

BEFORE PUBLIC LAW BOARD NO. 7602

CASE NO. 67

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

and

BNSF RAILWAY

BNSF 11-17-0061
BMWE S-P-2087-S
Claimant: Z. Berman

STATEMENT OF CLAIM

The Organization requests that the discipline of dismissal of Mr. Berman be overturned, no reference to this discipline be placed in Mr. Berman's personnel record and he be made whole.

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7602 has jurisdiction over the parties and the dispute involved herein.

In the instant matter, Claimant received a letter dated September 8, 2016, advising him of an investigation:

An investigation has been scheduled at 1000 hours, Wednesday, September 14, 2016, at the Dubuque, IA, 3388 Kennedy Circle, Dubuque, IA, 52002, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to approach road crossings at grade prepared to stop and yield the right of way to vehicular traffic when the pup tamper you were operating, X5600 18 1, collided with the side of a semi tractor trailer while working as a machine operator on gang TSCX0058 on the Aurora Subdivision at MP 240.3 on September 7th at approximately 10:20 hours.

This is to advise ZACHARY BERMAN is being withheld from service pending results of investigation.

Contact Michael Messner at 309-345-6090 or Michael.Messner@BNSF.com with any questions regarding this investigation, postponement or waiver.

Following postponements, an investigation was held. After the investigation hearing, Claimant was sent a letter dated October 18, 2016, which provided:

... [Y]ou are hereby dismissed effective immediately from employment with the BNSF Railway Company for failure to approach road crossings at grade prepared to stop and yield the right of way to vehicular traffic when the pup tamper you were operating, X5600181, collided with the side of a semi tractor trailer while working as a machine operator on gang TSCX0058 on the Aurora Subdivision at MP 240.3 on September 7th at approximately 10:20 hours.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MWOR 6.50.2 Approaching Road Crossings.

In assessing discipline, consideration was given to your discipline record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA).

Enclosed are copies of the investigation transcript and exhibits entered during the investigation. Copies of these documents have been sent to your Representative.

The Carrier maintains that Claimant violated the rule by crashing his pup tamper into the side of a semi as the semi drove across a crossing. Claimant had been operating in the area yet was unable to stop as a tractor trailer approached the crossing. The carrier states that Claimant admitted his guilt and therefore the inquiry is complete. Further, the mechanic's report showed that there was no hydraulic fluid on the brakes that would have prevented their operation. The Carrier continues that denying a waiver to Claimant was not a prohibited pre-judgment. Moreover, given the nature of the incident, Claimant was ineligible for a waiver and termination was appropriate despite a lack of disciplinary background.

The Organization raises a number of procedural violations including that the conducting officer was unfair because he was too intimately involved with the matter, the investigation was not conducted in an impartial manner, and the "evidence" about the inspection of the pup tamper should be ignored because it was nothing more than a copy of a text message and not subject to cross-examination or inquiry. On the merits, the

Organization continues that there was no admission to wrongdoing by Claimant. He testified that he had applied the brakes during the rainstorm on five or six prior unprotected crossings. The brakes had worked and he was able to slow the pup tamper. However, as he approached the instant crossing, the brakes were not slowing the machine. He testified to putting the machine in emergency and it still continued to slide - testimony corroborated by the Carrier official who measured the skid at over 97 feet. The Organization continues that Claimant testified that the pup tamper leaked hydraulic fluid and a hydraulic cylinder had been replaced on it the prior day after spraying a significant amount of hydraulic fluid all over the pup tamper. The organization further argues that the meager mechanic's report does not address the role of hydraulic fluid or leaks and whether it leaked onto the rail. The Organization points out that properly functioning brakes are irrelevant if the rails were covered in rain and hydraulic fluid from a leak. The Organization concludes that the Carrier improperly terminated Claimant. As the uncontradicted evidence shows, Claimant had worked on a number of machines in his short tenure with the Carrier and was a hard-working employee. He did not ignore the rules and tried to stop the pup tamper. It slid and did not slow. The Carrier cannot discount a mechanical defect and, not having produced a mechanic for examination, has improperly concluded that Claimant was at fault. The Organization concludes that even if the Claimant erred, there is no justification to terminate his employment. He should have been given a level S discipline.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

The Organization argues that the matter would not have occurred but for the absence of flaggers to protect the crossings or shunts on the equipment. Neither of those points are persuasive to the instant matter. Claimant acknowledged that he was required to approach the grade crossing prepared to stop. The Carrier argues in the

correspondence of May 1, 2017, that Claimant has admitted guilt. However, an examination of the cited portion of the transcript indicates that Claimant was acknowledging the rules and not that he willingly violated the rules.

The Organization argues that the exhibit attributed to the Mechanic should be ignored because the Mechanic did not testify. The only carrier witness was a production gang roadmaster. He presented Exhibit 10 which is a text from somebody listed as Ray Maine on the text printout. Ray Maine is not explained in the record and the name of the mechanic performing the inspection is never mentioned. The text message states:

As to the pup tamper on UCo8, that hit a truck on a road crossing. There were no oil leaks around the brakes that would impede it from stopping. If this was the machine that a lift cylinder was replaced on the day before there was no oil on the brakes. Brakes were changed about three weeks prior to the operator hitting the truck.

