PLB No. 7660
Award No. 243
Case No. 243

PUBLIC LAW BOARD NO. 7660

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
DIVISION – IBT RAIL CONFERENCE)
) Case No. 243
and)
)
UNION PACIFIC RAILROAD COMPANY)
SOUTHERN PACIFIC TRANSPORTATION COMPANY)
(WESTERN LINES)])

STATEMENT OF CLAIM

"Claim of the System Committee of the Brotherhood that:

1. The Carrier's discipline (dismissal) imposed upon Mr. R. Palomino by letter dated November 23, 2021, in connection with allegations that he was careless of safety of himself and others when proceeding through a road crossing without insuring it was safe to do so, resulting in the injury of a TEY employe in violation of Rule 1.6: Conduct – Careless was excessive, arbitrary, disparate; without the Carrier having met its burden of proof; and in violation of the Agreement (System File M-2245S-501/1770261 SPW).

2. The claim as presented under letter dated January 20, 2022, shall be allowed as presented because the Carrier defaulted on the claim when it failed to notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons or such disallowance within sixty (60) days from the date same is filed/transmitted as required by Rule 44(a) and the December 20, 2018 Electronic Exchange of Claims Letter of Understanding.

3. As a consequence of the violations referred to in Parts 1 and/or 2 above, Claimant R. Palomino shall now have the dismissal 'expunged from his personal record. Claimant be immediately reinstated to service and compensated for all wages lost, straight time and overtime, beginning with the day he was removed from service and ending with his reinstatement to service excluding all outside wage earnings. Claimant be compensated for any and all losses related to the loss of fringe benefits that can result from dismissal from service, i.e., Health benefits for himself and his dependents, "'Dental benefits for himself and his dependents, Vacation benefits, Personal Leave benefits and all other benefits not specifically enumerated herein that are collectively bargained for him as an employee of the Union Pacific Railroad and a member of the International Brotherhood of Teamsters. Claimant is to be reimbursed for all losses related to personal property that he has now which may be taken from him and his family because his income has

> been taken from him. Such losses can be his house, his car, his land, and any other personal items that may be garnished from him for lack of income related to this dismissal.' (Employes' Exhibit 'A-2)."

FINDINGS

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employer within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction of the dispute herein, and that the parties to said dispute were given due notice of hearing in the matter and participated therein.

Ricardo Palomino (the Claimant) at the time of his dismissal by the Carrier held the job of Welder Helper with 14 years of service and no record of discipline. By letter dated October 18, 2021, he was requested to report for a hearing on October 27, 2021, to develop the facts and determine his responsibility, if any, in connection with the following charge:

> On 10/14/2021, at the location of Yuma Yard, AZ, near Milepost 737.2, Gila Sub Subdivision, at approximately 10:33 hours, while employed as a Wldr Hlpr, you allegedly were careless of the safety of yourself and others when you proceeded thru a road crossing without insuring it was safe to do so, resulting in a collision between a local yard job and the grapple truck you were occupying which resulted in an injury to TEY employee. This is a possible violation of the following rule(s) and/or policy:
>
> 1.6: Conduct - Careless

The October 18 letter added, "Under the MAPS Policy, this violation is a Dismissal event. Based upon your current status, if you are found to be in violation of this alleged charge, Dismissal may result."

After a postponement an investigative hearing was held in this matter on November 9, 2021. The Charging Officer, whose title is Senior Manager I Track Maintenance, testified as follows. On the day in question the Claimant was operating a grapple truck and proceeded through a railroad crossing without ensuring that it was safe to do so, resulting in a collision with a local yard job and an injury to one of the TE&Y [Train, Engine and Yard] employees. The crossing was not a main line. It was a yard track. The Charging Officer identified the Claimant's statement in Spanish regarding the incident, which he translated as follows:

> I was crossing at 24th Street and 3 E Avenue. The truck got stuck on the helper axle on the crossing pads. I moved the truck backwards and I straightened out the tires with [my] foot. When the tires were straight, I got back on the truck and I proceeded forward without looking of [*sic* if?] the train was coming and happened what happened.

