

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 216, (Case No. 216)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES DIVISION – IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David R. Scoville, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing August 29, 2016, when Claimant, Lee Drones (1754233), was dismissed for his failure to stop within half the range of vision while operating on-track machinery during an approach to a road crossing resulting in a collision with a vehicle. The Carrier alleged violation of the Maintenance of Way Operating Rules 6.50, 6.50.1, 6.50.2, and Engineering Instructions 14.3.2 and 14.3.3.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall reinstate Claimant, remove from the Claimant’s record this discipline with all rights unimpaired and pay for all wage loss including overtime commencing August 29, 2016, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-16-0434) (Organization File No. 2410-SL13N1-16139)**

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

The facts indicate that on August 22, 2016, Claimant was part of a surfacing gang operating a Ballast Regulator, a large heavy piece of track equipment used to place and dress new or existing ballast for the purpose of providing optimal track conditions. On the aforementioned date, Claimant was traveling to the work location for the day and as he approached a crossing in Bangs, Texas, Claimant was involved in a wreck with an eighteen wheeler truck and it was alleged that Claimant may have not have been attentive and because of that allegation the Claimant was directed to attend a formal Investigation on August 31, 2016. That original Notice of Investigation dated August 22nd was corrected on August 29th which was the same date the parties agreed to change the Investigation to be held concerning in pertinent part the following charge:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to stop within half the range of vision while approaching a road crossing on August 22, 2016 at approximately 0835 hours on the Lampassa sub near MP 357.95.

This investigation will determine possible violation of MWOR 6.50 Movement of On-Track Equipment, MWOR 6.50.1 Maximum authorized Speed, MWOR 6.50.2 Approaching Road Crossings, EI 14.3.2 Inspecting Roadway Equipment and EI 14.3.3 Maintaining Roadway Equipment.” (Underlined portion was the added language of the corrected Notice)

On September 15, 2016, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

It is the position of the Organization that the Claimant was denied a “fair and impartial” Investigation because the Carrier modified the charges with a corrected Notice of Investigation on the date of the Hearing at the actual Hearing in violation of Rule 13(c) and the Hearing Officer was too knowledgeable of Claimant’s alleged violations to have been impartial. Additionally, it asserted that the Claimant was pre-judged which was shown by the fact that when the Claimant requested a Waiver it was denied by the Carrier. Lastly, it argued the investigative process was patently unfair. Organization asked that because of the aforementioned procedural errors the discipline should be removed without reviewing the merits.

Turning to the merits, it asserted the Carrier failed to meet its burden of proof that the Claimant failed to stop within half the range of vision while approaching a road crossing on August 22, 2016. It argued that at the Investigation it was shown that Claimant looked both directions before proceeding through the crossing and was traveling at a safe speed. Before Claimant entered the crossing a truck that had been hidden, emerged from heavy vegetation. The

Claimant testified that it appeared that after the truck pulled out and moved forward it had stopped again and had yielded the right of way to Claimant so Claimant proceeded to travel through the crossing at which time the truck went forward causing a collision. According to the Organization the accident was unavoidable. It concluded there was no basis for discipline and requested that the discipline be rescinded and the claim be sustained as presented.

It is the Carrier's position that the corrected Notice of Investigation did nothing to hamper the Claimant's defense as the original and the corrected Notice both were sufficiently specific as to put the Claimant on notice of the particular conduct that was being investigated and allowed him the opportunity to properly prepare his defense. It further argued that repeated offers of recess to provide additional time to prepare were rejected by the Organization and Claimant.

It further argued that because the Hearing Officer was aware of the charges against the Claimant as well as Rules was not evidence that he was either unfair or partial or that the Claimant was adversely affected. The Carrier asserted that the Hearing Officer simply prepared for the Investigation, familiarizing himself with the charges and the Rules cited so that he could ask pertinent questions. Regarding the Organization's argument that Investigations are unfair the Carrier stated that Investigations have been handled in same manner for decades and arbitration has never ruled such handling was improper. Lastly, it argued failure to offer the Claimant a waiver, which was not required, does not prove prejudgment or that the Hearing was unfair. It explained an employee signing a waiver is admitting guilt, and under the circumstances of this offense that would have been a Third Level S subjecting Claimant to dismissal which obviously neither the Claimant or Organization would have been agreeable to. It requested that the case be resolved on the merits of the dispute.

