

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 556 – Award No. 556 – S. McCroskey
Carrier File No. 14-21-0086
Organization File No. 2421-SL13C5-2052

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

We present the following claim on behalf of Samuel McCroskey (0052746) Seniority date April 18, 2011 for reinstatement with seniority rights restored and all entitlement to and credit for, benefits restored, including vacation, and health insurance benefits. The Claimant shall be made whole for all financial losses as result of the violation, including compensation for: 1) straight time pay for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to 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 Claimant was out of service; 3) Overtime pay for lost overtime opportunities based on overtime paid to any junior employee for work the Claimant could have bid on and performed had the Claimant not been suspended; 4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been wrongfully withheld from service beginning December 02, 2020 and unjustly dismissed from service commencing January 08, 2021, continuing forward and/or otherwise made whole. All notations of the dismissal should be removed from all Carrier records.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, S. McCroskey, had been employed by the Carrier since 2011. On January 28, 2021, following an investigation, the Carrier determined that Claimant fouled the track without authority with vehicle 27676 while operating a Carrier vehicle without a seatbelt, causing damage to the vehicle when he ran into a standing gondola on the track at Rosenberg, Texas on December 1, 2020 at approximately 0945 hours. The Carrier found that Claimant had violated MOWOR 1.6 Conduct, MWSR 12.5 Seat Belts and MOWOR 11.3 Fouling the Track, and dismissed him from service.

At all times relevant, Claimant was working as a Track Supervisor on the Alvin/Galveston South territory. Carrier Roadmaster John Reed testified at the investigation that, on the day at issue, Claimant called and notified him that he had an accident with his truck. Claimant explained that he hit a rail car in the yard and was not wearing his seatbelt. Mr. Reed traveled to the scene. He testified that he did not request drug or alcohol testing because Claimant was a good employee and he had no cause to order it.

Mr. Reed stated that he believed Claimant had been negligent as a result of what Claimant told him and what he observed on video taken inside Claimant's vehicle. He explained that, in the video, he observed Claimant take his eyes off the road while the vehicle was moving. The video, he stated, did show Claimant maneuvering around some equipment.

The Organization representative objected to the introduction of the video, which was stored on Mr. Reed's cell phone, as, he stated, there was no way to enter it into the record. Mr. Reed provided identifying information to the Organization representative so he could obtain and review the video. It was played at the investigation, with all parties reviewing it and Mr. Reed providing a narration for the record.

The video was approximately 12 seconds long. According to the narration, it showed Claimant without his seat belt on, traveling at six to seven miles per hour. It shows Claimant making a left turn, and beginning to make a corrective right turn to avoid a parked backhoe on the path. He stated that one could observe that Claimant's head dropped and he then struck the rail car on the track. The Organization representative asked no questions concerning the video.

Mr. Reed explained that the track was not main line. It was considered a yard or set-out track, where cars are typically placed or stored. He acknowledged that it was out of service. He stated that "incidentally fouling" a track, referenced in the relevant Rules, referred to an employee fouling the track, not a vehicle.

Mr. Reed testified that the rail car sustained significant damage. In addition, Claimant could have been injured, although fortunately he was not.

Claimant testified at the investigation that he had just returned from vacation on the day of the incident. There was a problem with his vehicle which he had expected to be repaired during his absence, but it was not. He had to adjust the hi-rails on his vehicle just to get by for the day. Mr. Reed called to have him meet in Brenham, about an hour away, to go over some track, and he

started driving at about 8:45 a.m. He had to avoid a backhoe bucket which was parked near the track, and go around it, and there were also cars parked nearby.

Claimant stated that he just “lost a little bit of focus” and struck the gondola car. He added that he basically experienced a “brain freeze” from returning from vacation and having a lot on his plate that morning. He added that the track on which the car was located was technically out of service, locked, tagged and spiked on one end, and discontinuity on the other. He added that the track had protection at the time of the incident, and he fouled it incidentally to avoid the parked backhoe.

Claimant testified that he did not believe he had been negligent concerning his own safety or that of other employees. He acknowledged that he had been distracted for “a few seconds” and that allowed the incident to occur. He also admitted that he had not been wearing his seatbelt, due to the brain freeze, and had made a mistake. He stated that he fully recognized the importance of wearing a seatbelt.

Claimant’s personal record shows a Level S record suspension with a 36-month review period in 2012 for failure to properly apply a steering wheel cover while equipment was in use; a formal reprimand in 2015 for backing into a pillar, causing damage to a Carrier vehicle; a Level S record suspension with a 36-month review period (pursuant to waiver) in 2016 for exceeding authority limits; a formal reprimand in 2017 for failure to properly protect an FRA defect resulting in a derailment; a formal reprimand in 2018 for failure to recognize and correct FRA defects; a record suspension with a 36-month review period in October 2020 for failure to secure main track authorization; and a formal reprimand on December 10, 2020 for failure to properly report and protect track conditions.

The Carrier stated that the record makes it clear that the violations occurred as alleged, but video from the camera inside Claimant’s vehicle was provided as an investigation exhibit, although the video itself could not be included in the record because it is proprietary. Therefore, Mr. Reed narrated what was shown so it could be included in the transcript.

The Carrier stresses that the video was made available to the Organization, along with the reference numbers from the Carrier’s surveillance system which would allow it to review the video. Although the Organization also objected to the video’s relevance, the Carrier notes that it was useful to show whatever obstructions might have been on the road, especially as Claimant contended he drove as he did because he was trying to avoid parked equipment. In any event, the Carrier states, the video was not necessary to prove Claimant’s guilt.

