

**BEFORE
PUBLIC LAW BOARD NO. 7499
CASE NO. 8
AWARD NO. 8
NMB Subject Code: 106**

BROTHERHOOD OF RAILROAD SIGNALMEN)	
(Organization file: 10-054-BNSF-188-SP))	PARTIES TO THE
vs.)	DISPUTE
BNSF RAILWAY COMPANY)	
(Carrier file: 35-11-0017))	

STATEMENT OF CLAIM:

"Carrier should now be required to remove all discipline imposed upon Mr. Thomassen and immediately clear his record of any part of this incident."

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 the basic facts in this case are not in dispute. On August 16, 2010, Signal Maintainer Thomassen, a nearly nine-year employee with a clean discipline record, was driving a company truck in The Dalles, Oregon. It being a very hot day, after the Claimant had stopped at a red traffic signal, he reached behind the seat to get a bottle of water. In order to be safe, he attempted to first put the automatic transmission in park. Apparently he missed, went into reverse, and as a result rolled backward into the car behind him. Neither he nor his passenger heard the backup alarm (although it was apparently working properly at the end of the shift that day). The bumper on his Ford F550 Crew Cab pickup crumpled the front end of the Plymouth Neon behind him. There was no damage to the company vehicle. The police were contacted and, while they were enroute to the scene, the Claimant called his supervisor to let him know what had happened. The police investigated but chose not to issue a citation.

After a mutually agreed-upon postponement, the Company Investigation was held on September 29, 2010. On October 25, 2010, the Carrier issued a Level S, 30-Day Record Suspension to the Claimant. 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 Maintenance of Way Operating Rules and Instructions in question state:

*"MOWSR S-1.2.3 Alert and Attentive
Assure that you are alert and attentive when performing duties."*

Organization Argument:

The Organization argues that the Carrier denied the Claimant the right to a fair and impartial investigation since they failed to "list a specific charge" they believed the Claimant had violated. They say that this was in violation of Rule 54 of the Collective Bargaining Agreement which states:

"At least five calendar days advance written notice of the investigation outlining specific offense for which the hearing is to be held shall be given to employee and appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire."

The Organization says that this failure prevented them from being able to properly prepare for the Claimant's defense.

They further say that the Carrier failed to give any proof that the Claimant had violated any of the rules submitted during the investigation. They say that the Claimant never intended to put the vehicle in reverse and that "accidents happen." They further say that this lack of intent means that the Claimant did not violate the Rule in question.

They also say that, if the Claimant was guilty of an offense, it should not have been treated as a "serious incident" under the Carrier's Policy for Employee Performance Accountability (PEPA), but rather as a non-serious incident. In support of this interpretation they say that no citation was issued by the police, there were no injuries and that the Claimant was allowed by the Carrier to drive the rest of the day, and indeed until now, without any further restrictions or training.

Carrier Argument:

With respect to the procedural argument, the Carrier says that inclusion of a specific rule in investigation notice is not required. They say that all that is required is that the notice contain enough information concerning the specific offense to enable the Claimant and his representative to prepare a defense.

The Carrier says that they did provide evidence proving that the Claimant was not alert and attentive when he placed the vehicle in reverse instead of park then failed to realize that the vehicle was actually moving until it struck another vehicle. They provide further details in their response to the Organization's letter of appeal.

With respect to the quantum of discipline, the Carrier says that their PEPA, Appendix B classifies this type of violation as a serious offense, for which a Level S, 30-day Record Suspension with a three-year probation period is appropriate. However, because the Claimant was discipline- and injury-free during the previous five years, they say that he qualified for a reduced 12-month probation period instead. The Carrier says that the Organization has provided no evidence to show the discipline assessed was either excessive or unwarranted. They say that the discipline assessed was consistent with the nature of the offense, the Claimant's record, and the PEPA Policy.

Result:

With respect to the procedural issue, the purpose of a Notice of Investigation is to allow the Organization and the claimant sufficient time and knowledge to know the case to be met. There is no specific language in the Collective Bargaining Agreement providing that Rules be specifically enumerated to meet this requirement. Parties in the industry in other agreements have bargained for clauses such as that. That is not the case here. The Organization and the Claimant knew the specific offense — allegedly backing his company truck into a non-company vehicle, by the Claimant, on the date and at the location specified. There was an incorrect company vehicle number originally supplied by the Carrier, but there can be little doubt that this was nothing more than a clerical error. The Claimant knew or ought to have known that they meant the company vehicle he was driving on the date in question. The Board finds that the Notice of Investigation held sufficient particulars to allow the parties to prepare, and that, therefore, there was no procedural error.

With respect to making out the elements of the case — the Claimant admitted that he did it.

At pp. 47 - 48 of the Investigation Transcript he said: "Okay, um, I admit that this did happen. It was an accident. Um, I didn't mean to back up. I meant to put it in park..." While the Organization and the Claimant contend that there was no Rule broken, this Board cannot agree. While it may be true that the quoted Rule is very broad, and sometimes may be used in an overly inclusive fashion, this Board finds that such is not the case here. This Board finds that the Claimant failed to be alert and attentive and that this caused the accident.

Discipline:

There is much in the way of mitigating circumstances in this case. This is not a short-service employee. He had a totally clean disciplinary record. He called his supervisor immediately to tell him what happened. He was very straightforward in his answers during the Investigation. He admitted that he could have waited until he pulled off at the upcoming service station to get the water. He agreed that this was not a life and death situation. His candor is to be commended.

With respect to the application of the Carrier's PEPA, and while the Organization's arguments about lack of police citation, lack of injuries, lack of removal of driving privileges and lack of training are not persuasive, this Board does not see that this Policy is quite as clear as the Carrier urges. They say, in their appeal response, that "[T]his incident was clearly a serious violation of a BNSF Rule." A careful reading of the PEPA, Appendix B, by this Board does not find it so.

Appendix B contains violations such as fall protection violations, blue flag violations, riding on end of rail cars, getting on and off moving equipment, going between equipment, engineer decertification, tampering with safety devices and other enumerated items. It is also clear from the first line of the "Serious Rule Violations" section, that this list is not intended to be exhaustive. However, it does not contain any wording covering this type of incident. While this is not fatal to the Carrier's case, it is also not determinative.

As the Organization points out in their letters of Appeal, Article (b) of PEPA on page 1 mandates that "[i]f there is any doubt as to how an incident should be handled, supervisors are **instructed** to err on the side of leniency" [emphasis added].

In the case of a serious incident, there is no discretion in the PEPA. Article (b) of that subsection, on Page 2, states that "[a]n employee involved in a serious incident **will** be given a 30-day record suspension..." [emphasis added].

Arbitration boards in this industry have repeatedly said that they are not within their authority to extend leniency in the place of management, nor will they interfere with the assessment of discipline unless it is arbitrary, capricious or fraught with bad faith as to amount to an abuse of discretion, or, in other cases, if it is arbitrary, capricious, harsh or overly excessive.

In this case, this Board finds that the assessment of a 30-day penalty, without even being able to consider the mitigating circumstances evident in this case, is arbitrary. As a result, this Board orders that the parties handle this case in line with the Carrier's PEPA under the provisions for a first time non-serious incident that were in effect at the time of the discipline. This Board remains seized with authority for the implementation of this award, should the parties have any implementation issues they cannot resolve.

AWARD

The Claim is sustained in part.



Roger K. MacDougall
Chair and Neutral Member



John Bragg
Vice-President
Employee Member



Michelle McBride
Director Labor Relations
Carrier Member

Dated: 6/25/2012

At: Chicago, IL