The Organization raises a valid point about the validity of the text statement. There was no mechanic produced at the hearing despite Claimant's testimony replete with references to hydraulic fluid leaking from various points on the machine. Further, Claimant testified that the mechanics told him not to worry about the leaks unless they were bad. In addition, at page 50 of the transcript, the Claimant testified the oil leaked onto the rail.

Claimant testified at page 50:

ZACHARY BERMAN: Um, all of these hoses on top of the pup tamper head, uh, leaked; um, there's a cylinder right here on the inside that moves this whole, uh, cyli- uh, pup tamper head up and down that they changed out; the leak I had the day prior was right inside of here off that little silver piece, it was on the inside and it was leaking onto the rail; um, all the major hoses from the, up here all the way down on both sides, I think one side was okay, but everything else leaked. They told me don't worry about it until it's, uh, it turns into a major problem.

There is only mention of oil leaking onto the brakes in the unidentified mechanic's text. The unidentified mechanic does not mention any inspection of the repaired leak from the day prior and whether the repair held. There is no comment on any other

possible leaks onto the rail in the mechanics brief statement – despite the mechanics repairing a leak onto the rail on the day before the collision.

This Board is left with a statement ostensibly from a mechanic that is virtually useless to this Board. It does not say when the brakes were inspected – this Board is left guessing as to whether the mechanic was discussing an inspection prior to the collision or after the collision. The short text describes neither the nature of the inspection nor the method – this Board does not know whether it was a visual inspection of the wreck or a visual inspection done prior. Perhaps it was an inspection when the brakes were installed three weeks prior to the collision. The mechanic's statement "If this was the machine that a lift cylinder was replaced on the day before there was no oil on the brakes" indicates that the mechanic did not inspect the machine after the collision because he did not know with certainty the history of the machine. That statement suggests to this Board that the mechanic was recalling the condition of the brakes when the machine had the hydraulic cylinder replaced. There is nothing in the record to establish that the machine was inspected following the collision.

Although this Board cannot place any reliance upon the mechanic's text at Exhibit 10, the inquiry does not end with a sustained claim. The question is still whether there is substantial evidence in the record of Claimant's infractions. The only evidence of what occurred in the pup tamper came from Claimant. He testified that he applied the brakes during the rain storm through five or six crossings when travelling back to the tie up point in Prairie du Chein, Wisconsin. He explained his written statement regarding the train on accompanying track and the gates going up. He testified that the train was a long train that had passed before he reached the crossing prior to the crossing of the collision. The brakes had worked as intended during those crossings. His testimony to sliding without decelerating suggests, as Claimant discussed, another hydraulic leak. As Claimant stated, it had been stopping fine prior to the collision under the same rainy circumstances and it simply slid at this crossing.

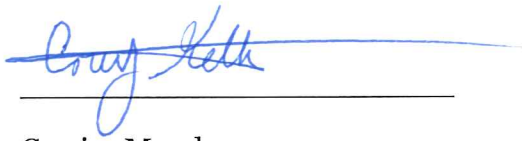
Claimant testified to a worn out machine with hoses that were wearing through and leaking at numerous points. He also testified that he was travelling at 20 mph and began to apply his brakes approximately 400 feet from the grade crossing. His testimony of skidding for a considerable distance was corroborated by the roadmaster who

measured the skid. However, the roadmaster admitted that he did not inspect the pup tamper for leaks following the collision.

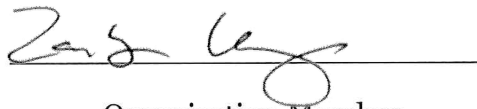
Given the limitations of the text from an unidentified mechanic, this Board finds that the remaining evidence, as discussed above, was insufficient to show substantial evidence of the cited rule violation.

“The claim is sustained in full. The Claimant shall be offered reinstatement subject to the Carrier’s return to service policies. The Carrier shall remove the discipline from the 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. Lost overtime shall be compensated at the overtime rate. His compensation shall be reduced by any interim earnings he may have had from outside employment. The Claimant shall be reimbursed for medical benefits to the extent that he provides the Carrier and the Organization with receipts of medical expenditures that would have been covered but for the lapse in his Health and Welfare Benefits. The Parties shall then jointly determine what co-pays, premiums and other medical costs would otherwise have been covered by his insurance had he continued in the Carrier’s employ uninterrupted by dismissal. Any other claims to compensation not specifically granted in this award are hereby denied.”

Claim sustained.

A blue ink signature, appearing to read "Craig Keith", is written over a horizontal line.

Carrier Member

A blue ink signature, appearing to read "Zachary", is written over a horizontal line.

Organization Member

A blue ink signature, appearing to read "Bob", is written over a horizontal line.

Neutral Member

Dated: 02-04-2019