In response to questions by the Organization representative, the Charging Officer testified that he was not a witness to the incident. He was in another state with his other section gang.

The designated translator for the hearing, at the request of the Organization representative, was also asked by the hearing officer to translate the Claimant's statement. His translation was largely the same as the Charging Officer's except for the latter part of the statement, which the translator rendered as follows: "Once it was straight, I got back on the truck and I went forward and I didn't see the train that was coming, and the accident happened."

A dispatcher notified the Manager, Terminal Operations of the collision, and she went to the scene of the accident. She testified as follows. She arrived at the site within 15 minutes of receiving the call from the dispatcher. The TE&Y crew were speaking to the local sheriff and explaining to him that it was a private matter. The sheriff left, and she took over. She approached the TE&Y crew and asked them if they were okay. The Conductor said that he was fine. The Brakeman said that his shoulder was hurting a little bit because he had to climb off of the equipment, but other than that he was okay. She then approached the Maintenance of Way crew and asked them if they were okay. They seemed a little shaken up, but they both said that they were okay. The visibility was clear; it was clear and sunny. There was no vegetation onsite to block the vision of the driver arriving at the crossing. The Brakeman is still off duty, but they are not sure if it's because of the incident or for personal reasons. At the time of impact the train was moving across the crossing at 9.5 miles per hour. The track is a Class 1 where the speed limit is 10 mph.

In response to questions from the Organization representative the Manager, Terminal Operations testified that the locomotive was on the opposite of the train facing east, and the train was making a west-shoving move. There is a curve at the location, she stated, approaching the location. She estimated that it was 10 to 12 car lengths from the crossing. In response to additional questions from the hearing officer the Manager, Terminal Operations testified that she did not know if the crossing has a stop sign. It does, she believed, have a railroad crossing sign. She estimated for the hearing officer that it was 10 car-lengths from the end of the curve to the crossing, a car length being about 60 feet.

A Truck Driver, who was a passenger on the grapple truck driven by the Claimant (the Passenger), testified as follows in response to questions by the hearing officer. They were driving on the right-of-way towards the crossing on 24th Street and 3E. They got to the crossing and made a stop. They looked both ways. There was no train. As they proceeded across the crossing, their vehicle got hung up by its tag axle. The driver rolled the truck back and got out of the truck to make sure that nothing else was wrong with the truck so that they could get on the road. He (the Passenger) was about to get out of the truck too, but before he knew it, the Claimant was coming back on. They started moving forward. He looked over his right shoulder, and the train was coming. He yelled at the Claimant, "Watch out, the train's coming." Then they panicked. He felt the truck rolling back, and the train kept on coming. That's when they got struck by the train.

In response to further questioning by the hearing officer, the Passenger testified that the crossing is a little bit on a right-hand angle. The tag axle, he explained, "hangs up in the middle of the truck." He estimated the width of the crossing as about ten feet. It is a wood crossing, he stated. The Claimant stopped at the crossing, he reiterated, and the crossing was clear. He spoke to the Brakeman, he testified, who was dusting himself off, and asked him if he was all right, if he needed help. He (the Brakeman) said that he was okay, that he just had a couple of scratches on his arm. He dusted himself off because he hit the ground. There was no radio communication attempted with the train while the truck was stuck on the crossing. There was no attempt to provide flag protection for the truck stuck on the crossing. They were not working with the train crew at all during that day. There was a stop sign on the crossing.

In response to questions from the Organization representative, the Passenger gave testimony as follows. He has taken the same truck over this crossing a couple of times before this incident. He had no issue at all with the truck getting stuck. When they approached the crossing the train was coming from the right, on the passenger side of the truck. The track is a big curve and then "it goes to tangent . . . on the crossing." He estimated that the curve was roughly 15 cars long. When they first approached the crossing, there was no train working close to the crossing. They were stuck on the crossing for about a minute. Asked by the Organization representative, "And you did make sure it was visually safe to cross the crossing before you guys proceeded. Is that correct?" He answered, "Yes." Asked if he believed the Claimant was careless of safety during the incident, he stated, "No." He did not receive any radio communication from the train crew, the Passenger testified. Nor, he stated, was he aware that there would be a shoving movement over that crossing. There was not a Car Department employee flagging the crossing for the shoving move, the Passenger testified. The Brakeman, he stated, alighted the train while it was still moving. From the time that he saw the train until the train hit, he testified, was about 60 seconds. The curve on the track, he estimated, started 20 or 30 feet past the crossing.

