rules, and in particular the Policy for Employee Performance Accountability (PEPA). By letter dated January 31, 2021 the Carrier informed the Claimant he was being dismissed.

Position of Organization

The Organization notes a number of problems with the investigation. They note the police report should have been presented. They argue there was collusion with witnesses beforehand. They also argue that remote testimony and failure to sequester were further defects in the investigation.

Additionally, the organization takes issue with the photographic stills. There are places the Organization notes the clips are more than one second apart. There is also an argument that in 10:00:51, one can see the color red emanating from a brake light. There is also the contention that the conditions were icy and even braking would not

have necessarily slowed down the truck. Ultimately, there is no evidence that he was negligent or reckless.

The Organization further argues that the quantum of discipline was too great. It was arbitrary, and excessive. The ultimate goal of any discipline policy should generally be rehabilitation—not to punish. The discipline was thus too great to satisfy ordinary principles of just cause.

Carrier's Position

The Carrier's position is that the Claimant was not alert and attentive and failed to approach this road crossing with the proper caution. During the hearing, the Carrier went through photographic evidence, still by still, to make the case that the Claimant did not attempt to brake as he approached the road crossing. This was so, even though a car crossed right in front of him. According to the Carrier, his brake lights did not light up at any point. Further, the Claimant continuously had his left hand on the wheel and his right hand never moved from his lap. There is simply no visually apparent effort to respond to either of the cars which were approaching the road crossing.

The Carrier argues the investigation was fair and impartial. They also note the discipline was issued in accordance with PEPA.

Analysis

The Board finds the Carrier had substantial evidence to dismiss the Claimant. The entire record was reviewed, including all of the photographic evidence. The Panel finds this case turns on two of the provisions cited by the Carrier.

MWOR 1.1.2 – Alert and Attentive states:

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.

6.50.2 Approaching Road Crossings at Grade

On-track equipment (including those with activated track shunts) must approach road crossing 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.

After reviewing all of the evidence, the Panel is persuaded that the Claimant failed to exercise prudence or caution in approaching the road crossing. It does not appear that the Claimant was alert or attentive. He did not move his body or his hands—even when a van passed the road crossing just before the car with which he ultimately collided. Similarly, there is no photographic evidence of braking. Further, this was not the first serious rule violation within the review period. And the prior one would appear it was within the same vein: Obstructing the DriveCam. All things considered, the Panel finds substantial evidence to support the Claimant's dismissal.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of October 2024.