

**PUBLIC LAW BOARD NO. 7585**

**Case No. /Award No. 68**  
**Carrier File No.: 10-16-0268**  
**Organization File No.: C-16-D040-15**  
**NMB 106**  
**Claimant: M.A. Luther**

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**BNSF RAILWAY COMPANY**

**-and-**

**BROTHERHOOD OF MAINTENANCE  
OF WAY EMPLOYEES DIVISION - IBT**

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**FACTS:**

On May 18, 2016 Claimant Luther was issued a Level S 30-day Record Suspension with a 12 month review period for failing to operate a Company vehicle in a careful and safe manner when he struck a BNSF rental vehicle with his fuel truck. The Organization protested the discipline as unfair and excessive. The matter was properly processed, culminating in review by the undersigned Board of Adjustment.

**CARRIER POSITION:**

The Carrier allegedly an established timeline fixes the event between the time the truck was parked and the time the broken side-view mirror was noticed. A video placed Claimant Luther at that location at the time in question, and in the opinion of the Carrier, showed questionable driving behavior. This was more than mere circumstance, it argues, maintaining it provided more than adequate proof that Claimant caused the damage to the mirror.

The video was played at the investigation. According to simultaneous commentary, it showed Claimant's fuel truck approaching Handzus' rental vehicle, and just as he passed, Claimant slammed on the brakes and jerked his head around to look. The video does not show actual impact. However, in the Carrier's assessment, it shows enough to constitute substantial evidence that Claimant's truck damaged the mirror on Handzus' truck.

**ORGANIZATION POSITION:**

The Organization protests that the Carrier refused to provide a copy of the video from the Claimant's vehicle which would show what occurred during the alleged violation. It argues the still shots in evidence simply do not equate to the video itself. It contends that

withholding evidence constitutes a clear and unequivocal violation of the Rule 40 guarantee of a fair and impartial hearing.

The Organization notes that the Carrier's witness admitted at hearing that no part of the video showed impact. It adds that Claimant flatly denies hitting Mr. Handzus' vehicle. Claimant testified that he saw the video twice and it did not show him hitting anything at all.

The investigation centered on the Drive Cam video and pictures, but in the Organization's view, neither showed anything except an employee slowing down and looking in the mirror. The Organization maintains that is exactly what an employee is supposed to do. The Organization notes that Roadmaster Handzus testified that neither the video nor other evidence showed any contact between the fuel truck and his rental vehicle. The Organization argues that there were other vehicles coming through the location at the time, raising the likelihood that another vehicle caused the damage. It also points out that there was absolutely no damage to Claimant's truck. The Organization contends that had there been impact, there would have been evidence of it on Claimant's vehicle. It concludes the Carrier lacks sufficient evidence to prevail in this matter.

## **DECISION:**

The Carrier supplied the video for viewing at the investigation and therefore has not withheld evidence from the Organization. Still shots from the video are consistent with testimony at the investigation to the effect that at the moment when Claimant's fuel truck was passing Handzus' parked rental vehicle, Claimant decelerated and looked in the direction of Handzus' truck. The question to be decided by the Board is whether this constitutes substantial evidence.

The Board finds that it does not. The evidence is certainly consistent with Claimant having had impact with Handzus' truck; the timing on the video falls between the time Handzus left his truck with the mirror intact and the time he received a report that his mirror was damaged. Certainly, if Claimant had hit Handzus' truck, he would have decelerated and looked toward the crunching sound.

That said, the evidence must be seen in context. Claimant was in a very large truck and was passing between two parked vehicles. It makes sense that he would slow down and the fact that he decelerated rapidly is not probative of any impact. His turning to look toward Handzus' truck is circumstantial evidence and simply does not prove that there was impact. When pinching between vehicles, drivers tend to turn and look at each.

The crucial piece of evidence in this Board's assessment, however, is the absolute lack of any discernible damage to Claimant's truck. The Board is not persuaded that Claimant's truck could impact the mirror of another vehicle and rip it off without a single scratch to the moving vehicle. The lack of damage militates against a finding of impact and is consistent with Claimant's denial. Given the equivocation in the probity of the evidence, the Board must find that the Carrier has not met its burden of proof.

**AWARD:**

The claim is sustained. The discipline shall be removed from Claimant's record and he shall be compensated for any lost time or benefits.

**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.

January 18, 2018; Park City, Utah



Patricia T. Bittel, Neutral Member



Zachary Voegel, Organization Member



James Rhodes, BNSF Member