The Claimant, with the aid of an interpreter, testified as follows in response to questions from the hearing officer. He is familiar with Rule 1.6: Conduct, Careless. With regard to the incident, he approached the crossing, tried to cross the crossing, and his truck's helper axle got wedged on the crossing pads. So he backed up, straightened out the axle that got wedged, proceeded to move forward again, and that's when the train impacted them. He did not try to communicate with the train crew that he was stuck on the crossing. There was a stop sign at the crossing, and he stopped. He looked right and left and did not see a train. He has operated the grapple truck before and has previously had a problem with the helper axle getting stuck on a crossing. The crossing is about 20 feet wide. The crossing is concrete, consisting of two concrete pads, ten feet each. One of the pads is on an incline; the pads are a little off. There is missing ballast, dirt, and stuff. Where the pad is lifted up at a slight angle because there is dirt on that side, is where the rear of he vehicle got wedged in.

With the crossing in that condition [the Claimant's testimony continued], it could be considered a safety-related issue. He did not turn this into his manager or take any appropriate remedial action for the crossing condition. He would estimate that from the crossing to the beginning of the curve is about

two car lengths. From the crossing one could see a distance of about 600 feet along the track. While struck on the track, he did not attempt to call the train crew or the yardmaster or anybody to protect the crossing. He did not ask the Passenger to provide flag protection while he was stuck on the crossing. He does not think that not communicating by radio or not providing flag protection while fouling the track showed carelessness on his part. He did not speak to the employee who was riding the shove of the train.

In response to questions from the Organization representative, the Claimant provided testimony as follows. He did not feel it was necessary to contact the train crew while he was stuck in the crossing. He was not aware that there was a train operating on that track. About two minutes passed from the time they arrived at the crossing until the vehicle was hit by the train. By the time he saw the train there was no time to make radio communication. He has gone over that crossing with the same truck previously. He never got struck at that crossing before. Asked whether he felt at any point during the event he was careless of safety, he answered, "Yes." Asked the question a second time, he again stated, "Yes." Asked a third time if he felt that at any time during the event he was careless of safety, he stated, "No." Asked if he felt that he violated Rule 1.6: Conduct, Careless, he testified, "No."

The hearing officer then asked the Claimant if it was correct that he stated that from the time he got stuck to the time of impact was roughly two minutes. He answered, "Yes." The hearing officer then followed up if it was correct that during those two minutes he did not make communication or attempt to make radio communication with the train crew. He acknowledged that he did not do so. He explained that he did not try to get communication with the train crew because it was all so quick. Things happened so quick. There was no time for radio communication or flag protection, he testified.

It is the position of the Carrier that it provided substantial evidence to prove that the Claimant's actions violated Rule 1.6: Conduct-Careless, that the seriousness of his violation fully supports the discipline assessed, and that he was accorded all due process rights he was entitled to under the collective bargaining agreement. The Carrier argues that the Claimant was careless of safety within the definition of that term in the MAPS Policy because he "failed to take even the most basic precautions after the grapple truck became stuck on a live track." Despite his having access to a functioning radio, the Carrier asserts, "the Claimant admitted during the hearing that he did not attempt to contact the train crew or the yardmaster, nor did he provide flagging protection to alert oncoming trains."

The Carrier contends that "[t]hese omissions represent a fundamental breakdown in situational awareness and safety responsibility" and that the Claimant's actions were "not a momentary oversight" but "a conscious decision to disregard critical safety protocols in a high-risk environment." The Carrier notes that the railroad environment is inherently hazardous, that employees are trained and expected to exercise heightened vigilance, especially near live tracks, and asserts that "Claimant's failure to communicate or warn others of the obstruction on the track created a foreseeable and entirely preventable risk." The collision that occurred, the Carrier maintains, "was not only avoidable but also a direct consequence of the Claimant's reckless disregard of safety." The Carrier further argues that "the Claimant admitted that the crossing had previously caused the truck to become stuck and that he was

aware of the potential hazard. Despite this," the Carrier continued, "he neither reported the condition to management nor took steps to mitigate the risk." It requests the Board to deny the claim.

