

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 368, (Case No. 368)**

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

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Michelle McBride, Carrier Member
Louis R. Below, Employee Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing August 31, 2020, when Claimant Justin Dunbar (0199307) was dismissed for failure to position someone at the rear of vehicle 25409 while backing up in the Tulsa Yard on June 30, 2020, which resulted in the damage to the outrigger and for misconduct in violation of MWOR 1.6 and MWSR 12.8.1.**
- 2. As a consequence of the violation referred to in part 1, the Carrier shall remove this discipline with all rights unimpaired and pay for all wage loss including overtime (if applicable) commencing August 31, 2020, continuing forward and/or otherwise made whole.**
- 3. This claim was discussed in conference between the parties.”
(Carrier File No. 14-20-0280) (Organization File No. 1251-BN40S1-2032)**

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 June 30, 2020, Claimant was the assigned Trackman and passenger with Forman Ryan Helms who were working together in Tulsa Yard, Red River Division under the supervision of Roadmaster Kara Brockamp. Mr. Helms was the driver of Section Truck/Vehicle #25309 and at approximately 1000 hours, Ms. Brockamp received a call regarding

damage to Vehicle #25309 and that an employee was covered in hydraulic oil. Upon arrival at the scene, Ms. Brockamp assessed the situation and discovered Claimant and Foreman Helms were assigned the vehicle at the time of the incident.

When interviewed about the incident by Ms. Brockamp, Claimant stated that he and Mr. Helms were on the way back to the tool house when they were blocked at a crossing by a train. In an effort to find a quicker route back, they decided to turn the vehicle around. He explained that as they reversed down a small hill and subsequently put the vehicle in drive, the outrigger had struck the dirt hill located behind them. Claimant stated that when the outrigger alarm sounded, Mr. Helms stopped the vehicle so they could both inspect the perceived damage. During that conversation with Ms. Brockamp it was alleged that Ms. Brockamp specifically asked if Claimant had ground protection during this time, as required by MWSR 12.8.1. Claimant allegedly responded that his co-worker provided ground protection. Noticeable damage was done to the rear left of the outrigger. The employees made a temporary repair to the outrigger and then returned to the tool hours. Ms. Brockamp also questioned Mr. Helms who provided the same storyline.

Roadmaster Brockamp was concerned about the incident so she notified her supervisor, Division Engineer Jason Watkins. Watkins recommended she contact another Roadmaster to perform a sign and symptoms test. The test was performed without any exceptions and the employees were sent home after Ms. Brockamp was able to inspect the vehicle.

Supervisors Watkins and Brockamp discussed the information and decided further conversation was needed to better understand the events leading up to the incident. Therefore, the next morning, on July 1st, the two employees met with Mr. Watkins and Ms. Brockamp, wherein, they provided the same version of events as the day before. Mr. Watkins then advised the Claimant and Mr. Helms that there was a video of the incident, since it was on Carrier property. At that point, Claimant and Foreman Helms explained that Claimant did not provide ground protection and because of that Claimant and Mr. Helms were both directed to attend a formal Investigation on July 14, 2020, which was mutually postponed until August 5, 2020, concerning in pertinent part the following:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to position someone at the rear of vehicle 25309 while backing up in the Tulsa Yard on June 30, 2020 which resulted in damage to the outrigger and for alleged misconduct.”

On August 31, 2020, Claimant was notified that he had been found guilty as charged and was dismissed effective immediately.

The Board notes that is the first of two dismissal cases involving two different Claimants that were involved in the same incident and attended the same Hearing and were dismissed on the same date (the second case is Award No. 369).

It is the Organization's position that the transcript shows that there were two reverse movements. It asserted the two individual back-up movements that occurred in short succession. The first reverse movement was backing down a hill away from the blocked crossing. That first original reverse movement was neither questioned about nor testified about by anyone other than co-Claimant Helms. It argued no Rules violations were filed for the first movement, ergo there must have been a ground guide, Claimant Dunbar. The second movement, an unintentional movement created by Mr. Helms (who didn't normally drive the truck) was accidentally caused because Mr. Helms missed the proper gear and hit a reverse gear rather than a forward gear causing the truck to lurch backwards. Because Mr. Helms had intended the truck to go forward rather than backwards there was no positioning of a ground guide.

The Organization further argued that when Claimants were faced with the alleged video proof of the incident and continued interrogation, the Claimants unknowingly admitted to a violation in an attempt to save their employment relationship with Carrier. It reasoned the record actually shows there was no admission to the first movement not being a protected move and admission to no protection for the second move was because there was no intention to back-up the vehicle and there was no dishonesty exhibited by either Claimant. It concluded the Carrier did not meet its burden of proof and it requested the discipline be set aside and the claim be sustained as presented.

