

**PUBLIC LAW BOARD NO. 7394**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

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

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Case No. 21 – Award No. 21 – Claimant: Papenfuhs  
Carrier File No. 12-10-0130 / Organization File No. B-3178-4

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when it assessed Mr. Jeremy D. Papenfuhs a 10-day Record Suspension with a one-year review period for his 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, violating Maintenance of Way Operating Rule (MWOR) 2.0 and Engineering Instruction (EI) 1.1.9.
2. As a consequence of the Carrier's violation referred to in part (1) above, we request that the charge and discipline be removed from Mr. Papenfuhs' 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, Jeremy D. Papenfuhs, has been employed by the Carrier since 2007. On June 18, 2010, the Carrier instructed Claimant to attend an investigation for the purpose of ascertaining the facts and determining his responsibility, if any, for his alleged

failure to comply with rules governing Off-Track and On-Track Equipment movement when, on June 15, 2010, BNSF Company Vehicle 21674 collided with BNSF Scrap Crane #600319 at MP228.1, Bridge St. crossing, Mulvane, KS on the Ark City Subdivision, in violation of several Carrier Maintenance of Way Operating Rules. Following the investigation, on August 24, 2010, the Carrier found Claimant guilty of violating Engineering Instruction 1.1.9 and Maintenance of Way Operating Rule 2.0, and assessed him a Level S 30-day record suspension with a three-month review period. The record indicates that Engineering Instruction 1.1.9 has been combined with Maintenance of Way Operating Rule 6.50. On August 26, 2010, the Carrier issued Claimant a letter indicating that he would receive a 10-day record suspension with a one year review period.

The applicable Carrier directives provide, in relevant part:

## **Maintenance of Way Operating Rules**

### **2.0 Railroad Radio Rules**

#### **2.1 Transmitting**

Any employee operating a radio must do the following:

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- Give the required identification
- Not proceed with further transmission until acknowledgement is received

#### **2.2 Required Identification**

Employees transmitting or acknowledging a radio communication must begin with the required identification. The identification must include the following in this order:

- For base or wayside stations
  - Name or initials of the railroad.
  - Name and location or other unique designation.
- For mobile units:
  - Name or initials of the railroad
  - Train name (number), engine number, or words that identify the precise mobile unit.

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## **2.3 Repetition**

An employee who receives a transmission must repeat it to the person transmitting the message . . .

## **6.50 Movement of On-Track Equipment**

### **6.50.2 Approaching Road Crossings**

. . . If necessary, flag the crossing to protect movement of on-track equipment.

The facts of this case are not in dispute. Claimant, Jeremy D. Papenfuhs, was working as a fill-in foreman at the time of the incident, his gang was moving equipment from one location to the next. Claimant was flagging a crossing at Bridge Street, and scrap crane operator Bradley Carlisle approached the crossing. Willard Hudson, a relief operator who had been dropped off by a van, had been parked in a pickup truck on the east side of the crossing. Claimant stated that he had conducted a job briefing with Mr. Carlisle concerning his movements. However, he stated, Mr. Hudson was not part of his gang and even though he saw his vehicle parked on the right of way on the east side of the crossing, they had not discussed what Mr. Hudson's movements would be.

Claimant testified that he told Mr. Carlisle, over the radio, that the crossing would be clear after a black car went through. He was using the channel utilized by the entire gang. Mr. Carlisle, Claimant added, acknowledged that radio transmission by stating, "Copy that." Claimant explained he knew that it was Mr. Carlisle by his voice. He admitted that this was not an acceptable means of communication under the Carrier's rules. Mr. Carlisle testified at the investigation that he did not recall Claimant stating his name or identification during the radio exchange, and he replied to Claimant by saying, "Copy."

Mr. Carlisle stated that as he entered the crossing, he saw Mr. Hudson backing up along the crossing in front of him. Willard Hudson testified at the investigation that his Assistant Foreman told him that someone was needed to move a parked pickup truck from Bridge St. to a tie-up location at Conway, so he agreed to do it. He stated that the vehicle had not been parked properly, as it was parked at the signal house in a way that prevented him from seeing the oncoming traffic on the rail.

Mr. Hudson stated that he got into the truck and Claimant, over the radio, asked him for the mileage marker on the signal box in front of the truck. He told him the marker. He recounted that he had begun to back up when he heard Claimant, again over the radio, tell him that after the black car crossed the crossing he was good to go. Mr. Hudson stated that he was unable to take his hands off the wheel to acknowledge Claimant's communication. Mr. Hudson testified that Claimant used his name on the first transmission but not on the second. He continued backing up and collided with the

machine driven by Mr. Carlisle. Mr. Hudson maintained that his view had been blocked by vegetation and the signal house and he had not seen Mr. Carlisle approaching.