The Organization first argues that the charge against the Claimant must be dismissed on procedural grounds under Rule 44 (a) of the collective bargaining agreement because the Carrier did not render a decision in the case within 60 days from the date the claim or grievance was transmitted to it, which, according to the Organization, was January 20, 2022. The Carrier's answer was not submitted to the Organization until March 22, 2022, the 61st day after January 20, 2022. The Organization rejects the Carrier's contention that the claim was transmitted on January 21, 2022, since it was not received by the Carrier until 12:36 a.m. on that date. The Board finds no merit to the Organization's procedural argument. The word "transmit" is defined in the *The New Oxford American Dictionary* (2001) as follows: "cause (something) to pass on from one place or person to another: *knowledge is transmitted from teacher to pupil*." There is no transmission until the recipient receives what is passed on. Since the claim or grievance was not received by the Carrier until January 21, there was no transmission until that date. The Carrier's response was therefore timely.

Nor does the Board find merit to the Organization's contention that the Claimant was denied due process because the Brakeman was not called as a witness by the Carrier. The Organization has not offered any evidence that the Brakeman had testimony to give that is not already in the record that arguably could have made a difference in the outcome of the hearing. Nor has Organization shown that it requested the Carrier to produce the Brakeman as a witness, and the Carrier denied its request, or that the Organization attempted to secure the Brakeman as its own witness, and he refused to appear. See, for example, Third Division Award No. 41785 (White, 2013), where the carrier refused the organization's request to call a particular witness, unlike the present case where there was no request of the Carrier by the Organization to call the Brakeman as a witness. The Board concludes that the record fails to establish that Claimant was denied due process on the basis that the Carrier failed to call the Brakeman as a witness in this matter.

The Organization argues that the Carrier has not met its burden of proof, first, because Rule 1.6 : Conduct – Careless was not introduced into evidence at the hearing. Rule 45 (e) of the collective bargaining agreement, it notes, provides that a decision of ". . . whether or not employee is at fault will be based upon evidence adduced at the hearing. . . ." This cannot be accomplished, the Organization contends, if the applicable rule is not in evidence. The Board rejects this argument because it was not raised on the property during the processing of the claim but made to the Carrier for the first time in a letter dated February 16, 2023, long after the July 7, 2022, claims conference between the parties wherein they discussed but were unable to reach agreement on this matter.

In addition, the Organization argues, the Carrier failed to meet its burden of proof because it charged the Claimant with violation of but one rule, 1.6: Conduct – Careless, a rule that is only charged in the event that an employee refuses to comply with Carrier rules, or exhibits a willful and wanton reckless disregard for safety. Such conduct has not been established in this case, the Organization asserts, since Claimant had never previously had an issue with the particular crossing in question and

had never been disciplined for any repeated safety rule infraction of any kind in the past. A reading of the definition of "careless of safety," the Organization contends, shows that it requires proof of an intentional violation or reckless action beyond even gross negligence. The Organization cites *Restatement (Second) of Torts § 500 (1965)*, which defines the term "Reckless Disregard of Safety," in support of its position that the Claimant's conduct did not approach the level of negligence that characterizes recklessness.

The Organization also questions how flagging protection at the point of an obstruction on a road crossing would have stopped a train making a shoving movement. It argues, "The Claimant did what made sense in the moment, he rolled the truck backwards, resulting in only the front bumper getting clipped thereby preventing further damage and all injuries." The Organization asserts that the Claimant was not negligent, but, regardless of whether he was or not, he was not charged with negligence. It notes that both the Claimant and the Passenger testified that they had never been stuck previously on that crossing. The Organization further argues that the Brakeman was responsible for the collision because it failed to follow the Carrier rules applicable to making a shoving move.

