

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35714
Docket No. MW-35752
01-3-99-3-739**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level 3 requiring a five (5) day actual suspension] imposed under the date of June 11, 1998 upon Roadway Equipment Operator N.L. Milner for allegedly violating Union Pacific Rules 42.2.2 and 42.6 in connection with a grade crossing incident at Mile Post 221.49 on the LaGrange Subdivision on May 13, 1998 involving a motor vehicle and the crane he was operating was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement System File J-9848-64/1154844).
- (2) As a consequence of the violation referred to in part (1) above, Mr. Milner’s record shall be cleared of the Level 3 discipline and five (5) day suspension and he shall be paid for all time lost on July 6, 7, 8, 9 and 10, 1998.”

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

On May 13, 1998, Roadway Equipment Operator N. L. Milner (Claimant) was operating the MP62 (Ohio Crane) on Gang 6903. The Claimant was working in the vicinity of MP 221.49, LaGrande Subdivision, when he struck a vehicle at a public road crossing. As a result of the accident, the Carrier sent the Claimant a Notice of Investigation directing him to appear at the LaGrande Depot on Wednesday, May 27, 1998.

On June 11, 1998, Manager Track Programs Riviera informed the Claimant that:

“This refers to Formal Investigation held at the Union Pacific Railroad Company on Wednesday, May 27, 1998, regarding that while working as R.E.O. you struck a vehicle, at a grade crossing on, on May 13, 1998, while operating the MP62 on Gang 6903, this is in violation of Union Pacific Rule 42.2 and 42.6 effective April 10, 1994.

I have now carefully reviewed and have considered all testimony contained in the hearing transcript. I have found more than a substantial degree of evidence was presented to warrant sustaining all charges brought against you, for your violation of the above cited rules. Accordingly your record will be assessed a Level 3 discipline.

Level 3 Discipline requires a five (5) day actual suspension. You may also be required to review rules which pertain to the specific violations involved prior to returning to work and a Corrective Action Plan must be developed upon return to work.”

The Organization protested the discipline, contending that the accident that occurred on May 13, 1998 “was not Claimant Milner’s fault.” According to the General Chairman, the Claimant was operating at a slow speed and could have stopped half the distance the track is seen to be clear, however, “The lady stopped, but did not stay stopped at the stop sign and then moved to the crossing and caused the accident.”

The General Chairman further asserted that because the Carrier eliminated the Crane Helper position, the Claimant did not have anyone available to flag the crossing, which would have prevented the accident from occurring. Finally, the General Chairman maintained that there was only "a minimum amount" of damage to the crane and no mention of damage to the automobile, therefore, no discipline should be assessed.

For his part, the Claimant stated that:

"The vehicle stopped at the stop sign, and set there as I approached. I was slowing down. I took my air off cause she was, the blue vehicle was stopped. And when . . . as soon as I started taking my air off she pulled out in the crossing and stopped again and by then when I dynamited it, I dropped my air."

The Carrier denied the claim, maintaining that the Claimant was afforded a fair and impartial Hearing, and there was sufficient evidence to warrant sustaining the charges brought against him. Given the "serious nature of the proven offense," the assessment of discipline was not unjust, unreasonable, excessive, unwarranted, harsh or arbitrary, according to the Carrier.

The following Rules, deemed pertinent to this dispute, state the following:

RULE 42.2.2

"Track cars and machines must be operated at a speed that will allow the operator to stop in 1/2 the distance the track is seen to be clear.

Where maximum freight train speed is lower, it will govern.

Reduce speed on curves and branch lines as conditions require and when hy-railing at night.

When it is raining, or when the rail is wet, only essential hy-rail vehicles must leave the track as soon as possible.

***operators must take into consideration that a greater distance is required to stop a track car under these conditions.**

When approaching workmen or others on or near the track, reduce speed and, if necessary stop.

RULE 42.6 GRADE CROSSINGS

Track cars and on-track equipment must approach all grade crossings prepared to stop, and must yield the right-of-way to vehicular traffic. If necessary, flag the crossing to protect movement of a track car or on-track equipment."

The Rules noted above are clear and unambiguous. In pertinent part Rule 42.2.2 states that: "When approaching workman or others on or near the track, reduce speed and, if necessary stop." That Rule also stipulates that when it is raining, "Operators must take into consideration that a greater distance is required to stop a track car under these conditions." Rule 42.6 provides that: "Track cars and on-track must approach all grade crossings prepared to stop, and must yield the right-of-way to vehicular traffic."

At the outset, the Claimant admitted that it had been raining "off and on" throughout the day, but stated that it was "only slightly sprinkling" when the accident occurred. According to the Claimant, he initially slowed to "ten or twelve" m.p.h. to yield the right-of-way. However, when he "thought" the vehicle would remain stationary, he proceeded toward the crossing and was then unable to stop when the vehicle attempted to cross the track. When questioned about his decision to proceed through the crossing, the Claimant admitted that he had "no guarantee that she was going to stay put."

In that connection, when asked if he had made arrangements with anyone to protect the crossing ahead of him, the Claimant stated that he had not. The Claimant went on to explain that:

"I was unfamiliar with the small farmer's crossings there. I knew there was a main crossing down just a little ways from that. But I was

unfamiliar with the small farmer's crossing. I haven't worked over that area for a long time."

Finally, when asked if he thought a Flagman could have prevented the incident, the Claimant replied: "She could have possibly run over anybody."

The Claimant's failure to properly yield the right-of-way resulted in the crossing accident with the driver of the car being transported to a hospital for emergency medical care. Therefore, in these circumstances, any attempts to mitigate the discipline by discussing the dollar amount of damage to the Ohio Crane or to the private automobile are simply not appropriate.

Based on all of the foregoing, we do not find the Carrier's imposition of Level 3 Discipline harsh or otherwise inappropriate.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of September, 2001.