

BEFORE PUBLIC LAW BOARD NO. 7602

CASE NO. 70

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

and

BNSF RAILWAY

BNSF 10-17-0113  
BMWE C-17-Co40-9  
Claimant: D. Law

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STATEMENT OF CLAIM

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

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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 October 31, 2016, advising him of an investigation:

An investigation has been scheduled at 1000 hours, Friday, November 11, 2016, at the Conference Room, 3700 Globeville Road, Denver, CO, 80216, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to properly operate equipment resulting in damage to company property on October 28, 2016.

Following an investigation, Claimant was sent a letter dated December 9, 2016, which provided:

Standard Formal Reprimand

As a result of investigation held on Friday, November 11, 2016 at 1000 hours at Conference Room, 3700 Globeville Road, Denver, CO, 80216 you

are hereby assessed a Standard Formal Reprimand for your failure to properly operate equipment resulting in damage to company property on October 28, 2016.

In addition, you are being assessed a One (1) Year Review Period that commences on December 9, 2016. Any rules violation during this review period could result in further disciplinary action.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MWOR 1.19 Care of Property.

The Carrier maintains that Claimant violated the rule when operating the ballast regulator by catching the lines for the greaser box thereby breaking some of the lines and moving the box.

The Organization responds that Claimant operated in a safe manner and had twice reviewed the area of work. He was operating at a slow speed and immediately cased movement when he noticed that the lines were caught. Had the lines been properly buried by the contractors who installed the greaser box, then there would have not been an issue. The lines were too close to the surface.

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.

This Board finds that there are no procedural violations which void the discipline. The hearing was conducted in a fair and proper manner. On the merits, this Board finds no substantial evidence in the record of the violation. The evidence shows that Claimant was performing work with the ballast regulator to alleviate an SIRP trip/walking hazard due to rocks in the area. As the Track Inspector testified, Claimant was performing a dressing to remove rock and was not performing ballast regulation. The Roadmaster stated that it was a question of experience.

ALLAN BREDEN: Do you believe there was any other way, other than having a lubricator on site, for Mr. Law to know that

there were buried wires there, i.e., or for example, is it part of our operating procedures to have the written or stated anywhere where wires or, uh, hoses are buried?

MICHAEL W PAZ: That I'm aware of, no. I don't think that there is anything, but I may be wrong, so I don't, I don't want to speak on that. I guess I'll answer your question a couple ways. No, there were no signs indicating that there were buried wires or hoses there. Uh, and then to answer your question should Mr. Law have understood that there were wires there, I think that comes down to an experience, uh, factor. Uh, some of our, uh, seasoned employees that work around a surfacing gang daily may have that experience and knowledge that there would be something buried there. Uh, I can't really answer for Mr. Law, with his experience, that he would have known that.

ALLAN BREDEN: You had stated before, Mr. Paz, that Mr. Law, when you had spoken to him after the incident, had said that, uh, he had intended to stop, due to the fact that there would be wires or hoses buried there, is that correct?

MICHAEL W PAZ: Yeah, on the, I don't know what exhibit it was, but there was, you can see like a, which almost, I guess the closest description I can give, it's the lubricating plate, but it would almost look like a joint bar, if I'm not mistaken, yes. Uh, Exhibit 2A, right in front of the arrow, to the left, it looks like a joint bar, but it's a lubricator bar. Or he said he had, I think he told me that he noticed there was a bar there and he could see that, and that's why he was planning to stop prior to the, prior to arriving to his stopping point that he initially sought after, he had unearthed the wires. So he did say that he did notice there was a lubricator bar there and that was his stopping point.

ALLAN BREDEN: Other than, Mr. Paz, other than visual inspection from the cab, I think you had stated before about being able to un-belt your seatbelt and have better, uh, vision in front of and behind the machine. Is there a standard operating procedure, uh, any other way of locating wires prior to using the Regulator to disturb the ballast line?

MICHAEL W PAZ: Uh, you know, I guess you, there are multiple ways, I suppose, a job safety briefing, you know, you could talk about the exposures. You could talk about some, uh, barriers, your working environment. You can do a walk-through your project, uh, to get familiar with

where you're going to be working. Uh, and just overall, just, you know, knowing your environment, I suppose.

The Track Inspector testified that

ALLAN BREDEN: Okay. Mr. Savalo, do you have anything else you would like to add about the incident?

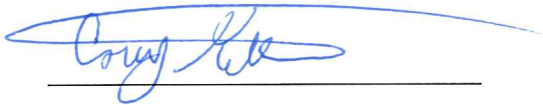
RICK SAVALO: Hmm, uh, I really think this was, you know, uh, a minor accident. Uh, I really think that, you know, I don't see really anything should, uh, should be anybody be at fault here. Uh, Darrell is a pretty good Operator and, uh, and he's, I believe, that day, he was volunteering to help out, doing the machine, because nobody was around and, to this day, he is still being asked to fill in the machine when he's going about his job and doing the right thing. So, uh, as per this lubricator, I, I don't think that the installment of it was installed correctly and, again, we were just dressing. Now if we were regulating and digging and trying to bring rock up, it could be a different story, but I, again, like I said, I, we were, he was just going about his job, what he was told to do and, uh, and that's about it.

ALLAN BREDEN: Mr. Savalo, do you believe, uh, there was any way for Mr. Law to know where the wires were buried, other than the proximity of the oil or the lubricator?

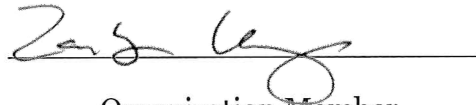
RICK SAVALO: No. No, I don't believe he knew where the wires were at.

The evidence shows that Claimant traversed the area twice prior to beginning the dressing of the area with the regulator. The evidence shows that he relied on his experience and knowledge. The carrier cites a rule about caring for equipment but there is no substantial evidence in the record to show how Claimant violated the rule.

Claim sustained.



Carrier Member



Organization Member



Neutral Member

Dated: 02-04-2019