

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 10-13-0398
Organization File No. C-13-D040-22

Claimant — Richard Remington

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on May 2, 2013, when it issued Claimant, Richard Remington, a Level S 30-day Record Suspension with a one-year review period for violation of MOWOR 1.1.2 — Alert and Attentive and MOWOR 1.6 — Conduct, for negligence in operating BNSF truck 20171, resulting in a collision with another motor vehicle at approximately 0645 on March 16, 2012, near Trenton, Nebraska.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately remove the discipline from Claimant's record, and make him whole for glosses incurred.

BACKGROUND:

The Claimant entered service with the Carrier on May 3, 1977. At the time of the incident that resulted in his discipline, he had been a Track Inspector off and on for almost 20 years and had worked as a Relief Track Inspector on the Akron Subdivision for nine or ten years.

The Claimant was driving to work in his Company-issued pickup truck at about 6:45 a.m. on March 16, 2012, heading west on Highway 34 when he struck the rear of a semi-tractor trailer that had recently exited onto Highway 34 westbound from the premises of a local ethanol factory. According to the Accident Report filled out by Nebraska State Troopers at the scene, the semi- was “traveling westbound slowly trying to build up speed while negotiation (sic) up a grade in the roadway.” (No citations were issued to either driver.) The speed limit on Highway 34 is 65 miles per hour, and it appears that Claimant was driving at the speed limit up until right before he struck the semi-. It was still full dark outside; the road is curvy and terrain is hilly and full of vegetation. The Claimant testified at the investigatory hearing that he did not see any tail lights and only saw a “glimmer” of the DOT reflective stripes that the semi- was required to have immediately before the accident occurred. That glimmer was his first realization that there was a vehicle immediately in front of him. There were no eyewitnesses to the accident. Claimant’s vehicle was seriously damaged on the front driver side and the Claimant, who was trapped in the wreck until freed by the fire department, sustained significant injuries as a result of the collision.

The Carrier initially sent Claimant a Notice of Investigation dated March 26, 2012, indicating that an investigation would be held “for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged negligence in operation of a motor vehicle causing a collision resulting in damage to the vehicle and injury to yourself on the Akron Subdivision near Trenton, Nebraska, at approximately 0645 hours Central Time on March 16, 2012 while assigned as Track Inspector, McCook, Nebraska.”

The Claimant was on medical leave of absence due to the injuries he sustained in the accident from March 19, 2012, until April 1, 2013, and the parties agreed to hold the investigation in abeyance until he returned to work. The hearing was ultimately held April 9, 2013. At the hearing, a number of witnesses who had been at the scene of the accident testified that the back of the semi-tractor trailer was covered in “filth and dirt,” to the point where the DOT reflective stripes were not visible. Moreover, at least two witnesses testified that they saw the driver of the semi- wipe the tail lights clean before one of the State Troopers at the scene took photographs of the vehicle.

By letter dated May 2, 2013, the Claimant was informed that in conjunction with the accident on March 16, 2012, he had been found in violation of MOWOR Rule 1.1.2 Alert and Attentive and in violation of MOWOR 1.6 Conduct. He was assessed a Level S 30 Day Record Suspension and placed on a one-year review period. The Organization timely appealed the discipline.

In denying the Organization's appeal, the Division General Manager responded:

In summary, this is an unfortunate accident. However, the testimony from all parties support the discipline assessed based on the fact that Mr. Remington struck the rear of the semi-tractor trailer unit. A key piece of evidence involved the fact Mr. Remington took no action to slow his vehicle as he was traversing the highway. There was no evidence he slowed his speed prior to impact. The accident report from the Nebraska State Patrol documented the inspection of the trailer Mr. Remington struck confirmed all lights on the trailer were functioning properly. Had Mr. Remington taken into consideration all factors involved with the operation of his vehicle (darkness, terrain, vehicle speed, and sight distances), and operated his vehicle in an alert and attentive manner and with the knowledge of potential truck traffic entering and departing the Ethanol Plant, this accident could have been avoided. His failure to exercise due diligence while operating the truck and his failure to remain alert and attentive resulted in the accident.

According to the Carrier, the accident was the result of Claimant's negligence and failure to be attentive to the road conditions as he was driving down Highway 34 on the morning of March 16, 2012. The charges were proven, and the discipline assessed was consistent with the PEPA program. The Organization contends that the Carrier has not met its burden of proof in establishing that Claimant was negligent or that he was not alert and attentive. Its case was based on speculation as to what transpired when the accident occurred. The evidence is that the Claimant saw no tail lights or reflective striping ahead of him and that the rear of the semi-trailer was "typical" of trailers carrying mash: covered in "filth and dirt," to the point where the tail lights, if they were even turned on, were obscured. The Claimant did everything he could to avoid the collision but because its tail lights were obscured, he did not see trailer until it was too late. The discipline in this case was not justified: the Carrier's findings were not consistent with the facts, and under the circumstances, the penalty assessed was excessive.

