

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 65, (Case No. 65)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION - IBT RAIL CONFERENCE**

vs

BNSF RAILWAY COMPANY

William R. Miller, Chairman & Neutral Member
Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement commencing August 24, 2010, when Claimant, Willard Hudson (1719871), was issued a Level S 30-day Record Suspension with 3 years probation concerning his failure to comply with the rules governing Off-Track and on On-Track Equipment movement when his company vehicle collided with a crane on June 15, 2010. The Carrier alleged violation of MOWOR 2.0 Railroad Radio Rules, MOWSR S-12.8 Backing and MOWSR S-12.8.1 Vehicles.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline."
(Carrier File No. 14-10-0162) (Organization File No. 60-13C2-1035.CLM)**

FINDINGS:

Public Law Board No. 7048, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute have participated in accordance to the Agreement that established the Board.

On June 18, 2010, Claimant was directed to attend a formal Investigation along with two other principals (B. B. Carlisle, Machine Operator and J. D. Papenfuhs, Foreman) on July 13, 2010, which was mutually postponed until July 27, 2010, concerning in pertinent part the following charge:

"...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to comply with rules governing Off-Track and On-Track Equipment movement when BNSF Company Vehicle 21674

collided with BNSF Scrap Crane #600319 at MP 228.1, Bridge St. crossing, Mulvane, KS, on the Ark City Subdivision, at approximately 1400 hours, June 15, 2010.

This investigation will determine possible violation of MOWOR 6.50, MOWOR 6.51, MOWOR 2.0, MOWSR S-12.8, MOWSR S.12.8.1, EI 1.1.9, EI 1.13.8, and EI 1.13.11."

On August 24, 2010, Claimant was notified that he had been found guilty of violating MOWOR 2.0, MOWSR S-12.8 and MOWSR S-12.8.1 and was assessed a Level S 30 Day Record Suspension with a three year probationary period.

There is no dispute between the parties that on June 15, 2010, the three charged employees were working on the RP17 Gang when an accident occurred. J. Papenfuhs, was the acting Foreman, B. Carlisle was the Operator of the Scrap Crane and the Claimant was the Relief Operator. Claimant was instructed to move a Carrier pick-up truck which subsequently had a collision with the crane operated by Carlisle both of whom were under the supervision of Papenfuhs.

It is the Organization's position that the Carrier did not meet its burden of proof. It argued the Claimant volunteered to move the pilot's one-half ton pickup to the tie-up location and the pickup (which the Claimant did not park) was parked in an improper location where visibility was limited and no flagger was provided for that movement. It argued that Claimant complied with those Rules he was alleged to have violated and followed the directives of the acting Foreman. It concluded he had no fault in the accident and it requested that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that Foreman Papenfuhs instructed Crane Operator Carlisle via radio to move his crane through the crossing and contrary to the Claimant's version of the incident the Foreman was not talking to the Claimant nor did he give him permission to move the pickup. It further asserted the facts indicate the Claimant did not follow the Rules for backing a vehicle when you cannot see account of an obstruction which in this instance was vegetation and a signal house, but instead backed up and ran into the scrap crane that had started moving through the crossing. It closed by asking that the discipline not be disturbed.

The Board has thoroughly reviewed the transcript and record of evidence and has determined that the Investigation was held in compliance with Rule 13(a) the Discipline Rule and Appendix No. 11.

Review of the record reveals that on page 29 of the Transcript, Foreman Papenfuhs was questioned about whether or not he had given the Claimant instructions on moving the pick-up. That questioning went as follows:

"Robert Emmons: Obviously at some point Mr. Willard got into his vehicle. Did you have any discussion with him prior, prior to that or after he got into his vehicle?"

Jeremy D. Papenfuhs: No, sir. A flagging man had dropped him off.

Robert Emmons: So the van dropped him off from what you understand and he got in the vehicle?

Jeremy D. Papenfuhs: Yes, sir.

Robert Emmons: And you did not in any way discuss with him what his movements would be?

Jeremy D. Papenfuhs: No.

Robert Emmons: Had you had any radio conversations with him that would have made him assume you were talking to him and not the scrap crane?

