

PUBLIC LAW BOARD NO. 7585

**Case No. /Award No. 102
Carrier File No.: 11-20-0324
Organization File No.: T-D-6370-M
Claimant: D. W. Olson**

BNSF RAILWAY COMPANY)
(former Burlington Northern Railroad Company))
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES DIVISION - IBT)

STATEMENT OF CLAIM:

The Organization alleges BNSF violated the Agreement when Claimant was disciplined as a result of a formal investigation held on January 24, 2020, for Claimant's violation of Maintenance of Way Operating Rule 6.50.3-Equipment Components Clear when he struck a grade crossing with his assigned machine while plowing snow on January 9, 2020, which resulted in significant damage to the machine (X0600422).

CARRIER POSITION:

Claimant admits that he struck a concrete grade crossing panel while plowing snow. In the Carrier's view, this admission constitutes substantial evidence of negligence, warranting discipline. In its assessment, the fact that Claimant struck the grade crossing is evidence that he failed to comply with MWOR 6.50.3-Equipment Components Clear, which states: "Before passing over crossings, switches, derails and frogs, be sure all equipment components will clear."

The cost to replace the left-wing assembly was \$23,000 according to Roadway Equipment Supervisor K. Berger. Berger further stated that damaging wings while plowing snow is not a common occurrence and happens maybe once or twice a year.

The Carrier maintains there are numerous awards supporting the conclusion that where there is an admission of guilt, there is no need for further proof. For instance, Third Division Award 28484 states: "Where, as here, there is an admission of guilt, there is no need for further proof. Where, as here, there is no

mitigation of the admitted guilt, this Board is without power to reverse the discipline assessed by the Carrier.”

The Carrier argues discipline was warranted and is consistent with established BNSF policy. It found this particular incident to be a standard violation, and Claimant was assessed a Formal Reprimand consistent with PEPA. Under these specific circumstances, the assessed discipline was not excessive, arbitrary, or unwarranted, and the Board should not disturb the discipline imposed.

ORGANIZATION POSITION:

As the Organization sees it, there is no direct or implied evidence that suggests Claimant was negligent in his operation of the machine. Claimant’s attention was necessarily divided between watching the side wing plowing snow and watching for passage of the traveling public through the grade crossing.

The Organization protests that there was no fair or impartial hearing because Hearing Officer Ivan Arias had predetermined the result. It insists this was clearly evidenced when, referencing Claimant, he requested a copy of the rule “he broke.”

The Organization additionally cites multiple mitigating circumstances: There were no flagmen to protect Claimant’s movement; the Carrier’s rail and the edge of the concrete grade crossing were not visible; the Carrier waited two weeks after the incident to take pictures; Berger did not approach the snow plow because of the snow depth; there is nothing in the record regarding the age of the machine or its wings.

The transcript revealed that the right wing of Machine X06-00422 was not operable on January 9, 2020 because of damage incurred while being operated by a previous operator. The damage to that wing was described as being similar to the damage to the left wing on January 9, 2020. The transcript also reveals that: “The right wing was broken by somebody else?” (Union Representative J. Mozinski, Page 22) “Previously, yes.” (Work Equipment Supervisor K. Berger) “And no investigation was issued for him?” (Mozinski) “Not to my knowledge.” (Berger) In the Organization’s assessment, this constitutes evidence of disparate treatment, which defeats any finding of just cause.

DECISION:

The Organization has established a number of considerations in this case which cumulatively defeat the Carrier’s case. It is clear that the Carrier and the Hearing Officer took the applicable rule at face value, denying any possibility of mitigating circumstances and avoiding any need to show wrongdoing by the employee.

Further, some of the Organization's proffered mitigating circumstances were valid. We are not persuaded that flagmen were necessary. Berger's hesitance to walk in the snow is not probative in our view. The lack of evidence regarding the age of the machine and/or its components has little value on its own. However, the fact that the edge of the concrete grade crossing was invisible does count as a mitigating circumstance. As to the Carrier's tardiness in taking pictures, this delay allowed the photographs to show the grade crossing which Claimant could not see when it was covered with the snow he was plowing. It is the prerogative of the Carrier to choose the evidence it wants to submit. The timing of the pictures is not evidence of guilt or innocence of the employee.

It is well established in labor arbitration that just cause is defeated when the Carrier fails to enforce its rules equitably. The Organization has shown that the machine was damaged by another employee, with no disciplinary consequence in evidence. However, this evidence fails to show that supervision knew of the incident and could identify the responsible employee. The Carrier cannot be held accountable for a failure to discipline when it has not been shown to have had knowledge of the perpetrator.

The Carrier's tardy attempt to add documents to the record was improper and those documents must be ignored. The existence or nonexistence of the rule in question and its violation will be determined based on the on-property record.

We find that the rise at the grade crossing was completely invisible. There was no evidence that Claimant was trained to anticipate an undetectable rise at crossings. There is no evidence of any wrongdoing whatsoever on his part. The rule in question must be interpreted in a reasonable manner, such that impact alone does not establish a violation. No rule can exclude mitigating circumstances, and the lack of visibility did not receive adequate consideration in this case. The Carrier's position is further weakened by the Hearing Officer's demonstrated bias.

The Organization has argued that Claimant should receive compensation for the day he appeared at the investigation. We find that failure to compensate for the investigation was in actuality a punitive suspension of one day, without cause.

AWARD:

The claim is sustained in full. The Carrier will compensate Claimant for eight hours on January 16, 2020. The Carrier shall immediately remove the discipline from Claimant's record, with seniority, vacation and all other rights unimpaired and make him whole for all time lost as a result of this incident.

ORDER:

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is to comply with the award on or before 30 days following the date the award is adopted.

Dated: February 10, 2022



Patricia T. Bittel, Neutral Member



Zachary Voegel, Labor Member



James Rhodes, Carrier Member