

PUBLIC LAW BOARD NO. 7394

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

VS.

BNSF RAILWAY COMPANY
(Former St. Louis—San Francisco Railway Co.)

Case No. 20 - Award No. 20 - Claimant: Ruch
Carrier File No. 12-10-0117 / Organization File No. B-2929-8

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assessed Mr. Nathan L. Ruch a Level S 30-day Record Suspension with a three-year probation period on June 22, 2010 for his alleged failure to stop at road crossing at MP 157.2 at approximately 1345 on June 18, 2010 on the River Subdivision, thereby hitting non-railroad vehicle violating Maintenance of Way Operating Rule (MWOR) 6.50-2—Approaching road Crossing, Prepared to Stop.
2. As a consequence of the Carrier's violation referred to in part (1) above, we request that the charge be removed from Mr. Ruch's personal file.

FINDINGS:

Public Law Board No. 7394, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, N.L. Ruch, has been employed by the Carrier since 1996. On June 22, 2010, the Carrier assessed Claimant a Level S 30-day record suspension, with a three-year probation period, for his failure to stop at the road crossing at MP 157.2 on the River Subdivision, at approximately 1345 on June 18, 2010, thereby hitting a non-railroad vehicle. Following a request by the Organization, a formal investigation was scheduled

in connection with this matter. Following the investigation, on July 13, 2010, the Carrier issued Claimant a letter upholding the discipline.

The applicable Carrier rule provides:

6.50.2 Approaching Road Crossings

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 on-track equipment. The use of horns at grade crossings by all roadway machines and hy-rail equipment is optional at the discretion of the operator. (Emphasis added).

The facts of this case are not in dispute. On June 18, 2010, Claimant was operating an automatic spike puller, an open cab machine, when he struck a non-Carrier vehicle at a road crossing at Milepost 157.2 on the River Subdivision. R.S. Harlin, Carrier Roadmaster at Cape Girardeau, Missouri, testified at the investigation that he received a call from the Foreman of Claimant's gang informing him of the incident and proceeded to the depot at Chaffee, Missouri. There, Claimant and other members of his gang had, pursuant Mr. Harlin's request, prepared written statements concerning the incident. Mr. Harlin sat in on Claimant's interview with a Claims Agent and then questioned Claimant himself. Mr. Harlin stated that Claimant told him that he had made eye contact with the other vehicle's driver but had not stopped.

Mr. Harlin testified that the crossing at issue was paved and had flashers, but no gates. He stated that the Carrier does flag sufficiently busy crossings, but it is not necessary to flag every one. Mr. Harlin explained that the Carrier does not usually flag crossings on the River Subdivision, although it would be helpful to do so, and an operator is expected to flag his own crossings. He added that if an employee believed a crossing was unsafe he could call for a flagman.

Claimant's written statement was entered into evidence at the investigation and was consistent with his live testimony. Claimant testified at the investigation that at the time at issue he proceeded to the crossing, blowing his machine's horn, at a speed he believed safe for the area. He stated that he started to slow down and saw a pickup truck approaching the crossing. He added that he made visual contact with the truck's driver, and from that contact he assumed that the other driver was going to stop, but he did not. He stated that he was prepared to stop at the crossing, but after he made the visual contact he proceeded through the crossing, blowing his horn. Claimant testified that the truck had initially slowed down, but he realized that the truck was still traveling faster than it should have been if the driver had been preparing to stop. Therefore, Claimant stated, he attempted to stop, but was already halfway through the crossing. He explained that the other driver also attempted to stop, but slid into the crossing and Claimant's machine struck the front end of the other vehicle. Claimant acknowledged that he did not come to a full stop before entering the crossing.

Claimant maintained that he had been prepared to yield to the truck, but made the judgment call that the other vehicle was going to stop but it did not. He also maintained that Mr. Harlin informed him that the other driver had been ticketed in connection with the incident, but the record contains no other evidence concerning that issue.

The Carrier asserts that the investigation showed Claimant violated MOWOR Rule 6.50.2 as alleged. The rule, the Carrier points out, requires an employee to yield the right of way to vehicular traffic, and Claimant failed to do so, resulting in a collision with a non-employee vehicle.

