

Award No. 2

Case No. 2

NMB Case No. PLB-07602-000002

PUBLIC LAW BOARD NO. 7602

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY)
EMPLOYES DIVISION—IBT)
)
v.)
)
BNSF RAILWAY COMPANY)

Carrier File No. 10-12-0216

Organization File No. C-12-D040-8

Claimant — Keith A. Antholz

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- 1. The discipline [Level S thirty (30) day record suspension and a three (3) year review period] imposed upon Mr. Keith A. Antholz by letter dated February 7, 2012, for alleged violation of MOWOR 6.50.2 Approaching Road Crossings in connection with his vehicle accident, while operating BN 5600192, at a railroad crossing at or near MP 266.33 on the Ottumwa Subdivision, on October 26, 2011, at approximately 0915 hours.**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant Keith A. Antholz shall now receive the remedy prescribed by the parties in Rule 40(G).**

BACKGROUND:

On the morning of October 26, 2011, the Claimant was part of a gang performing track maintenance work on a section of track near Batavia, Iowa, on the Ottumwa Subdivision. From the testimony at the investigation, it appears that this is a rural area with very little traffic. Claimant was operating a piece of track equipment BN 5600192, known as a pup tamper. As Claimant approached the railroad crossing at or near MP 266.33, he stopped and waited for about fifteen minutes. The crossing gate had been de-activated that morning by the Signal Department as part of its maintenance schedule. At approximately 0915 hours, another employee pulled his bobcat skid loader out and across the road to block vehicular traffic. A passenger car approached the crossing and stopped, then started to move forward. The bobcat operator honked his horn and held up his hand in a stopping motion to the car before motioning Claimant forward. The car stopped a second time. The record is not entirely clear, but it appears that Claimant may also have had radio communication that he was cleared to cross. Claimant saw that the car was stopped. After Claimant had started to move the pup tamper through the crossing (given the pup tamper's orientation on the track, it was actually backing into the crossing), the car started moving forward yet again, driving off the paved road to drive around the bobcat and onto the track. According to one witness, the car almost ran the bobcat over, then swerved around the backside of Claimant's vehicle. The bumper of the pup tamper made contact with the right rear quarter panel on the car. Claimant, who was seated facing forward in the cab of the pup tamper with limited vision at the rear, did not realize that there had been an impact and kept moving through the crossing until he heard a radio message telling him to stop. The pup tamper was not damaged beyond a scraped bumper. While there was some damage to the car, the driver was unharmed. The Jefferson County Sheriff's Department was called to the scene. The Iowa Department of Transportation Investigating Officer's Report of the accident concluded that the elderly driver of the car had misinterpreted the flagger's hand motion to stop as one waving her forward onto the crossing: "Unit 1 [the car] thought the workers were waving her on through. The workers were waving for her to stop." The Claimant was not cited for his role in the accident.

FINDINGS AND OPINION:

The Public Law Board, upon the whole record and all the evidence, finds that the carrier 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 Public Law Board has jurisdiction over the dispute involved herein.

MOW Operating Rule 6.50.2, "Approaching Road Crossings," states:

On-track equipment must approach all grade crossings prepared to stop and must yield the right to vehicular traffic. If necessary, flag the crossing to protect movement of on-track equipment

There is no dispute between the parties that pursuant to Rule 6.50.2, private vehicles have the right of way over railroad equipment and machinery at railroad track road crossings, at least as a general matter when there is no crossing gate or signal and no one flagging the crossing. Where the Carrier and the Organization differ is that according to the Carrier, the rule is violated any time a piece of machinery is involved in an accident with a vehicle—by definition, the machine was not "prepared to stop" as required by the rule—while the Organization contends that there may be circumstances and situations where the operator was blameless—and that this was one of those cases.

From the record, it appears that there is no real dispute about the facts of what happened and how the accident came to occur. Although the signal at the crossing had been disabled, a skid steer bobcat was parked crossways on the road so as to block vehicular access to the crossing. After the Claimant had been cleared to move through the crossing, had seen that the car was stopped, and had begun to move the pup tamper into the crossing, the car suddenly began to move forward onto the tracks in a somewhat erratic manner. As the incident report prepared by the Roadmaster stated, "...after Keith had been flagged through ... the car decided to cross against STOP instructions by the BNSF employee flagging the crossing..." According to the state Department of Transportation's accident report, the driver of the car thought that the employee flagging the crossing was waving her forward when in fact he was waving at

her to stop. The two other employees who witnessed the accident and were called to testify at the investigation stated that there was nothing that the Claimant could have done to avoid the accident.

The record establishes that the car started to move forward into the crossing after the pup tamper had started moving through it. Claimant was driving quite slowly, not more than 3-4 miles per hour. The Carrier concluded that Claimant violated Rule 6. 50.2 when he failed to stop. But the physics of movement and momentum are such that, even moving slowly, a large heavy object like the pup tamper may be incapable of stopping in the blink of an eye, which is the time within which this accident occurred. The pup tamper was already in motion and had started into the crossing when the automobile made an unexpected end run around the bobcat blocking the crossing and drove onto the tracks in the path of the oncoming pup tamper. The Carrier has interpreted MOW 6.50.2 strictly: if a piece of equipment makes contact with a vehicle, the rule must have been violated. But as the testimony at the investigation indicated, the rule is not in fact so black and white. The fact that Claimant's equipment made contact with a vehicle is enough to raise questions about whether the operator violated Rule 6.50.2, but without more, it is not sufficient to establish that he did. As one witness stated, vehicles have the right of way under Rule 6.50.2 *as long as* there is no signal and no one flagging the crossing. The Rule itself explicitly states "if necessary, flag the crossing to protect movement of on-track equipment." That is exactly what happened here: the crossing was being flagged and the Claimant had been cleared to move forward. The fact that the driver of the car suddenly took it into her head to disobey, ignore or misinterpret the flagger and start her car moving forward, driving off the road in the process of driving into the crossing and into the path of an oncoming piece of machinery is an extraordinary series of events outside the Claimant's ability to control. Between the time when the car started up again and drove into his path, the Claimant literally could not have stopped his equipment in time to avoid the accident. When someone effectively drives their vehicle into a moving piece of equipment, it is inappropriate to hold the operator accountable for the collision. The Claimant is an experienced operator. The evidence is that he operated the pup tamper with all due caution and pursuant to directions he had been given. The State of Iowa concluded that the driver of the car was at fault. Under such circumstances, the facts in the record do not establish that the Claimant violated

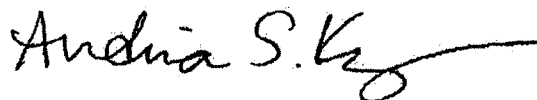
MOW Rule 6.50.2, or any other rule, during the accident that occurred on October 26, 2011, and he should not have been subjected to discipline. The matter in its entirety shall be removed from his record.

AWARD

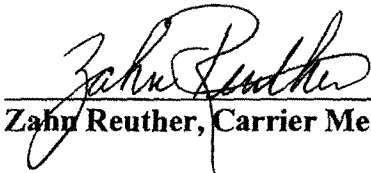
Claim sustained.

ORDER

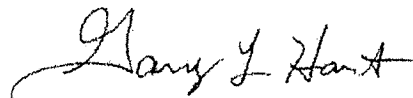
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.



Andria S. Knapp, Neutral Member



Zahn Reuther, Carrier Member



Gary Hart, Organization Member

April 29, 2013

Date