It is the position of the Carrier the record shows that both Claimants admitted there was no ground guide provided for the reverse movement that resulted in damage to the outrigger. It stated Carrier Officer Brockamp's testimony remained consistent throughout the Hearing. In its appeal the Organization argued the Claimants stated there were two reverse movements. The first was the improper reverse movement when backing down the hill and the second was when the vehicle allegedly missed a gear causing it to jolt backwards. Since that was the case, it reasoned the Organization was also admitting there was no ground cover on either reverse movement, thus they did not comply with MWSR 12.8.1 and because both Claimants were dishonest about the incident until challenged by video proof dismissal was appropriate. It asked that the discipline not be disturbed and the claim remain denied.

A review of the Transcript reveals that neither Claimant testified that there were two reverse movements of the vehicle driven by Claimant Helms nor is there any closing comment at the conclusion of the Investigation that suggested such. The argument concerning a second backing up of the vehicle in the appeal letter is “de novo” as it was never set forth during the Hearing, therefore, it will not be considered.

On Page 30 of the Transcript, Carrier Officer Watkins testified that he interviewed both Claimants after which Watkins stated the following:

“After the conversation was over, I told Mr. Helms and Mr. Dunbar I was going to go up and watch the video. Uh did they give me a complete and accurate uh view or picture of what had happened? And at that point, Mr. Helms to me that uh, no, that they didn’t have anybody backing him up when the damage occurred. Uh so I asked Mr. Dunbar at that point if he was, in fact, backing him up. Mr. Dunbar shook his head said no.”

Contrary to the Organization’s suggestion both Claimants admitted there was no ground movement on their reverse movement. On Page 35, Claimant Dunbar confirmed Supervisor Watkins testimony as Claimant testified in pertinent part:

“...I told him, I said, we got hung up at the crossing so backed up real fast and then on the way pulling forward we got hung up. And he said, so there was no one or you were on the ground? And I said no. And then he asked Ryan. So no one was on the ground and I said no....”

On Page 36, Claimant Helms confirmed Supervisor Watkins testimony when Helms testified in pertinent part:

“...We did not have a ground man....”

Claimant Dunbar also admitted on Page 16, that he was not honest about the incident when first interviewed by Roadmaster, Ms. Brockamp.

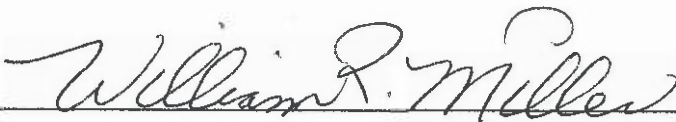
Claimants Dunbar and Helms both admitted in closing statements that they failed to have ground protection when they backed up from the crossing that resulted in damage to Carrier machinery. The record is clear that minor damage occurred on the hasty reverse movement and assuming for the sake of argument that there was a subsequent accidental reverse move there was no showing that would have been the causation of the mechanical damage. The Board further notes that Claimants would not have been expected to have ground protection for an unexpected accidental reverse movement which does not appear to have happened. There is no doubt that both Claimants understood they were admitting that they did not have ground

protection when they made their reverse movement backing away from the railroad crossing. It is equally clear that both Claimants made a mutual concerted effort to distort the facts when first questioned about the incident. Substantial evidence was adduced at the Hearing that the Carrier met its burden of proof that both Claimants were guilty for failure to position someone at the rear of the vehicle on June 30, 2020, and were further guilty of misconduct when they were not initially honest about the incident.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had a little over seven years of service with one Formal Reprimand on his Disciplinary Record. Claimant's failure to provide ground protection coupled with a failure to be forthright about the incident, when questioned twice, was a serious offense as dishonesty about any job related subject is a Stand-Alone Dismissible Violation. At the Hearing Claimant was honest about what transpired on June 30, 2020. Unfortunately, Claimant did not choose to be forthright about the incident until July 1st after he was advised by Division Engineer Watkins that Mr. Watkins intended to review a Carrier video of the incident and asked Claimant and Mr. Helms if there was anything else they might want to say, at which time Claimant admitted he had not been honest about what had transpired after which Mr. Helms confirmed Claimant's statement that he too had not been forthright. That admission was not made because Claimant was remorseful, but was made because Claimant knew the video might tell a different story than what Claimant had told. Claimant was remorseful at the investigation, but it came too late. The discipline assessed was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA). Therefore, the discipline was appropriate and 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



Michelle McBride, Carrier Member



Louis R. Below, Employee Member

Award Date. March 25, 2022