

PUBLIC LAW BOARD NO. 7425

PARTIES ) SMART - TRANSPORTATION DIVISION  
TO )  
DISPUTE) BNSF RAILWAY COMPANY

**STATEMENT OF CLAIM:**

**Claim of Memphis, Tennessee Utility Employee Corey Gordon for reinstatement to service with seniority rights unimpaired, removal of censure from his personal record and pay for all time lost including but not limited to the following: payment of vacation allowance, health and welfare costs, reimbursement of all expenses related to the pursuit of alternative employment, reimbursement for any damages incurred as the result of discharge from service including proceeds on any property, real estate or financial instruments sold to replace lost compensation, as a result of an investigation held on March 27, 2015. (Organization File No. D1420-471-15A; Carrier File No. 55-16-0028)**

**FINDINGS:**

**The Board, after hearing upon the whole record and all the evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended; this Board has jurisdiction over the dispute involved herein; and, the parties were given due notice of hearing thereon.**

**The claim at issue arises from the Carrier's dismissal of the Claimant from service in its determination that testimony and exhibits brought forth at a March 27, 2015 investigation show that the Claimant failed to be responsible for using and caring for railroad property while working as a Utility Employee at Memphis, Tennessee on March 16, 2015 and operating a company utility vehicle (Kubota), resulting in damage to the front windshield, as well as being dishonest in the reporting of this incident. The Carrier held the Claimant to have violated GCOR 1.6, Conduct, and GCOR 1.1.2, Alert and Attentive.**

**The Claimant was present for the investigation and duly assisted in a defense against the charge by a representative of the Organization.**

**Before moving to the merits of the dispute, the Board will note that it has given studied consideration to Organization argument that the Claimant was deprived of a fair and impartial investigation. The several points of argument advanced by the Organization are not found to be supported by the facts of record or not found of sufficient substance to hold that the proceedings be set aside for a violation of due process contractual rights to a fair and impartial hearing.**

At the investigation testimony of two Carrier supervisors was that at approximately 0540 hours on March 16, 2015 the Claimant walked into the yard office and said that the windshield on the Kubota that he had been operating had shattered. The Claimant was said to have told the supervisors that water from a puddle had splashed onto the windshield and engine, causing steam from water on the engine to stream onto and break the windshield. The supervisors said they asked the Claimant if he was okay and sure that was the way it happened and not the result of having hit something, to which the Claimant said he had not hit anything. The supervisors said that they took the Claimant at his word and gave him the keys to another vehicle to continue his work.

It was further testimony of the supervisors that once it was daylight, they inspected the Kubota and observed a significant abrasion on the front passenger side leading up to the broken windshield, indicating that the Kubota had hit something to shatter the windshield. Other damage found was that of a headlight having been knocked loose and a part of reflector tape to have been broken or torn loose. The supervisors said they subsequently walked between Tracks 8 and 10, where they saw the Kubota's shattered windshield lying on the ballast next to a crew pick-up sign that had been knocked over.

Based upon the above findings of the supervisors the Claimant was issued a notice of investigation under March 16, 2015 for the purpose of ascertaining the facts and determining the Claimant's responsibility, if any, in connection with the charge of record as above mentioned.

The Carrier says that due to the nature of the violation and the Claimant being dishonest about how the glass shattered on his Kubota in first reporting it and continuing at the investigation to offer a dishonest description of the manner in which the Kubota came to be damaged, that the Claimant has irreparably violated the trust so necessary in an employee/employer relationship and the penalty of his dismissal from service is clearly warranted.

It is the position of the Organization that the event was nothing more than what the Claimant had reported to his supervisors and explained at the investigation; he was simply operating the utility vehicle as intended when the windshield shattered.

The Claimant's representative at the investigation went into great detail about other factors that it was contended could have caused the windshield to shatter. It was offered that some aftermarket brackets used to modify the windshield mounts, if not properly installed, could have caused the breakage; when the windshield was manufactured glaziers could have nicked or chipped the glass, causing it to be weak and susceptible to breakage; rubber objects or gaskets stuck in to prevent shaking could have come loose; it was possible that fasteners such as nails, screws used to

attach the glass could have nicked the glass if the fasteners were not installed at a proper angle, and, the Claimant could have hit a bump that caused the windshield to shatter.

