

**PUBLIC LAW BOARD NO. 5850**

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**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**vs.**

**BNSF RAILWAY**

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Case No. 443 – Award No. 443 – Claimant: Brumfield  
Carrier File No. 14-12-0325  
Organization File No. 110-13N1-1275

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**STATEMENT OF CLAIM:**

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing July 11, 2012, when Claimant, Kenya L. Brumfield (1734623), was disciplined with a Level S Record Suspension with a 1-year review period for his alleged failure to stop short of a red flag at MP 203.5 while working as a Machine Operator on the Galveston Subdivision on June 28, 2012. The Carrier alleged violation of MOWOR 6.50 Movement of On-Track Equipment.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline with seniority, vacation, all rights unimpaired and pay for all wage loss commencing July 11, 2012, continuing forward and/or otherwise made whole.

**FINDINGS:**

Public Law Board No. 5850, 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, K.L. Brumfield, has been employed by the Carrier since 2007. On June 29, 2012, the Carrier charged Claimant to attend an investigation for the purpose of ascertaining the facts and to determine his responsibility, if any, in connection with his alleged failure to stop short of a red flag at Mile Post 203.5 on the Galveston Subdivision Main Track on June 28, 2012. The Carrier alleged violation of Maintenance of Way Operating Rule (MOWOR) 6.50, Movement of On-Track Equipment. Following the

investigation, the Carrier found that Claimant had committed the misconduct alleged and assessed him a Level S 30-day Record Suspension with a one-year review period

Maintenance of Way Operating Rule 6.50, Movement of On-Track Equipment, provides, in relevant part:

On-track equipment must move at a speed that will allow stopping within half the range of vision short of:

- |   |                              |   |
|---|------------------------------|---|
| * | *                            | * |
| • | Men or equipment fouling the |   |
| • | track.                       |   |
| • | Stop signal.                 |   |
| * | *                            | * |

Maintenance of Way Operating Rule 5.3, Hand and Radio Signals, 5.31 Hand Signals, includes a diagram illustrating the appropriate hand signals for a train or engine to stop. It depicts the stop indication as the hand swinging the signal at a right angle to the track. Rule 5.34, Signal to Stop, provides that any object waved violently by any person on or near the track is a signal to stop.

Carrier Temple, Texas Roadmaster David Mooney testified at the investigation that he was part of a four-man team performing operations tests on the Galveston Subdivision on the day of the incident, June 28, 2012. He stated that the team decided to perform random stop tests on Gang RP19 as the employees were backing over the main track to their start location south of Rogers, Texas.

Mr. Mooney stated that he pulled up to a road crossing to stop a random vehicle traveling down the track, which Claimant, a machine operator, was driving at the time. Mr. Mooney explained that he gave a stop signal, a red flag, but Claimant went past the flag the length of a push car. Mr. Mooney explained that Claimant should have stopped short of the red flag within half the range of vision.

Mr. Mooney stated that when he exited his vehicle with the flag, he was approximately "a couple of thousand feet," but at least a thousand feet, from Claimant's vehicle. Mr. Mooney maintained that when he exited his vehicle, Claimant was sufficiently far away that Mr. Mooney had time walk up to the track on the west side, and wave the flag in a downward motion for the stop signal. Mr. Mooney stated that he began to wave the flag as soon as he got to the track from his vehicle and as Claimant's machine approached the road crossing. Mr. Mooney added that he then crossed the track at the road crossing and hung the flag over the track because it did not look like the machine was going to stop.

Mr. Mooney stated that the machine rode by, and Claimant got out and asked for permission to pass the red flag. Mr. Mooney replied that he told Claimant it was a little late because he had already passed it. Claimant acknowledged that one wheel car went past the red flag before he stopped.

Claimant testified that when he first observed Mr. Mooney he was fouling the track but not waving a flag. He saw Mr. Mooney from about 500 feet away and saw that he had something by his side, which he believed was a red flag but was not sure. Claimant stated that Mr. Mooney did not display a flag, but he stopped just to make sure, as he was aware that a red flag meant stop. He added that only when he exited his vehicle did Mr. Mooney drop the flag down.

Claimant's personal record shows no previous discipline.

The Carrier states that there is no merit to the Organization's procedural objections, and nothing to show, as the Organization alleges, that the Carrier intimidated or harassed employees. On the merits, the Carrier asserts that the record is clear that Claimant ran his machine through a red flag held by Roadmaster Mooney, an obvious violation of MOWOR 6.50. As Mr. Mooney's explained, the applicable Rule required Claimant to stop short of the red flag, within half the range of vision. The Carrier also notes Mr. Mooney's testimony that Claimant was required to notify the preceding machine that he was stopping and to be prepared to stop as well, and Mr. Mooney's testimony that Claimant failed to do so. The Carrier concludes that Claimant's guilt has been proven, and the discipline was appropriate considering the seriousness of the offense, and was assessed in accordance with its Policy for Employee Performance Accountability. The Carrier urges that the claim be denied.

The Organization states that the Carrier disciplined Claimant for failing to stop within half the range of a stop signal, but the record reveals serious questions about what that signal was. Carrier witness Mr. Mooney, the Organization notes, testified inconsistently, first saying that the signal was given at a distance of more than 1000 feet, and then that it was given at a distance of up to "a couple of thousand feet." Moreover, the Organization states, Mr. Mooney testified that he waved a hand-held flag while crossing the tracks, but the Carrier's Rules allow this type of flagging only for trains, not maintenance of way machines. Mr. Mooney, the Organization points out, also stated that he hung the flag over the track, but this too is not the proper procedure for placing a stop signal. The Organization stresses Claimant's testimony that Mooney stood only on the right of way, not foul of the track.


The Organization also notes Claimant's testimony that Mr. Mooney had his flag rolled up and held against his side, opposite Claimant's point of view from the track. Claimant also testified, the Organization points out, that he never saw the flag until he stopped and dismounted his vehicle to speak to Mr. Mooney on the side of the track. The Organization maintains that the Carrier is using deception and duplicity, as well as fear and intimidation, to "fail its way to a better safety record." The Organization states that the Carrier has failed to follow its own Rules regarding the proper display of a stop signal and has trumped up these charges in order to coerce others into following Rules through the fear of finding themselves in the same position as Claimant. The Organization asserts that the Carrier has failed to prove the charges by substantial evidence. Even if it had, the

Organization maintains, the penalty assessed is arbitrary, excessive and unwarranted. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. Carrier witness Mr. Mooney testified that when Claimant's vehicle was still quite a distance away he exited his vehicle and waved his red flag in a downward motion, giving Claimant the proper signal to stop, but Claimant did not do so until he had passed the flag. Claimant disputed this testimony, contending that Mr. Mooney kept his flag at his side, never giving a clear indication, until Claimant had already stopped and gotten out of his vehicle. This conflict between the witnesses presents an issue of credibility – the two versions cannot be reconciled. It is well settled that the resolution of credibility disputes is the province of the Hearing Officer, not this Board, and such resolutions should not be overturned unless they are unreasonable or unsupported by the record. There is no such showing here. Mr. Mooney's testimony is sufficient for the Carrier to meet its burden of proving Claimant's guilt by substantial evidence. We see no reason to disturb the penalty deemed appropriate by the Carrier.

**AWARD**

**Claim denied.**



**DAN NIELSEN**  
Neutral Member



**JOY MENDEZ**  
Carrier Member



**DAVID TANNER**  
Organization Member

Dated this 20<sup>th</sup> day of Feb, 2014.