FINDINGS AND OPINION:

Public Law Board 7602, upon the whole record and all the evidence, finds that the carrier and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934. This Board has jurisdiction over the dispute involved herein.

The Carrier found Claimant guilty of violating MOWOR 1.1.2 and MOWOR 1.6. MOWOR 1.1.2 — Alert and Attentive, states:

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

MOWOR 1.6 — Conduct, reads:

Employees must not be:

1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome
- or
7. Discourteous

Any act of hostility, misconduct or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated.

The Carrier's disciplinary letter set forth its conclusion that the Claimant had been negligent in operating his truck in such a way as to collide with another vehicle and that he had failed to remain alert and attentive while operating his truck, resulting in the collision.

The Organization contends that the Carrier's conclusions were based on speculation, and it is true that there were no eyewitnesses to the accident who could testify with certainty about how the accident occurred. The Claimant candidly acknowledged that he had limited recall of what had happened. However, the accident at issue was a rear-end collision. When all is said and done, one fact is indisputable: the Claimant drove his vehicle into the rear of another vehicle traveling on the same highway in the same direction. There is no indication that the semi-tractor trailer was stopped or that it somehow backed into Claimant's truck. As every student driver learns early on, it is the driver of the rear vehicle that is ordinarily deemed responsible for a rear-end accident.

The Claimant is certainly a sympathetic figure: he was driving to work in the dark one morning when all of a sudden he strikes a lumbering semi-tractor trailer from behind under circumstances that suggest the semi's tail lights were either not turned on or not visible. The injuries he suffered in the accident kept him off work for over a year. He is a long-term employee whose last discipline was in 1987. From the Organization's perspective, assessing him with a Level S penalty when he returns from over a year off work was callous and excessive. Given what the Claimant went through, the Carrier was

certainly not obligated to pursue discipline in this case—but it did. Regardless of how sympathetic a Claimant might be, however, the Board’s function in cases like this is to determine if the charges were proven and the discipline imposed commensurate with the proven charges.

There is no dispute that Claimant drove into the back of the semi-tractor trailer. This is not a case where the driver was in new territory or driving in unfamiliar conditions. The Claimant testified that he was familiar with Highway 34. He was also aware of the Trenton Agri-Products Ethanol Plant and the entrance where large trucks and semi-tractor trailers entered and exited regularly. There are also highway signs in the vicinity warning drivers to “Watch For Turning Trucks.”

It is the obligation of every driver to be alert to hazards on the road ahead. While the Claimant was familiar with Highway 64, it was dark outside, and he should have known to take the ordinary precautions for driving in the dark, mainly to slow down in order to make up for decreased visibility ahead. However, the evidence is that immediately before impact, the Claimant was driving at the top of the speed limit, 65 mph. The Carrier’s conclusion that he was driving too fast for road conditions was not unreasonable. The conclusion that followed from that—that his speed was negligent under the circumstances—was also not unreasonable.

There was credible evidence in the record that the trailer’s tail lights may have been so dirty that they could not be seen; there is no way to establish one way or another whether they were even on. If the semi-’s tail lights were not visible, that would establish some responsibility for the accident on the part of its driver. But it would not relieve the Claimant of his own responsibility for the accident. Accidents may result from multiple factors, involving negligence on the part of several individuals. Contributory negligence on one actor’s part may mitigate another actor’s negligence, but both actors remain guilty of negligence.

So the Carrier’s conclusion that the Claimant had been negligent was supported by the evidence in the record; his negligence was sufficient for the Carrier properly to conclude that he had violated MOWOR 1.6 and MOWOR 1.2.2.

The Board next turns to the level of discipline imposed. The Carrier’s Policy for Employee Performance Accountability (PEPA) sets forth “Categories of Discipline” ranging from a Standard Violation to a Serious Violation to a Stand Alone Dismissible Violation. According to the PEPA, “A Standard violation is a violation which does not subject an employee or others to potentially serious injury or fatality and does not meet

other criteria for a Serious or Stand Alone Dismissible violation..." Because of the serious injuries sustained by the Claimant and the significant damage to the Carrier's truck caused by the accident, the incident would not qualify as a Standard violation. The next level of discipline is Level S (Serious), which is what the Claimant was assessed. Because of his good work record, the Claimant was placed on a one-year review period, not the three-year review period normally assessed. The discipline assessed was consistent with the standards set forth by the Carrier in its PEPA, and there is no basis for the Board to set it aside.

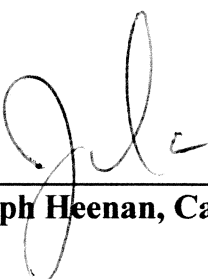
AWARD


Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant not be made.


Andria S. Knapp, Neutral Member


Joseph Heenan, Carrier Member


Zachary Voegel, Organization Member

5/25/2016
Date