

**PUBLIC LAW BOARD NO. 7564**

Case No.: 18/Award No.: 18  
Carrier File No.: 10-12-0030  
Organization File No.: C-12-D070-3  
Claimant: Edward M. Yalowizer

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BNSF RAILWAY COMPANY )  
 )  
-and- )  
 )  
BROTHERHOOD OF MAINTENANCE )  
OF WAY EMPLOYES DIVISION - IBT )  
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**Statement of Claim:**

The Carrier violated the Agreement when on November 22, 2011 Claimant Edward M. Yalowizer was dismissed for violating MOWSR 1.2.3 Alert and Attentive and MOWSR 12.8.1 Backing Vehicles.

As a consequence of the violation, the Carrier should expunge the discipline from the record and make the Claimant whole for any and all losses.

**Facts:**

By letter dated October 14, 2011 the Claimant was directed to attend an investigation "for the purpose of ascertaining facts and determining your responsibility, if any, in connection with your alleged failure to be alert and attentive when backing a leased motor grader at MP 63.5 on the Orin Subdivision on October 13, 2011 at approximately 1300, while working as a machine operator on gang TMOX0683 resulting in damage to a signal relay box." After mutual agreement to postpone, the investigation was held at 0900 hours, November 2, 2011.

**Carrier Position:**

The Claimant had a fair and impartial hearing, during which he admitted backing into the signal box. The admission made all Organization procedural objections moot. The Claimant knew the signal box was behind the grader but he did not leave the vehicle to locate the box and has not taken responsibility for the failure to do so. The Claimant obviously was not alert and attentive. The Carrier is concerned for the Claimant and others who may be working with him. The charges against the Claimant were specific and the serious violation has been admitted. This is the second serious violation in under a month and during the review period, thus subjecting the Claimant to dismissal in

accordance with the Policy for Employee Performance Accountability. The Claimant lost no wages when he was withheld from service because he was paid until he was dismissed.

**Organization Position:**

The Claimant did not receive a fair and impartial hearing because the Carrier has added heretofore unspecified charges, particularly MOWSR 12.8.1, which was not violated because the Claimant had to back up. The matter was obviously prejudged because the Claimant was withheld from service immediately upon the close of the investigation, despite the fact that he was allowed to work from October 13, 2011 when the accident occurred until the investigation on November 2, 2011. The Conducting Officer unfairly asked the Claimant repeatedly how the accident happened and improperly tried to correlate the Claimant's diagram with photos taken two days after the accident when the Claimant was not present to verify the accuracy of the photos. Because Roadmaster McCoy was not present when the accident occurred, he cannot say whether the Claimant was alert and attentive. The Claimant called to report the damage immediately after the accident and has been honest and cooperative at all times. He has tried to work safely at all times and to comply with the rules, even though the Conducting Officer expressed disbelief in the Claimant's compliance. The cost of the damage to the signal box is irrelevant and should not be considered in assessing discipline. While the Carrier relied on the Claimant's personnel record, there is no copy of the record in the file; thus the Organization could not check for accuracy.

**Findings:**

The Claimant received a fair and impartial hearing. He admitted backing into the signal box both when he called Roadmaster McCoy to report the accident and during the investigation. Nothing that occurred during the investigation could have altered that admission. The charges were specific enough to allow the Claimant to defend himself. The Carrier's concerns were expressed in the October 14, 2011 notice to the Claimant to appear at the investigation because of his "alleged failure to be alert and attentive when backing a leased motor grader. . .resulting in damage to a signal relay box." The Claimant and the Organization were given explicit notice of the Carrier's concerns. The Claimant's honesty and cooperativeness are commendable and his expressed belief that he did not violate any rules is understandable, but MOWSR 12.8.1 requires that "before backing, inspect areas to the rear to verify that no personel (sic) or obstructions are in the path of movement." The Claimant did a partial verification by checking the rear view mirrors and by trying to look over his shoulder in an effort to view what he knew was a blind spot. However, a complete verification, particularly when there was no other employee to serve as a lookout/guide, would have required the Claimant to exit the grader to assure himself of the exact location of the signal box relative to the grader. Because the Claimant did not do this, the Board finds that he was not fully attentive to the requirements of the job at the time of the accident. Any discrepancies between the location of the grader when the photos were taken two days later and the location at the time of the accident, or between the Claimant's diagram and the photos, do not mask the

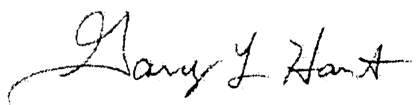
failure to do everything possible to ensure a safe operation. Whatever the dollar damage was to the signal box does not alter the basic facts. The Carrier has noted without opposition that this was the Claimant's second serious violation within a review period, thus subjecting him to dismissal in accordance with the Policy for Employee Performance Accountability. The Board finds no basis for substituting its judgment for that of the Carrier.


**Award:**


Claim denied.

**Orders:**

The Board, after consideration of the dispute identified above, hereby orders that no award favorable to the Claimant be made.

  
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Gary Hart, Organization Member

  
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Zahn Reuther, Carrier Member



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I. B. Helburn, Neutral Referee

Austin, Texas  
June 28, 2013