

Award No. 42  
Case No. 42  
NMB Case No. PLB-07602-000042

**PUBLIC LAW BOARD NO. 7602**

**Parties to the Dispute:**

<b>BROTHERHOOD OF MAINTENANCE OF WAY</b>	)
<b>EMPLOYES DIVISION—IBT</b>	)
	)
<b>v.</b>	)
	)
<b>BNSF RAILWAY COMPANY</b>	)

**Carrier File No. 11-14-0132**  
**Organization File No. S-P-1805-C**

**Claimant — D. L. Niles**

**BACKGROUND:**

This Claim challenges the Carrier's imposition on the Claimant of a Level S 30-Day Record Suspension and permanently disqualifying him from a Traveling Mechanic's position or from driving a Company vehicle or operating Company machines. The Claimant entered service with the Carrier on September 5, 1978, in the Bridge and Building Department.

On September 23, 2013, the Claimant was working as a Traveling Mechanic in the Pasco (Washington) Yard and driving a maintenance truck, Carrier vehicle 26893. Shortly after 0900, the Claimant was traveling west on A Street to go to the work equipment shop when he made a left-hand turn that brought him to a private crossing, at MP 146.5. He noticed a train crossing A Street. It appeared to the Claimant that the train was traveling east on the track away from him, when in fact it was traveling west on the track closer to him. Claimant testified that he was looking toward the shop and proceeding very slowly to cross the track when he looked up and saw that the train was headed in his direction. He slammed on his brakes and was able to stop short of the tracks. The train crew, which had blown its whistle at least twice when it saw the truck approaching the track, put the train into emergency mode to try to stop short of the crossing. The Claimant's and the crew's actions were enough to avoid a head-on

collision, but not contact altogether. The Claimant was unable to stop the truck but could not stop short of fouling the track, and the crew could not stop the train before the crossing. In passing, the engine's sight glass clipped the front corner of the truck in the passenger side, damaging the right side bumper, grill and hood. There were no injuries.

The Carrier issued a notice of investigation by letter dated September 25, 2013, "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with BNSF Maintenance of Way Operating Rules 1.1.1 Maintaining a Safe Course, and 1.1.2, Alert and Attentive, when you were involved in a vehicle accident in the vicinity of Pasco WA, BJSF Pasco Yard, Lakeside Subdivision, MP 146.5 on Tuesday September 24, 2013 around 0915...."

Following mutually agreed postponements, the investigatory hearing was held October 25, 2013. The Claimant acknowledged in his testimony that he was distracted, thinking about the duties ahead of him for the day, when he approached the private crossing where the incident occurred:

... I saw the, the train, uh, the crossing, as I was approaching the crossing, I saw the crossing bucks come down and I saw a train going into the crossing. Um, I was kind of distracted, I was looking out to the side for Doc because I was supposed to meet him there. There were several trucks out there and I was kind of scanning over there as I was approaching where I needed to drive in, uh, looking for Doc. And, uh, I did see the train, saw the crossing bucks come down and, uh, for some reason in my head, I felt that the train was just going east, he was on the track going up toward the east end of the yard, and I, uh, I, I disregarded it after that....

When he heard the train's whistle sound a second time, close by, he looked at the tracks and saw the train coming toward him. He stated that he "killed" the truck but then "froze" as he realized how close to the tracks he was. Ultimately, the Claimant testified that "it was just error on my part."

Following the investigation, by letter dated November 21, 2013, the Carrier found the Claimant guilty of violating MWOR 1.1.1 Maintaining a Safe Course, MWOR 1.1.2 Alert and Attentive, and MWSR 12.1.2 Railroad Crossing at Grade. The letter also set forth the discipline assessed:

[Y]ou are hereby assessed a Level S 30 Day Record Suspension with a three year review period commencing November 21, 2013, disqualified as a Traveling Mechanic, and you are restricted from holding any position that may require you to drive any BNSF vehicle or operate any BNSF equipment (on-track or off-track). Furthermore, you must contact the Employee Assistance Program Manager, [contact information omitted], to make arrangements for both EAP and Medical Evaluations.... It is expected that you will comply with all instructions issued by the EAP Manager. Upon receipt of the results of your EAP and Medical evaluations, the Company will reconsider the restriction on your operation of BNSF equipment only.

The Organization filed an appeal, and the parties having failed to resolve the matter mutually, it has been appealed to the Board for decision.

According to the Carrier, the Claimant admitted his guilt, so the only issue before the Board is the penalty that was assessed. This was Claimant's second Level S violation within the review period for his prior vehicle incident and he could have been dismissed. The penalty that was assessed was fair under the circumstances and should not be disturbed. The Organization contends that the discipline was harsh, excessive, and punitive in nature, which is contrary to the principles of progressive discipline that apply.

#### 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 Claimant was charged with violating MWOR 1.1.1, Maintaining a Safe Course; MWOR 1.1.2, Alert and Attentive; and MWSR 12.1.2, Railroad Crossings at Grade.<sup>1</sup> In his testimony at the hearing, Mr. Niles effectively admitted that he had violated the rules at issue. The real crux of this case is the level of discipline that was assessed.

Claimant's lack of attention caused an accident whereby a locomotive engine struck his truck—a new one he had only had for two days—causing damage to both

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(approximately \$450 to the engine, for a new sight gauge on its fuel tank, and \$7500 in damage to the bumper and hood of the truck.) Causing an accident under the circumstances that pertained in this case warrants discipline at Level S. The standard Level S penalty for a first offense is a 30-day record suspension, accompanied by a review period. The Policy for Employee Performance Accountability (PEPA) states that “A second Serious violation committed within the applicable review period may result in dismissal.”