Turning to the record the Carrier asserted the evidence shows that the Claimant failed to control his machine so that it did not strike a truck driven by the traveling public. It argued that contrary to the Claimant's assertions the truck was not hidden by dense vegetation and that Claimant admitted he saw the truck and assumed the truck would stop before the railroad crossing. It closed by stating that after having proven its charges it appropriately disciplined the Claimant and it asked that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and will first address the Organization's procedural arguments. The Organization first argued that the Carrier violated Rule 13(a) when it added four Rules to the Notice that it alleged the Claimant might have violated without giving the Claimant and Organization proper advance notice. The Carrier's addition of the four Rules were not unrelated to the charges and did not change the allegations

or “blindsided” the Organization in its defense of the Claimant, therefore, it is determined the Carrier did not violate Rule 13(a). However, the Carrier is forewarned that in the future if the addition of other Rules to a Notice of Investigation changes the thrust of the Charges there could be a violation of Rule 13(a) that will not be cured by simply asking the Organization if it would like a recess as the Organization is not obligated to cure the Carrier’s procedural error. The Organization also argued that the Hearing Officer had too much pre-Hearing knowledge of the incident to be impartial. That argument is not persuasive as the record simply shows that the Hearing Officer was prepared. The Organization’s prejudgment argument is equally unpersuasive. The last argument offered by the Organization that the Investigation process is not fair, lacks substance because the Investigation process was developed by the parties and is covered by Agreement Rules. If either party is unhappy with that process which has been in existence for decades the negotiating table is the place to make changes. The Board has determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11 and the Claimant was afforded his “due process” Agreement rights. The case will be resolved on its merits.

On page 90 of the transcript, the Claimant was questioned as follows:

“SAMUEL TURNBULL: Okay. So you mentioned that you seen the truck, you thought it was stopped. So was vegetation an issue?”

LEE E. DRONES, JR: I feel like veg- vegetation was a issue because I, I saw the front part of the truck. I didn’t know there was is, a trailer or whatever actually behind it. I just saw the front part of it. I didn’t know that there was an actual trailer. I saw the front part. You know how trucks sometimes come across without trailers, and I figured in a area like that that that’s all there was to it.”

Claimant went on to testify on the same page that he saw the truck stopped at a four way stop that ran parallel to the railroad tracks and crossing.

Examination of Transcript Exhibit No. 9, photograph of the accident location, in conjunction with Claimant’s testimony on page 103 reveals that Claimant was traveling eastward and the eighteen wheeler truck was traveling south. The photograph Exhibit 9 shows that Claimant had a clear unobstructed view of the truck and trailer on his left side, north side of the track. The truck and trailer were both bright white (See Exhibits 10 and 11). Therefore, Claimant’s initial view would have been of a white truck and trailer with a dark green background. Claimant had zero obstruction and no reason to not see the truck and trailer moving towards and across the railroad crossing.

On page 90 of the transcript, the Claimant was questioned about the truck as it approached the railroad crossing as follows:

“LEE E. DRONES, JR: Yes, sir, he looked like he, looked as though he had stopped right there.

SAMUEL TURNBULL: It looked like he was stopped, or he was stopped?

LEE E. DRONES, JR: I thought he was stopped. It looked to me like he was stopped.”

(Underlining Board’s emphasis)

The testimony above confirms that the Claimant assumed the truck was stopping and/or was stopped, but was not positive it had stopped and still continued moving his machine forward through the crossing.

On page 135, Claimant testified that he checked the brakes of his machine twice that date and they were in compliance. Later when the brakes were tested after the accident they were found to be out of adjustment which the Carrier admitted may or may not have been the result of the collision. The Board has nothing other than the Claimant’s testimony that the brakes were in working order prior to the accident (See pages 67, 119 and 120), however, Claimant refutes himself, when for example on pages 92 and 93 he suggested that at the time of the accident the brakes did not function properly. Review of the transcript reveals that Claimant’s testimony fluctuated depending upon the questioning. If Claimant was asked about whether he checked his brakes his testimony indicates he fulfilled his job requirements and brakes were okay, but when the questioning turned to when the accident occurred Claimant testified the brakes failed. The Board is not persuaded that the Claimant failed to properly maintain the Ballast Regulator. Although the Carrier has not shown that the Claimant was derelict in maintaining his machine that does not help the Claimant and if anything it hurts his argument and gives him no excuse for a mechanical error. Claimant’s testimony that the brakes failed just before the collision is best described as conveniently timed and self-serving.

It is clear that the Carrier met its burden of proof that the Claimant failed to stop within half the range of vision while approaching a road crossing on August 22, 2016, near MP 357.95.

The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had approximately nine years of service. The subject incident was of a serious nature that caused about \$17,000.00 damage to the Ballast Regulator and totaled the eighteen wheeler’s aluminum trailer. Claimant’s Discipline Record shows this incident was the Claimant’s third Serious Level S discipline event within his 36 month review period. The Carrier’s

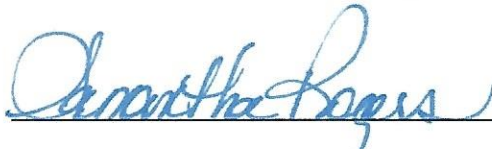
decision to dismiss the Claimant in this instance was permissible in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). The Board finds and holds that the discipline will not be disturbed and the claim will remain denied because it was not contrary to PEPA, nor was it arbitrary, excessive or capricious.

AWARD

Claim denied.



William R. Miller, Chairman and Neutral Member



Samantha Rogers, Carrier Member



David R. Scoville, Employee Member

Award Date: 1/5/18