

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7048
AWARD NO. 88, (Case No. 88)**

**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 February 3, 2011, when Claimant J. L. Godfrey Jr. (6455745), was Dismissed for failure to properly control vehicle number 20149 which resulted in a collision with a private vehicle at the road crossing at Mile Post 254.1 on February 4, 2011. 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 pay for wage loss commencing when Claimant was withheld from service and continuing forward and/or otherwise made whole."
(Carrier File No. 14-11-0112) (Organization File No. 100-13C2-115.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 February 7, 2011, Claimant was directed to attend a formal Investigation on February 25, 2011, which was mutually postponed until April 29, 2011, 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 properly control vehicle number

20149 on Friday, February 4, 2011 at approximately 0730 hours on the Lampasas Subdivision, which resulted in a collision with a private vehicle at the road crossing located at Mile Post 254.1, in violation of Maintenance of Way Operating Rule 6.50.2, Approaching Road Crossings."

On May 27, 2011, Claimant was notified that he had been found guilty as charged and was dismissed from service.

It is the Organization's position that the Claimant was denied a "fair and impartial" Hearing because the Notice of Investigation had the wrong date as to when the incident occurred. It argued that Notices are very important and when they are vague and ambiguous, as was the case in this instance, it is impossible to prepare a proper defense. Additionally, it argued that the Carrier did not supply the Claimant a copy of the Police Accident Report prior to the Investigation and because of those two procedural errors the discipline should be set aside without even addressing the merits. Turning to the incident it argued that Claimant was operating a hy-rail vehicle on the tracks on February 3, 2011, at the road crossing located at Mile Post 254.1. Claimant had stopped for vehicular traffic as there were cars on both sides of the track. Claimant slowly proceeded across the road crossing on the rail when one of the stopped highway vehicles proceeded to go around and pass the other stopped vehicles on the shoulder of the road and ran into the side of Claimant's vehicle, causing minor damage through no fault of the Claimant. It closed by requesting that the discipline be rescinded and the claim be sustained as presented.

It is the position of the Carrier that the Claimant was not denied his "due process" Agreement rights because the Notice had the wrong date which was a typographical error that should have read February 3rd rather than the 4th. It argued the Notice did have the correct Mile Post and the Organization and Claimant had more than enough information contained in the Notice to prepare a proper defense. On the merits it argued that the Claimant admitted in his testimony that he was in violation of the Rules when he was involved in an accident with his hy-rail vehicle at a road crossing on February 3, 2011. It also pointed out that following the accident the Claimant had a drug and alcohol test which resulted in a positive test for marijuana. It further asserted the Organization's argument that even though the Claimant admitted during the Hearing that three weeks prior to this incident while on vacation he had smoked some marijuana - he was not in violation of the Drug and Alcohol Policy on the day of the accident because he not indulged in over three weeks was without merit. It argued it did not know when the Claimant last smoked marijuana, but it is clear that MOWOR 1.4 prohibits any controlled substance to be in an employee's body while they are on duty and the Claimant's drug test was positive for marijuana. It concluded by asking that the discipline not be disturbed and the claim remain denied.

The Board has thoroughly reviewed the transcript and record of evidence and will first address the Organization's procedural arguments. The Organization is correct that Notices must

be clear enough that the charged employee understands the allegations made against him so as to prepare a proper defense. Examination of the transcript confirms that the Claimant and Organization understood the charges. The other argument made by the Organization was that the Carrier withheld information until the day of the Investigation which put them at a disadvantage. The information not provided until the Hearing consisted of the police report and photos of the hy-rail damage. The transcript indicates that the Organization was given whatever time they needed to review those exhibits and there was no showing that they were inhibited in their defense by when they received the aforementioned documents. The Board has 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 on February 3, 2011, Claimant was involved in a minor accident when his hy-rail vehicle collided with a private citizen's vehicle. On page 25 of the transcript the Claimant was questioned about the accident as follows:

"Dave Cunningham: Okay. If you come up to an intersection that has a, where it, where it tells you to yield, what's required of you as a driver at that point?"

J. L. Godfrey Jr.: You stop and look both ways.

Dave Cunningham: Okay, and if you get struck by the vehicle while you're crossing, who's at fault?

J. L. Godfrey Jr.: I guess I would be. (Underlining Board's emphasis)

Dave Cunningham: Okay. Is that essentially the same thing here, that under the rule, you're supposed to stop and, and yield to right of way?

J. L. Godfrey Jr.: Yes.

Dave Cunningham: If you have an accident, did you yield right of way?

J. L. Godfrey Jr.: No, sir. (Underlining Board's emphasis)

Dave Cunningham: Did you use your horn at all, when you were crossing that crossing?

J. L. Godfrey Jr.: No, sir." (Underlining Board's emphasis)

On page 28 of the transcript the questioning of the Claimant continued as follows:

"Dave Cunningham: So Mr. Godfrey, if you had, you, if there was a vehicle stopped that the vehicle that entered the railroad crossing came around or passed or however they got there, if there was a part of the roadway you could not see, should you have kept going through the intersection?

J. L. Godfrey Jr.: No. *(Underlining Board's emphasis)*

Dave Cunningham: Then why did you?

J. L. Godfrey Jr.: I went because I thought I could make it. I thought my way was clear. *(Underlining Board's emphasis)*

It is clear from the aforementioned testimony that the Claimant admitted he violated MOWOR 6.50.2 Approaching Road Crossing, but the record also substantiates that the vehicle driven by the private citizen (Loyal Jennings) passed the stopped car ahead of it on the right hand shoulder of the road which was verified by the police report. Passing a stopped car on the right hand side of a two lane road is not the norm and in many instances is illegal. The Organization is correct when it argued that it is not unreasonable to believe that the private citizen's actions were a contributory factor to the accident as the stopped car acted as a shield to his car as he passed on the right hand side. Despite that contributory factor there was substantial evidence adduced at the Investigation that the Claimant was guilty as charged. The Board makes no determination regarding the Claimant's alleged positive drug test and whether he might have violated MOWOR 1.4 because it was not part of the charges and it is evident that alleged allegation was known to the Carrier prior to its filing of charges and could have been included.

The only issue remaining is whether the discipline was appropriate. At the time of the incident Claimant had approximately 31 years of service. This violation was his second Level S within a one year period. As the Carrier stated in its declination two Level S violations may subject an employee to dismissal, however, the Board finds and hold that the discipline in this instance was excessive and is reduced to a lengthy suspension which is progressive and corrective in nature and in accordance with the spirit of the Carrier's Policy for Employee Performance Accountability (PEPA) wherein under Paragraph (b) General Information it states in pertinent part: "**Circumstances surrounding a serious incident may reduce an employee's personal culpability.**" Because of the unique circumstances of this case wherein the private citizen's driving contributed to the accident the Claimant will be returned to service with seniority intact, all benefits unimpaired, but with no back pay and two Level S Violations on his record. Claimant is forewarned that he needs to be careful to abide by all Carrier Rules and Policy as he works to clear off that record over the 12 months following reinstatement.

AWARD

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman & Neutral Member



Samantha Rogers, Carrier/Member



David D. Tanner, Employee Member

Award Date: 5-21-12