Claimant's personal record shows no prior discipline.

The Carrier states that this is not a complicated case. Three employees assigned to Region System Gang TRPX0017 were, the Carrier notes, involved in a collision between an on-track machine (Scrap Crane #600319) and a pickup truck (Company Vehicle #21674) on June 15, 2010. Claimant, the Carrier points out, was flagging the crossing by directing vehicular traffic and providing guidance to the scrap crane operator, Mr. Carlisle, on a radio channel used by the entire gang.

The Carrier recites that Machine Operator Willard Hudson had been instructed to move the pickup truck, which was parked next to a Signal Bungalow along the right of way. The Carrier notes that Claimant testified at the investigation that he instructed Mr. Carlisle, the scrap crane operator, to move the machine through the crossing. However, the Carrier notes, Claimant failed to properly identify himself, or to receive identification from the communication's recipient, as required by Carrier rules. As a result, the Carrier states, both the scrap crane operator and the pickup driver believed that Claimant was speaking to them. As a further result, the Carrier continues, both employees proceeded into the crossing, resulting in a collision.

The Carrier argues that it is clear that Claimant, as charged, failed to comply with the applicable rules. These rules, the Carrier stresses, have been created to prevent incidents such as the instant one, and to protect Carrier employees. Claimant could have prevented the collision, the Carrier maintains, because, had he followed the rules, there would have been a clear understanding as to which employee he was instructing to enter the crossing.

The Carrier asserts that it has met its burden of proving Claimant's guilt by substantial evidence, especially as Claimant admitted his violation. The discipline assessed, the Carrier states, is consistent with its PEPA and Claimant's record, and was not unreasonable or unwarranted. The Carrier concludes that the claim should be dismissed.

The Organization states that Claimant was found guilty of violating two Carrier directives. First, the Organization asserts, Engineering Instruction 1.1.9 sets forth procedures for traveling and slowing/stopping on-track machines, but Claimant was not the machine operator at the relevant time, nor did he instruct another operator to run the machine in a manner which violated this instruction. On the contrary, the Organization maintains, Claimant was doing what he was supposed to, flagging crossings with traffic in two directions, and had conducted the necessary job briefings. The second directive was the Maintenance of Way Operating Rule, which the record shows Claimant did not violate.

The Organization concludes that Claimant violated neither cited Carrier directive and should not have received any discipline. Therefore, the Organization urges that the claim be sustained.

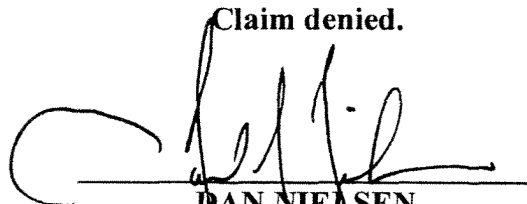
We have carefully reviewed the record in its entirety. There is no question as to the facts of this matter: Claimant was responsible for flagging the Bridge St. crossing to protect the movement of on-track equipment, in this case the scrap crane operated by Mr. Carlisle. The record demonstrates that he was aware that there were two vehicles in the vicinity, the scrap crane and the pickup truck. When he gave the instruction to Mr. Carlisle to proceed, he failed, as he admitted at the investigation, to properly identify himself, nor did he make it clear that his instruction was intended for Mr. Carlisle. He also failed to obtain the proper acknowledgement from Mr. Carlisle.

As the Carrier asserts, its rules governing radio communications are designed to prevent exactly the type of confusion which occurred here, and which created a potentially serious situation for the employees and damage to Carrier property. Therefore, while the actions of the other employees involved in this incident may well have contributed to the occurrence, Claimant was primarily responsible for moving the traffic safely and he failed to do so. He violated the radio transmission rules as well as his responsibility to act as an effective and safe flagger, thereby also violating the rules governing the movement of on-track equipment.

While Claimant was initially assessed a Level S violation, the Carrier apparently later determined to treat it as a non-serious offense. This penalty does not represent an excessive or unreasonable exercise of the Carrier's discretion to determine penalties.

**AWARD**

**Claim denied.**

  
**DAN NIELSEN**  
Neutral Member

  
**MICHELLE MCBRIDE**  
Carrier Member

  
**R. C. SANDLIN**  
Organization Member

Dated this 30<sup>th</sup> day of July, 2012.