The Organization contends that the level of discipline in this case was arbitrary, excessive, and unwarranted. If any discipline were to be imposed in this case, the Organization contends, it should be on a progressive basis. The Organization requests the Board to sustain its claim and that Claimant be afforded the remedy asked for in its claim.

The Carrier has not sustained the charge of violation of Rule 1.6: Conduct – Careless against the Claimant. It contends that Claimant was careless of safety within the definition of that term in the MAPS Policy, which defines "CARELESS OF SAFETY" as follows:

> When an employee's actions or failure to take action demonstrate an inability or unwillingness to comply with safety rules as evidenced by repeated safety rules infractions or when an employee commits a specific rule(s) infraction that demonstrates a willful, flagrant, or reckless disregard for the safety of themselves, other employees or the public.

The record contains no evidence of any prior violation on the part of the Claimant, whether of safety or any other kind. To prevail in this matter, therefore, the Carrier must prove by substantial evidence that the Claimant acted in "a willful, flagrant, or reckless disregard for the safety of themselves, other employees or the public." The Carrier makes various arguments in an effort to show that the Claimant's conduct amounted to that high degree of negligence as to constitute willful, flagrant, or reckless disregard for safety. It asserts, for example, that Claimant's own testimony supported the Carrier's case in that he "admitted that after the truck became unstuck, he proceeded forward without checking for an oncoming train, stating, 'I proceeded forward without looking if the train was coming and happened what happened.'"

The fact is, however, that the quotation attributed to the Claimant by the Carrier is the Charging Officer's translation of the Claimant's written statement in Spanish. The Charging Officer was not the

designated translator according to the official transcript of the hearing. The person designated as the "Foreman Translator" in the transcript translated the relevant portion of the Claimant's statement as follows: "I went forward and I didn't see the train that was coming, and the accident happened." In the designated translator's translation, there is no admission of proceeding forward without checking for an oncoming train. More important, however, is the fact that Claimant's attempt to drive through the crossing did not begin at the point where the truck got stuck on the tracks.

It is clear from the testimony of both the Claimant and the Passenger, and unchallenged by any other witness or document, that when they arrived at the crossing, preparatory to proceeding across it with the grapple truck, the Claimant stopped the truck at the stop sign and looked both ways before attempting to cross the tracks. It is also clear from the testimony of both the Claimant and the Passenger that there was no train in site when the truck proceeded to enter the crossing and traverse the tracks. The objective facts also confirm that there was no train in site. Thus according to both Carrier and Claimant testimony the track curved out of sight about ten or 12 car-lengths from the crossing, a distance of 600 to 700 feet. The truck was stuck at the crossing, according to the evidence, for approximately two minutes. (The evidence is contradictory whether the two-minute period represented the entire time that the truck was at the crossing until the collision; or only the time that it was stuck at the crossing until the collision). The train that struck the truck was traveling 9.5 miles per hour, or approximately 14 feet per second. At that rate it would cover 840 feet in one minute. Had the track not been clear at the moment when the truck first began to cross the tracks, the collision would have occurred at least a minute before it actually did.

The evidence establishes that the Claimant operated his truck in a safe, non-negligent manner at least to the point where the truck began to traverse the crossing and got stuck on a crossing pad that had a slightly raised edge instead of being perfectly flat on the ground. Against uncontroverted evidence in the record to the contrary, the Carrier contends that "the Claimant admitted that the crossing had previously caused the truck to become stuck and that he was aware of the potential hazard. Despite this," the Carrier continued, "he neither reported the condition to management nor took steps to mitigate the risk." The actual testimony on the issue, however, is to the contrary. The Passenger testified that he took the same truck over this crossing a couple of times before this incident, and he had no issue at all with the truck getting stuck. (Tr. 31). The Claimant testified that he has gone over that crossing with the same truck previously and has never got struck at that crossing before. (Tr. 57). He has gotten stuck, he acknowledged, at other crossings. (Tr. 50).

