BEFORE
PUBLIC LAW BOARD NO. 7499
CASE NO. 15
AWARD NO. 15
NMB Subject Code: 106

BROTHERHOOD OF RAILROAD SIGNALMEN	)	
(Organization file: 11-010-BNSF-33-K)	)	**PARTIES TO THE**
vs.	)	**DISPUTE**
BNSF RAILWAY COMPANY	)	
(Carrier file: 35-11-0032)	)	

STATEMENT OF CLAIM:
"Carrier should immediately clear Mr. Johnson's personal record of any reference to the discipline or this event."

FINDINGS:
The Board, upon consideration of the entire record and evidence herein, finds that the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted by Agreement dated June 22, 2011 that this Board has jurisdiction over the dispute involved herein, and that the parties were provided due notice of the instant proceedings.

After a thorough review of the record, the Board concludes that on December 26, 2010, the Claimant was working as a Signal Maintainer out of Kansas City, KS for the Carrier. At that time, he had worked for the Carrier for approximately 12.5 years and had no discipline on his record. On January 3, 2011, the Carrier was made aware that there was a police report, including information from an eye-witness, which indicated the Claimant's company vehicle had been involved in a parking-lot accident on December 26, 2010.

As a result, the Carrier held an investigation, after an agreed-upon postponement, on February 23, 2011. The Carrier assessed the Claimant a 30-day Record Suspension on March 23, 2011 for his violation of Maintenance of Way Operating Rule (MOWOR) 1.1.2 and MOWOR 1.6. The Organization appealed this discipline through the proper process under the Collective Bargaining Agreement between the parties. The parties have been unable to resolve this issue and, after an on-property conference, they have placed the issue before this Board for adjudication.

The BNSF MOWOR Rules in question state:

"1.1.2 Alert and Attentive
Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

...

1.6 Conduct
Employees must not be:
1. Careless of the safety of themselves or others
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome
or
7. Discourteous
Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty, or to the performance of duty, will not be tolerated"

Organization Argument:
The Organization says that the Carrier failed to provide adequate evidence or witnesses to support their allegations that the Claimant backed into another vehicle on the date in question. They say that the Carrier failed to call as a witness the one eyewitness who claimed she saw him back into a parked vehicle. They, and the Claimant, maintain that the Claimant did not back into another vehicle. Further, they say, if he did back into another vehicle he certainly had no knowledge of the incident. They point to photographs of the white company vehicle on which, they say, there is no evidence of any scratches or paint from the other vehicle. The Organization also says that they did contact the eyewitness to the incident. They say that she did not obtain the license tag of the vehicle she believed backed into the parked truck until after going into the mall, and then exiting the mall parking lot. They say that this calls into question the facts around the eyewitness' statement.

With respect to the charge that the Claimant had failed to report the incident in a timely manner, the Organization says that he had no knowledge of the incident on December 26. The Claimant then went on vacation, during which time he was not only allowed but instructed to turn his company cell phone off. When he returned from vacation on January 3, they say he turned his cell phone back on, received a voicemail concerning the incident and immediately went to the police station with his vehicle and then called his supervisor. They say that this was all in accordance with company rules and policies.

With respect to the fact that the Claimant paid the $121 citation online, the Organization says this is not an admission of guilt. They say he did not plead guilty. Instead the plea was *nolo contendere*, which simply means no contest. They say that he chose this plea as it was cheaper than either hiring a lawyer to contest the citation or even missing a day of work.

Carrier Argument:
The Carrier says that, with respect to the eyewitness, they had no power to compel this third party to attend the company investigation. They further say that her statement was included as part of the police officer's report. They thus say that this independent third-party report is admissible and reliable. As further evidence of the Claimant's guilt, the Carrier says that the eyewitness report indicates that when the Claimant backed his vehicle into the parked vehicle, he leaned forward and looked in his mirror to see what happened. She then says that the Claimant drove to another location in the parking lot and parked his vehicle.

The Carrier says that the police investigation included an interview with the alleged victim of the incident, including an inspection of his vehicle which did show white paint on the bumper which was damaged. It also included an interview with the eyewitness. While initially labeled as a hit-and-run, the ultimate citation by the police was for improper backing. The eyewitness provided the police with the license plate number of the Claimant's vehicle, along with a description thereof.

With respect to the lack of physical evidence on the Claimant's vehicle, the Carrier says that it would have been relatively easy to clean off any such evidence in the days that the Claimant had the vehicle at home while on vacation. With respect to the somewhat dirty state of the vehicle on January 3, the Carrier says it would have been easy to drive the vehicle in such a way as to regain dirt after any evidence had been rubbed and/or washed off.

They say that the combination of the physical evidence on the victim's vehicle, the police report and the eyewitness recitation to the police, all prove that the Claimant failed to be alert and attentive, as required by the Carrier rule, when he backed his vehicle into that of the victim.

They further say that the eyewitness testimony that the Claimant was aware that he struck the other vehicle on December 26 is evidence that the Claimant's actions were dishonest and negligent, in violation of rule 1.6. They further say that the driver failed to notify the Carrier for five hours on January 3 about the incident. This was in the face of a supervisor who was trying to contact him.

Result:
This Board finds that the eyewitness testimony, contained within the police report, is admissible before this Board. It is common practice in this industry to admit many forms of evidence that might not otherwise be admissible in a court of law. This is especially true of third-party independent official reports of agencies such as police services. The question which then often arises before an arbitration board is one of weight to give to this evidence, which has not been subject to cross-examination by one party or the other. In this particular case, this Board finds that not only is the police report, including the eyewitness statement, admissible but that weight should be lent to that evidence.

It should be noted that the photographs in evidence of the Claimant's company vehicle make it obvious that this is not a standard white pickup truck. Instead, it has very distinctive boxes attached to its body work which, in the view of this Board, would make it relatively easy for the eyewitness to identify the precise vehicle in question in a mall parking lot.

After a complete review of the evidence before this Board, it finds that the Claimant did back his vehicle into that of the victims' on the date in question. As a result, the Claimant is guilty of failing to be alert and attentive.

With respect to the Claimant being guilty of dishonesty, the evidence is less clear. The evidence of the eyewitness about the Claimant leaning forward to peer into his mirror is inconclusive as to whether he knew that he hit the other vehicle. As a result, this Board

finds that the Carrier has not met its burden of proof with respect to proving that the Claimant knew that he hit the vehicle on December 26.

However, this Board is aware that a failure to be alert and attentive can still fall within Appendix A of the Carrier's PEPA as a serious violation of a work procedure that is designed to protect employees, the public and/or others from potentially serious injuries.

As a result, according to this policy, given the Board's findings, the Claimant would still be subject to the same level of discipline.

AWARD

The claim is denied.

Roger K. MacDougall
Chair and Neutral Member

John Bragg
Vice-President
Employee Member

Michelle McBride
Director Labor Relations
Carrier Member

Dated: 6/29/12

At: Chicago, IL