The Carrier maintains that the testimony provided at the investigation, including Claimant's admission, established that Claimant saw the other vehicle at the crossing and nevertheless entered the crossing in front of it. While the Organization makes much of the fact that the other driver was supposedly ticketed, the Carrier states, no police report or other evidence was provided to support this affirmative defense and, even if it had been, that fact would have been irrelevant, as it was Claimant's responsibility to follow the Carrier's requirement that he yield to vehicular traffic.

The Carrier also disputes the Organization's assertion that the lack of a flagman at the crossing contributed to the incident. The Carrier states that there is no requirement that such protection always be provided, and, in any event, its employees are still required to follow all rules applicable to their assignments. Indeed, the Carrier states, employees should show more rather than less caution when there is no flagman protection.

The Carrier asserts that Claimant simply assumed that, because the other driver slowed down, he was going to stop. The Carrier states that its rule requiring employees to yield are designed to prevent incidents such as this one, and had Claimant followed it the incident would not have occurred. The fact that the resulting damage was minimal, the Carrier urges, is lucky but does not reduce Claimant's culpability.

The Carrier concludes that it has proven Claimant's guilt by substantial evidence, and the discipline assessed was reasonable and in accordance with its PEPA. For all of these reasons, the Carrier urges that the claim be denied.

The Organization asserts that factors outside Claimant's control were the cause of the incident at issue. The Organization points out that Claimant was one of 10 machine operators traveling across Roadmaster Harlin's territory, and the usual procedure is for the Carrier to provide protection at crossings for mechanized gangs traveling through the territory. However, the Organization states, due to manpower issues there was no such protection on the day of the incident. The Organization notes that Claimant testified that the incident occurred at a flasher crossing with lights displaying, and Claimant was prepared to stop when his vehicle slowed to a stop, but then accelerated, barely making contact with the other vehicle. The Organization stresses that there was no damage to the Carrier's machine, only very minor damage to the other vehicle, and the other driver was cited for his failure to stop.

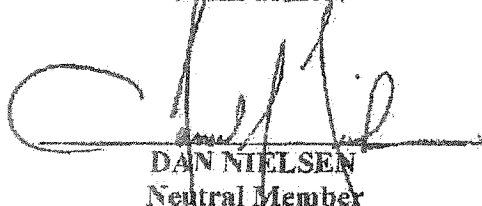
The Organization concludes that Claimant should not be held liable when a member of the public disobeys traffic laws. The discipline, the Organization urges, was unreasonable and unwarranted, and should be overturned.

We have carefully reviewed the record in its entirety. There is no question as to the facts of this matter: Claimant, as he acknowledged, had a clear view of the crossing. He saw the pickup truck. While he maintained that he was prepared to stop and began to slow down, he did not stop, because, based on his eye contact with the truck's driver, he assumed that driver was going to stop. His assumption turned out to be incorrect, and, as a result, his heavy machine collided with the other vehicle.

As the Carrier asserts, its rule governing the movement of heavy, on-track equipment is intended to prevent exactly the kind of incident which occurred here. The rule required Claimant to be prepared to stop, and to yield to the other traffic. While Claimant states that he was prepared to stop, he was unable to do so, and he clearly did not yield the right of way. The record contains no verification that the other driver was cited for his conduct, but, even if he had been, it would not excuse Claimant. The Carrier's rule provides an extra layer of protection for its employees, beyond what is required by traffic laws. Claimant did not comply, and his reading of the other driver's eye movements is not a reasonable excuse for having failed to do so. Therefore, his guilt has been proven by substantial evidence. The discipline was assessed in accordance with the Carrier's PEPA, and we cannot say that it represents an arbitrary or unreasonable exercise of the Carrier's discretion to determine the penalty.

AWARD

Claim denied.


DAN NIELSEN
Neutral Member


MICHELLE MCBRIDE
Carrier Member


R. C. SANDLIN
Organization Member

Dated this 30th day of July, 2012.