

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 107, (Case No. 107)**

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES 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 October 21, 2010, when Claimant, Jarrod P. Bentley (1671239), was dismissed for failure to stop and yield the right of way to vehicular traffic which resulted in a collision with and damage to a private vehicle and delay in transportation service on the main line on August 30, 2010. The Carrier alleged violation of MOWOR 6.50.2 Approaching Road Crossings.**
- 2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated with seniority, vacation, all rights unimpaired and wage loss commencing October 21, 2010, and continuing forward and/or otherwise made whole." (Carrier File No. 14-10-0228) (Organization File No. 210-13C2-1052.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 August 31, 2010, Claimant was directed to attend a formal Investigation on September 9, 2010, which was mutually postponed until September 24, 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 stop and yield the right of way to vehicular traffic on August 30, 2010, at approximately 1130 hours at Mile Post

124.5, near Ann St., New Iberia, Louisiana, on the Lafayette Subdivision while you were operating Ballast Regulator X0600332, which resulted in collision with, and damage to, a private vehicle, and delay in transportation service on the main line, in violation of Maintenance of Way Operating Rule 6.50.2, Approaching Road Crossings."

On October 21, 2010, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the Organization's position that the facts indicate that Claimant was operating a Ballast Regulator on August 30, 2010, that was involved in an accident with an automobile as it passed over a railroad crossing at Mile Post 124.5. It argued the evidence shows that the Claimant approached the crossing, that was partially blocked by an overhanging tree and other vegetation, prepared to stop if necessary when an automobile struck his machine. Claimant looked both directions and the crossing was clear. According to it, an investigation conducted by the local police at the scene of the accident found the driver of the car guilty of failure to yield thus it reasoned the Claimant was without any guilt. It further argued that if the Carrier had shown the Claimant had been guilty of anything, which it did not, the discipline exercised was excessive. It concluded by requesting that the discipline be rescinded and the claim sustained as presented.

It is the position of the Carrier that Claimant was involved in an accident that could have been prevented if he had been more careful. It argued that contrary to the Organization's position the fact that the automobile driver was cited did not relieve the Claimant from his responsibility to yield to vehicular traffic before passing over a railroad crossing with his machine. It further argued dismissal was appropriate due to the seriousness of this violation coupled with the fact that this violation was his second Level S within a one year period and Policy for Employee Performance Accountability (PEPA) subjects an employee to dismissal. It closed by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and the record of evidence and it is determined that the Investigation and appeal process met the guidelines of Rule 13(a) the Discipline Rule and Appendix No. 11.

There is no dispute that Claimant was involved in a vehicular traffic accident on August 30th while operating a Ballast Regulator. On pages 17 and 18 of the transcript Roadmaster A. Whitney was questioned about the incident as follows:

"David Cunningham: Mr. Whitney, why does the rule state that our machines must operate, must yield the right of way to vehicle traffic?

Aaron Whitney: Because our machines don't activate the gate crossings, and like,

such as trains. And, you know, vehicles wouldn't be as aware to our machines coming, coming across a crossing as a, as a train would be.

David Cunningham: Does the fact that the driver may have been cited for a, a motor vehicle statute of the state of Louisiana, relieve your, the Machine Operators on this rule?

Aaron Whitney: No, he has, I mean, he has a responsibility to stop, ensure the way is clear, and proceed through the crossing."

On page 25 of the transcript the questioning of Mr. Whitney continued as follows:

"David Cunningham: In this instance, did both operators, the one in the vehicle and the one, the Ballast Operator, have an obligation to yield and, proceed cautiously?

Aaron Whitney: That's correct.

David Cunningham: Did either operator do that?

Aaron Whitney: No." (*Underlining Board's emphasis*)

Roadmaster Whitney's testimony was not refuted that the Claimant was not relieved of his responsibility to yield to vehicular traffic nor was he innocent because the police only cited the automobile driver.

On page 31 of the transcript the Claimant was asked about the railroad crossing at Milepost 124.5 whether his machine had the right of way or did vehicular traffic have the right of way. Claimant responded as follows:

"Jared Bentley: Basically the stop sign's here, and it's not a stop sign. They do have the right of way here, ..." (*Underlining Board's emphasis*)

Claimant's admission that vehicular traffic had the right of way at the grade crossing site of the accident is consistent with MOWOR 6.50.2 that states in pertinent part:

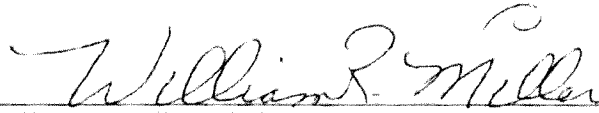
"On-track equipment must approach all grade crossings prepared to stop and must yield the right of way to vehicular traffic...." (*Underlining Board's emphasis*)

The record is clear that substantial evidence was adduced at the Investigation that the Claimant was not prepared to stop at the crossing and was guilty as charged.

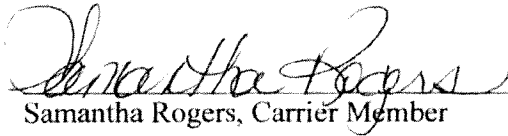
The only issue remaining is whether the discipline was appropriate. At the time of the incident the Claimant had a little less than five years of service. The instant violation was his second Level S infraction within a one year period and the PEPA Policy subjects an employee to potential dismissal. The Board finds and holds that the discipline exercised in this case was not excessive, arbitrary or capricious, therefore, it will not be set aside and the claim will remain denied.

AWARD

Claim denied.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier Member



David D. Tanner, Employee Member

Award Date: 2/27/13