On the merits, the Carrier states that the facts are clear. Claimant, at the relevant time, was operating a Carrier vehicle in the Rosenberg, Texas yard. As he drove around a backhoe, Claimant ran into a standing gondola while traveling approximately seven miles per hour. The Carrier adds that Claimant immediately informed his supervisor and self-reported that he was not wearing his seat belt.

The Carrier stresses that Claimant admitted having committed the violations alleged in the investigation notice, and it is well established that such an admission is sufficient to satisfy the

Carrier's burden of proof. Claimant's failure to adhere to several Carrier safety policies and procedures directly caused damage to Carrier property.

Clearly, as Claimant also admitted, he was distracted and failed to wear his seat belt. He fouled a track and caused damage to a rail car located within the track. He could have injured an employee possibly standing between the tracks under the erroneous impression that he had proper protection. Contrary to the Organization's contentions, Claimant was not allowed to "incidentally" foul the track due to its protection.

That Claimant was honest and forthright and was attempting to avoid equipment on the road when he fouled the track does not change the fact that he admitted his guilt or the nature of the violations. The Carrier states that they have been established by substantial evidence.

With respect to the penalty, the Carrier states that in addition to the seriousness of the instant violations, Claimant was in an active review period for a previous offense, and had, in 2018 and 2019, been disciplined for track violations like the one at issue. Clearly, there is a gap between the expectations set by the Carrier's Rules and Claimant's clearly negligent conduct. The Carrier's determination that dismissal was appropriate, especially given Claimant's record, was not arbitrary or excessive, and should not be disturbed by this Board. The Carrier therefore urges that the claim be denied.

The Organization first states that the Carrier failed to provide a complete transcript, in violation of the parties' Agreement, because it did not include a video played at the investigation. The Organization notes that it objected as there was no way for the Carrier to enter this physical exhibit into the record. Thus, the Organization was deprived of the opportunity to properly represent Claimant on appeal, and he was denied his right to a fair and impartial investigation.

On the merits, the Organization states that Claimant clearly and honestly described the incident. As he testified, Claimant cares very much about his job and strives to be perfect every day, although he is human and makes mistakes. The Organization notes Mr. Reed's testimony that Claimant is a good employee.

The Organization points out that Claimant described the incident in detail. It was his first day back from vacation, and his vehicle had not been repaired in his absence as expected. He had to start his day by making those repairs. His supervisor then called and asked him to meet at a location approximately an hour away.

These events, the Organization explains, led to Claimant getting caught up in the moment. He never intended to put the vehicle in motion without wearing his seatbelt. In his effort to leave the depot, he had to travel around the parked backhoe. To do so, he needed to get near the tracks. He did not make a steering correction in time and admittedly struck the gondola on the tracks. Claimant was not safety insensitive to his or other employees' safety; the incident occurred simply because of how the backhoe was parked and what was necessary to get around it. Moreover, the Organization asserts, Claimant was allowed to incidentally foul the track because it was protected.

The Organization contends that the Carrier has failed to prove any intent to violate Carrier Rules; Claimant owned that he simply made mistakes while caught up in a moment. Claimant's dismissal was excessive and unjustified, and he should be reinstated and made whole.


We have carefully reviewed the record in its entirety. With respect to the Organization's objection to the introduction of the video from inside Claimant's vehicle, we agree with the Carrier that he suffered no prejudice. He admitted to the conduct depicted on the video, so the video did not have any determinative effect on the Carrier's decisions in this matter. Therefore, Claimant was not denied his right to a fair and impartial investigation.

On the merits, Claimant admitted that he failed to wear his seatbelt while operating his vehicle, and that he fouled the track and struck a rail car, causing damage, as he attempted to maneuver around a parked backhoe. However the track was protected, Claimant obviously committed misconduct when he fouled the track and hit a rail car. We note that Claimant explained that he was distracted and suffered a brief "brain freeze," and made a mistake. However, that does not excuse his conduct. On the contrary, operating as he did put himself and possibly other employees in danger, and caused damage to Carrier equipment. His guilt has been proven by substantial evidence.

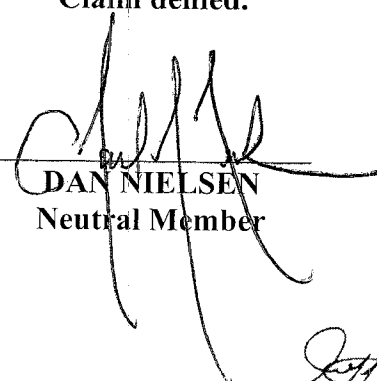
With respect to the penalty, Claimant committed serious offenses which could have had much more serious consequences. In addition, as the Carrier states, his personal record shows discipline for several careless incidents, including one for which he was still in the review period. Although the record indicates that Claimant's supervisor viewed him as a good employee and he was honest and forthright concerning this incident, we cannot say that the Carrier's decision to dismiss Claimant represents an unfair, arbitrary or discriminatory exercise of its discretion to determine disciplinary sanctions.

AWARD

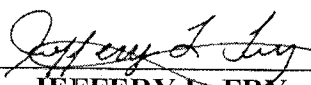
Claim denied.



JOE HEENAN
Carrier Member



DAN NIELSEN
Neutral Member



JEFFERY L. FRY
Organization Member

Dated this 30th day of March 2025.