Jeremy D. Papenfuhs: No, sir." (Underlining Board's emphasis)

On page 36 of the Transcript, the Claimant was asked to offer his rendition of the incident which he explained as follows:

"Willard Hudson: Okay. The front half of the machines, machines were done with their work and we had rail traveled them to tie up location in Conway. Assistant Foreman Decosta had gathered up the machine operators from the front half to go back and flag crossings. When we got to Bridge Street Crossing he said we don't need to flag it, but I need someone to move the pickup. First two guys he asked said no. Then I got out to do it. Got in the truck. Foreman Papenfuhs asked me what the mileage marker on the signal box in front of the truck said and I told him the mile marker. Started to back up and heard him over the radio say after this black car crosses the crossing you're good to go and at that time it was crossing. So turned over my right shoulder cause there was a crew coming up at the crossing on that side and started backing up and the machine and truck I was in got together prior to me being able to acknowledge communication."

The questioning of the Claimant continued as follows:

"Robert Emmons: You mentioned that you had talked to him about where the mileage marker was. How did you have this conversation?"

Willard Hudson: On the radio.

Robert Emmons: And is it your understanding you had a radio conversation and then you heard him say after this black vehicle you're good to go. Is it your understanding he was speaking to you?

Willard Hudson: On the radio transmission he said my name.

Robert Emmons: What were your instructions? You were told to move this vehicle?

Willard Hudson: To our tie up location in Conway. (*Underlining Board's emphasis*)

After listening to the contradictory version of the same incident the Hearing Officer recalled Foreman Papenfuhs who reiterated on page 40 of the Transcript that he recalled no conversation on the radio with the Claimant wherein he was instructed on his movements. If no additional testimony had been provided we would be faced with irreconcilable differences as to what transpired and a stalemate. However, that it not the case in this instance as the questioning of Crane Operator Carlisle sheds a light and confirmation on one of the aforementioned testimonies. On page 21 of the Transcript, Carlisle was asked to explain the incident. He stated the following:

"Bradley B. Carlisle: Approached Bridge Street, Mr. Papenfuhs was sitting at the crossing. Told me that there were vehicles in the crossing, so I slowed down. As I approached the crossing, there was a black car going through the crossing. He said as soon as this black car gets through the crossing, the crossing would be clear. I proceeded through the crossing and as I was entering the crossing, what I seen was Mr. Hudson backing up along the crossing. I proceeded to go through the crossing and the, he backed, backed up the truck in front of me.

Robert Emmons: You say Mr., I'm sorry, who whose the Foreman that was giving you the instructions after the vehicle was clear that you could go through?

Bradley B. Carlisle: Mr. Papenfuhs.

Robert Emmons: Mr. Papenfuhs. How did he communicate that with you?

Bradley B. Carlisle: Over the radio.

Robert Emmons: Did you acknowledge that communication on the radio?

Bradley B. Carlisle: Yes.

Robert Emmons: How did you acknowledge it? What was your verbiage?

Bradley B. Carlisle: Copy."

On page 24 the questioning of Carlisle continued as follows:

"Rick Sandlin: You say that Foreman Papenfuhs was flagging the crossing and you were communicating with him on the radio?

Bradley B. Carlisle: Um-hum.

Rick Sandlin: What channel was that?

Bradley B. Carlisle: It was channel 87.

Rick Sandlin: Which that would be the?

Bradley B. Carlisle: I guess you could call it the Maintenance of Way channel.

Rick Sandlin: Maintenance of Way or gang channel?

Bradley B. Carlisle: Yeah. The whole gang was on channel 87."

Carlisle's testimony confirmed Foreman Papenfuh's version of the incident that the two were communicating with each other concerning the movement of the scrap crane and both understood that when the black vehicle passed over the crossing Carlisle should proceed through the crossing. Carlisle acknowledged that understanding when he stated Copy. The testimony further affirmed that the Claimant was listening on a channel that the entire gang could hear on and when he heard the Foreman tell Carlisle that he could go through the crossing he mistook that as an okay to back up the pick-up. Testimony also substantiated that the Claimant did not follow the Rules for safely backing a vehicle when you do not have a clear sight line. Substantial evidence was adduced at the Investigation that the Carrier met its burden of proof that Claimant was guilty as charged.

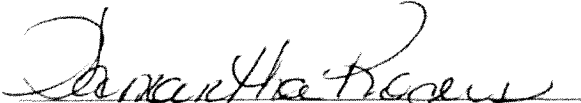
The only issue remaining is whether the discipline was appropriate. Safety on the job is an important issue and Carrier Rules are in place to protect employees and the general public. Employees are required to adhere with those Rules and even though no one was harmed in this instance it had the potential for serious consequences and was a serious violation. The Board finds and holds that the discipline assessed was proper because it was not excessive, arbitrary or capricious and was in accordance with the Carrier's Policy for Employee Performance Accountability (PEPA).

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member


Samantha Rogers, Carrier Member
David D. Tanner, Employee Member

Award Date: 10-12-11