The Claimant did not testify that he was aware of the potential danger at the site in question prior to the collision and failed to report the track's condition. What the record shows is that, in his testimony, the Claimant described the condition of the track on the day of the collision that caused his truck to get stuck. (Tr. 51). He testified that he did not report that condition. (Tr.52). He did not testify that he knew of the condition of the track before the collision, and there is no evidence in the record to suggest that he, in fact, did know. His testimony that he did not report the condition of the pad to management can only mean that he did not report it after the collision since there is no evidence that he was aware of the condition prior to the collision. Moreover management presumably would be

aware on its own that there was a problem with the track at that location in view of the fact that the truck got stuck on the track, and a collision occurred.

The Carrier argues that the Claimant was careless of safety because, despite his having access to a functioning radio, "the Claimant admitted during the hearing that he did not attempt to contact the train crew or the yardmaster, nor did he provide flagging protection to alert oncoming trains." In response to questioning from both the Organization representative and the hearing officer, the Claimant testified that there was no time either to attempt to contact the train crew or to provide flagging protection to alert oncoming trains. That testimony is undenied on the record. In this Board's opinion, provided the Claimant's testimony regarding attempted radio contact or flagging protection is credible, absent any contrary testimony in the record the Claimant's testimony on that factual issue must be credited.

In the Board's opinion, the Claimant's testimony regarding the lack of time for radio communication with the train or flagging protection is credible. It must be remembered that for the Claimant and the passenger the incident in question started out as a routine traversal of a railroad crossing. Their duties on the day in question, so far as the record shows, had no connection with any train movement or other activity on the track in question or in the vicinity of the crossing. According to the testimony of both the Claimant and the Passenger, immediately after the truck got stuck on the track pad, the Claimant backed the truck off of the pad, got out of the truck, kicked the tires with his foot to straighten them out, and got back into truck preparatory to proceed to traverse the crossing.

To this point in the Board's opinion, the Claimant did nothing wrong. Nor has the Carrier provided any testimony or argument to explain in what way, if any, it believes that the Claimant was negligent or careless of safety up until this point. Where, in this Board's opinion, there was negligence was the failure of the Claimant and the Passenger to make sure that a train was not coming. Thus, according to the Claimant's statement, after his truck got stuck on the pad, he moved the truck backwards and straightened out the tires with his foot. The Board understands this to mean that the truck was off the tracks when the Claimant got out of the vehicle to look over the scene. There would therefore be no need to radio any train or provide flagging protection. What was necessary was to make sure that no train was coming before proceeding forward. So long as no train was coming, there was plenty of time for the grapple truck to safely traverse a crossing that, according to the testimony, was 20 feet wide.

The witnesses are in agreement that the distance from the crossing to where the track curved out of sight was approximately 600 feet. A train traveling 9.5 mph, or approximately 14 feet per second, would cover the distance in about 45 seconds. The Claimant's statement says that he proceeded forward after getting back into the truck without seeing the train. The Passenger testified that when he looked over his right shoulder he saw that the train was coming. Both the Claimant and the Passenger first became aware of the train while they were sitting in the truck on the tracks with the train bearing down upon them. At that point their priority was to try and get out of the way of the train. In this Board's opinion the testimony that there was no time for either attempting radio contact with the train

or to provide flagging protection in these circumstances is very credible. In the absence of any evidence in the record to the contrary, the Board credits that testimony.

The real issue in this case, in the Board's opinion, is whether the Claimant was "only" negligent or did his degree of negligence rise to the level of "willful, flagrant, or reckless disregard for the safety of [himself], other employees or the public." The Organization cites *Restatement (Second) of Torts § 500 (1965)* in support of its position that Claimant's conduct cannot be considered willful, flagrant, or reckless within the normal meaning of those terms. The Board agrees that the *Restatement (Second) of Torts,* the work product of the most eminent legal scholars in the field, would be a reasonable source to go to for an explanation of the distinction between negligent conduct and willful or reckless conduct. *Restatement (Second) of Torts § 500 (1965)* states as follows:

> § 500 RECKLESS DISREGARD OF SAFETY DEFINED
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> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.
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> Special Note: The conduct described in this Section is often called "wanton or wilful misconduct" both in statutes and judicial opinions. On the other hand, this phrase is sometimes used by courts to refer to conduct intended to cause harm to another.
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> COMMENTS & ILLUSTRATIONS: Comment:
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> * * *
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> g. Negligence and recklessness contrasted. Reckless misconduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness, or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency, in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. It differs not only from the above-mentioned form of negligence, but also from that negligence which consists in intentionally doing an act with knowledge that it contains a risk of harm to others, in that the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. The difference between reckless misconduct and conduct involving only such a quantum of risk as is necessary to make it negligent is a difference in the degree of the risk, but this difference of degree is so marked as to amount substantially to a difference in kind.

