Award No. 44
Case No. 44
NMB Case No. PLB-07602-000044

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:
BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 10-14-0343
Organization File No. C-14-D040-30

Claimant — Barry L. Hastings

BACKGROUND:

On the morning of May 17, 2014, the Claimant was working as a Track Inspector headquartered out of Brush, Colorado. Driving the utility truck that had been assigned to him by the Carrier, he went to a local restaurant, Santiago's, to get a breakfast burrito. Santiago's is located on a frontage road just off the highway, with parking stalls in front perpendicular to the building. The Claimant pulled into one of the spots and looked in the driver's side rear view mirror to see if the coast was clear for him to open the door and get out of the truck. Unfortunately, he failed to see a gray pickup truck that was just entering the adjacent parking stall, and when he opened his door, it made contact with the truck, causing damage to both vehicles. The right rear passenger side of the pickup truck was dented. The driver's side door on Claimant's truck was bent and would no longer close, and the truck had to be towed to a body shop.

The Claimant immediately called Roadmaster Hailey Brown to report the incident, and she instructed Assistant Roadmaster Cason Cole to go to the scene to investigate and to conduct a UA test on the Claimant.[1] When Cole arrived, the other

[1] The UA test is standard protocol for accidents. The Claimant passed the test.

vehicle had left. However, the owner had taken a photograph of the damage to his truck and texted it to the Claimant, who passed it along to Cole. Cole took additional photographs of the scene. The Claimant also called local police, who came and issued a citation to the Claimant for opening his door into a lane of traffic when it was not safe. (The citation was later dismissed.)

The Carrier issued a notice of investigation by letter dated May 21, 2014, "for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to properly operate company vehicle resulting in damage to company vehicle...."

Following mutually agreed postponements, the investigatory hearing was held on August 4, 2014. The witnesses testified to the facts as set forth above. The Claimant acknowledged that he had not looked in the center rear view mirror or over his shoulder when he checked to see if it was safe to open his door and get out of the truck.

By letter dated August 29, 2014, the Carrier found that the Claimant had violated MWOR 1.19, Care of Property, and assessed him a Standard 10 Day Record Suspension with a one-year review period. 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 case is a simple one: the Claimant opened his door into a truck pulling into the adjacent spot, causing damage to the truck, which is Carrier property. The evidence establishes that the truck did not run into the door when Claimant opened it. Instead, Claimant opened his door into another vehicle that was already pulling into the adjacent spot. His actions led to the damage of Company property, and he violated MWOR 1.19. The discipline assessed was the lowest level possible under the PEPA, and there is no basis for the discipline to be overturned. The Organization argues that the Carrier did not meet its burden of proof, in that there were no eyewitnesses to the accident and the evidence in the record does not establish that the accident was caused by the Claimant, not the other driver. Moreover, the discipline assessed was harsh and excessive for what was a simple accident that could have happened to anyone. The Claimant was honest and forthright from the beginning and even provided the photograph of the other truck that the Carrier used in deciding

that he had violated MWOR 1.19. Finally, the hearing and decision were procedurally defective in that the Notice of Investigation charged Claimant with failing properly to operate his vehicle, not MWOR 1.19, Care of Property, which is directed at tools and equipment, not vehicles.

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 the Claimant in violation of MWOR 1.19, Care of Property, which states: "Employees are responsible for properly using and caring for railroad property...." The Organization points out that the Claimant was notified that the investigation would be into his alleged "failure to properly operate" his Company vehicle. Notice is only defective if it does not give the accused employee and the Organization sufficient information upon which to mount a defense to the charges lodged against the employee. Here, there was no doubt what the subject of the investigation would be. Moreover, emphasis on the phrase "properly operating a Company vehicle" is inappropriate under the circumstances of this case. In one sense, the Claimant was operating the utility truck in that he was driving it around in the course of his work. However, he was not literally "operating" the vehicle when the accident happened, in that it was stopped and parked, with the engine turned off. "Operating" a vehicle implies that it is in motion, which Claimant's truck was not. The Carrier's decision to cite MWOR 1.19, Care of Property, was not inappropriate—the truck is its property. The Organization's procedural arguments are not persuasive.

The substantive question before the Board is whether the Carrier met its burden of proof that the Claimant had violated MWOR 1.19. The evidence in the record before the Board is sufficient to conclude that the Claimant was responsible for the contact between his vehicle door and the gray truck that was pulling in to the adjacent parking spot at Santiago's Restaurant on May 17, 2014. The Claimant described what happened at the investigatory hearing. Importantly, he testified that he had not checked the center rear view mirror to see if there were any vehicles approaching from the frontage road. Nor did he physically look over his shoulder to

check the blind spot for a vehicle that might be pulling in next to him. In short, he failed to fully check whether it was safe for him to exit the vehicle before doing so, and the resulting accident was attributable to his carelessness. In addition, the photograph of the gray pickup truck shows a dent in the passenger side panel just in front of the rear tire well. The location of the damage is not consistent with the gray truck's hitting Claimant's door as it pulled into the parking spot—any damage under that circumstance would have been at the front of the truck. The damage to the rear side of the gray truck *is* consistent with Claimant's opening the door after the truck was already at least partway into the spot, if not all the way in. Both vehicles were properly parked within the lines of their respective stalls, and there is no evidence that would apportion responsibility for the accident to the driver of the gray truck. Accordingly, the Carrier's conclusion that the Claimant had not properly used and cared for his truck—the definition of MWOR 1.19—is supported by the evidence.

The Claimant was assessed the penalty for a second Standard violation under BNSF's PEPA policy, which is a 10-day record suspension with a one-year review period. (The first Standard violation is a formal reprimand with a one-year review period.) A review of the Claimant's personnel record shows that he had previously been found guilty of failing to properly operate his company vehicle before this accident, when he was involved in a collision on February 25, 2014, only three months before this accident, that resulted in damage to his vehicle. He was disciplined for a first Standard violation and given a formal reprimand with a one-year review period. The incident before the Board today happened within the review period for the prior discipline. Accordingly, the Carrier was justified in applying the principle of progressive discipline to assess the penalty for a second Standard violation on the Claimant for the May 17, 2014, accident.

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

Andria S. Knapp, Neutral Member

Nathan Moayyad, Carrier Member

Zachary Voegel, Organization Member

3/15/17

Date