In Claimant’s case, his personnel record establishes that he was previously disciplined for exactly the same rules violations (MWOR 1.1.1 and MWOR 1.1.2) in May 2010 and in February 2011. He was assessed Level S penalties in both cases, the first one with a 12-month review period and the second with a 36-month (3-year) review period. The incident at hand occurred within the review period for the 2011 infraction, which could have subjected the Claimant to dismissal under PEPA. Even under principles of progressive discipline, more serious discipline was warranted for the most recent incident.

The Organization contends that nonetheless, the penalties instituted here—also restricting the Claimant from holding any position that required him to operate any Carrier vehicle or equipment and permanently disqualifying him from his long-time position as a Traveling Mechanic, in addition to another Level S record suspension—were Draconian overkill, essentially punitive in nature. One of the fundamental principles of industrial justice is that the penalty should be commensurate with the infraction, but arbitrators in general, and the Board in particular, recognize that employers should have some leeway in deciding what is “commensurate.”

In this case, another Level S record suspension without more would only have repeated the prior discipline that Claimant received in February 2011 and May 2010. If the purpose of progressive discipline is to increase the level of discipline in order to send a message to the errant employee that his performance needs to improve, it is not clear that the Claimant understood the messages he had been sent previously, and it was appropriate for the Carrier to increase the level of discipline for the September 24, 2013, incident. Without question, the Carrier could have increased the duration of the suspension or imposed an actual suspension.

Here, however, the Carrier elected a different course, restricting the Claimant from holding any position requiring him to operate any vehicle or equipment and disqualifying him from his position as a Traveling Mechanic. The operating restriction was not permanent, however. The November 21, 2013, Decision Letter also directed the Claimant to “make arrangements for both EAP and Medical Evaluations” and to “comply with all instructions issued by the EAP Manager.” Then, the letter continued: “Upon receipt of the results of your EAP and Medical evaluations, the Company will reconsider the restriction on your operation of BNSF equipment only.” That last sentence implies that if the Claimant received a clean bill of health from EAP and Medical, the restriction on operating equipment would be lifted. The Carrier’s action is both understandable and, given the critical importance of safety in the rail industry, reasonable. At the time of the accident, the Claimant had worked for the Carrier for almost 35 years, most of that time with a relatively unremarkable disciplinary history. Before the 2010 vehicle incident, his last discipline had been in 1997, and the one before that in 1987. Then, within a span of little more than three years, the Claimant had three serious vehicle incidents, all involving violations of MWOR 1.1.1 and 1.1.2. The Carrier has to have wondered what had caused such a dramatic turnaround, and a temporary restriction on the Claimant’s operating vehicles or equipment pending further investigation into the Claimant’s health and other possible physical, mental or emotional reasons for the accidents was a prudent approach to the problem.<sup>2</sup>

The Carrier’s decision to permanently disqualify the Claimant from his long-time position as a Traveling Mechanic is more problematic. There is nothing in the record to indicate why the Carrier decided on that course of action. Nor is it immediately evident what purpose would be served by such a permanent ban. The conduct for which the Claimant was disciplined had nothing to do with the performance of, or his ability to perform, the job duties and responsibilities of a Traveling Mechanic. The restriction on his operating Carrier vehicles and equipment would limit his ability to perform as a Traveling Mechanic as long as the restriction lasted; the purpose of the additional ban is entirely unclear. A temporary ban or demotion would be understandable. Given his recent difficulties complying with both MWOR 1.1.1 and MWOR 1.1.2, the Carrier could reasonably be expected to have had questions about the Claimant’s abilities overall, and requiring him to re-establish his qualifications would not have been inappropriate. A permanent ban on the position,

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<sup>2</sup> The record does not indicate whether the Claimant complied and if he did, what happened next.

especially the one he had performed satisfactorily had for some years, is another matter altogether. Progressive discipline is designed to give an employee notice of unacceptable conduct and an opportunity to improve. Permanently barring an employee from a position because of conduct unrelated to the performance of the duties of that position does not further either of those purposes. Discipline must not be arbitrary or excessive. Considering all of the circumstances of this case, the Board finds that the Carrier's decision permanently to disqualify the Claimant from his position as a Traveling Mechanic was both arbitrary and excessive, and that portion of the discipline assessed against him for the September 24, 2013, crossing accident shall be removed from his record. As noted above, he would not be able to work as a Traveling Mechanic while his ability to operate Carrier vehicles and equipment was restricted. Because the accident was unrelated to his abilities as a mechanic, additional discipline targeting his position was indeed punitive in nature.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant in part be made. The Level S 30 Day Record Suspension with a three-year review period shall remain on his record, but he shall be permitted, following appropriate EAP and medical evaluations and any necessary retraining, to operate Carrier vehicles and to work as a Traveling Mechanic. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.


  
Andria S. Knapp, Neutral Member

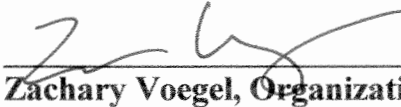
Page 7

Award No. 42

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Nathan Moayyad, Carrier Member

  
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Zachary Voegel, Organization Member

3/15/17

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Date