Contrary to Organization contention, at the investigation the Claimant several times offered statements that support testimony of the Carrier supervisors as to what the Claimant had told them, albeit the Claimant's statements are somewhat contradictory in of themselves. In this respect, at the investigation the Claimant said the following in response to questions about water having splashed up and created steam that broke the windshield:

Uh, what I know about the alleged incident, uh, the current time of driving in between tracks 2011 and RD8, drive through a puddle of water, I don't know, I'm guessing water splashed on the windshield, water hits the bottom of the motor, steam rolls from under the motor. Shortly after that happened the windshield crashed, exploded in my face. I'm not saying that's what caused it, but that's what happened, those are the facts, that's the truth.

\* \* \* \* \*

That's right, but I did not say the water broke the windshield. I said maybe the steam coming off the engine, you know, could have been, you know, warm or hot enough to, uh, have cracked or broken the windshield, but not the water itself, you know, I agree water would not break a windshield, but you pour hot water on a window on a cold day –

\* \* \* \* \*

Yeah, but I'm not saying that caused the windshield to shatter. I'm saying that did happen, the windshield did condense, the steam did fog the windshield, that's what I'm saying.

In questioning by the conducting officer about where the motor of the Kubota is located, and the Claimant having said that he was aware where the motor was located, the conducting officer then said: "Okay. And you contend that with the location of the muffler which is at the rear of the UTV, that water splashed up onto the rear of the motor and somehow manifested its way towards the front windshield and shattered the windshield?" The response of the Claimant here was:

No, if you drive through a puddle of water, the water splashes. I'm claiming that water hit the motor and steam. I'm not saying that water bounced off the bottom of the buggy and hit the front windshield, no way that it happened. Steam, you know, that buggy

had been moving all night, pretty much turned on all night, so of course it's hot. You can stick a hot spoon in water and steam will roll over everywhere, you know. I mean, I'm not a scientist. I'm pretty sure nobody in here is, but that's what happened. I'm not saying that that water and that steam did indeed break the windshield but that's what happened.

In study of the positions of the parties, although the Claimant's representative offered many plausible reasons that might have caused the windshield to break, none of those reasons was offered by the Claimant at the time he spoke with his supervisors or at the investigation. Instead, the Claimant gave a rather far-fetched explanation. Then, upon being faced with evidence of damage to the Kubota and questioning as to the mechanical structure of the Kubota describing the engine to be in the rear of the vehicle, the Claimant's explanation became increasingly confusing.

It also seems to the Board that if hot steam or hot water had caused the windshield, as the Claimant said, to have "exploded in my face," that such a happenstance might well have scalded or injured the Claimant, yet he told the supervisors he was not injured.

As stated above, the Board recognizes there are a number of possible ways for a windshield to be broken, but we find the explanation given by the supervisors most creditable since it is the only one supported by any evidence, i.e., the Kubota having hit something while the Claimant was its driver.

In the circumstances, the Board concurs with the Carrier that it is evident that the Claimant deliberately misrepresented the manner by which the windshield of the Kubota that he was driving had shattered in an attempt to avoid being charged with a failure to be alert and attentive to his driving so as to avoid having an accident. As the Carrier states, had the Claimant taken responsibility for his actions, he may have still faced discipline for a violation of rules, but it would not have been as severe had he not aggravated his conduct by brazen dishonesty.

An employee of the Carrier for two years at the time of the incident the subject of dispute, the Claimant had one prior discipline on his record; a formal reprimand and One Year Review Period as assessed on February 18, 2015 in waiver of a hearing for a missed call for service.

Although the record supports the conclusion that the Claimant's misconduct merits stern discipline by failing to honestly report the actual manner he came to be involved in accident while driving the Kubota, we find imposition of the ultimate penalty of dismissal from service to be excessive. We believe more appropriate discipline to be a Level S Suspension in the amount of time served, with no pay, and a One Year Review Period. The Board will accordingly direct that discipline be so

modified and that the Claimant be returned to service with seniority and benefits unimpaired, subject to passing all required return to service examinations.

Award:

Claim disposed of as set forth in the above Findings.



**Robert E. Peterson**  
Chair & Neutral Member



**Melissa A. Beasley-Coke**  
Carrier Member



**J. Michael LaPresta**  
Organization Member

Fort Worth, TX

Dated: March 27, 2018