In this Board's opinion, in line with comment g. above, the Claimant's conduct in failing to ascertain that no train was coming before proceeding forward after coming back into his truck is best characterized as negligence in that it constituted "a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency" rather than willful or reckless misconduct consisting of "a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man." There is no suggestion in the record that Claimant deliberately decided not to look if a train was coming before proceeding forward. To do so would be to deliberately place his own and his passenger's life in danger, and there is no basis whatsoever for suspecting the Claimant of such reckless conduct.

Rule 45 – HEARINGS (a) NOTICE of the collective bargaining agreement states, ". . . When charges are made against an employee, the Company will notify the employee in writing of the specific charges made against him by personal delivery evidenced by receipt or by Registered or Certified Mail, Return Receipt Requested. The employee will be allowed not more than ten (10) days from receipt of notice for the purpose of securing witnesses which he may desire to have appear at the hearing. . . . ." When the Carrier wants to charge an employee with violation of both Rule 1.6: Conduct – Careless and Rule 1.6: Conduct – Negligent, it knows how to do so. See, for example, PLB No 7660, Award No. 242, where the employee was charged with being both Careless and Negligent. In the present case there was a single, specific charge against the Claimant, namely, alleged violation of Rule 1.6: Careless. Given the language of Rule 45 (a), this Board will not expand the charges against the Claimant to include an alleged violation of 1.6: Conduct – Negligent.

There is another consideration mandating against expanding the charges in this case. Rule 45 (a) provides that the charged employee is to be allowed up to ten days from receipt of the notice of charge to secure witnesses to appear at the hearing. During the hearing the Organization read into the record rules applicable to TE&Y employees in an effort to show negligence on the part of the TE&Y crew in not stopping the train before the collision occurred and in failing to have someone guarding the crossing during the reverse shove. Since the evidence failed to show reckless conduct on the part of the Claimant, it was not necessary to pursue that line of defense with respect to the charge of careless of safety, and, in fact, the Organization made no attempt to have the Brakeman or any other TE&Y employee present as a witness at the hearing. Faced with a charge against the Claimant of negligence, however, to which he was much more vulnerable than careless of safety, the Organization very well may have decided that it was necessary, for the defense of the Claimant, to have the Brakeman or some other TE&Y employee present. This Board is aware of the line of cases holding that contributory negligence on the part of another employee does not excuse one's own negligence. However, it may arguably be a mitigating factor affecting the penalty for a violation. This Board need not decide that question at this time. It is sufficient that contributory negligence on the part of the train crew could arguably be a mitigating factor in this case had Claimant been charged with negligence and reasonably could affect the selection of the Organization's witnesses.

In conclusion, there is substantial evidence that the Claimant was negligent with regard to the incident that is the subject of the present claim. The record falls far short, however, of proving by substantial evidence that he was careless of safety, as that term is defined in the MAPS Policy. Since the Claimant was not charged with negligence, and the rules violation with which he was charged has not been proved by substantial evidence, the claim in this case will be sustained. The Carrier will be directed to make the Claimant whole in accordance with the make whole remedy in PLB No. 7660, Award No. 82.

A W A R D

Claim sustained. Claimant shall be made whole in accordance with the make-whole remedy applied in PLB No. 7660, Award No. 82. The Carrier is directed to comply with this Award within 30 days of the date that any two members of the Board affix their signature to the Award.

/s/ Sinclair Kossoff 9/15/2025
Sinclair Kossoff, Neutral Member Date

Jennifer McNeil October 6, 2025
Jennifer McNeil, Carrier Member Date

October 6, 2025
John Schlismann, Organization Member Date