

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

BNSF RAILWAY COMPANY

Case No. 478 – Award No. 478 – Rager
Carrier File No. 14-14-0308
Organization File No. 90-SF13N1-1484

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing June 3, 2014, when Claimant, Christopher Rager (0155325) was disciplined with a Level S 30-day record suspension with a 3-year review period for his alleged failure to approach grade crossing prepared to stop while operating a machine for gang RP19 in Streetman, Texas on June 3, 2014. The Carrier alleged violation of Maintenance of Way Operating Rule (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 all wage loss including overtime commencing June 3, 2014, 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, Christopher Rager, has been employed by the Carrier since 2013. On June 4, 2014, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, in connection with his alleged failure to approach a grade crossing prepared to stop while operating a machine for gang RP19 in Streetman, Texas on June 3, 2014 at 1125 hours. The Investigation Notice stated that the hearing would determine possible violation of MOWOR 6.50.2 Approaching Road Crossings. Following the investigation, the

Carrier found Claimant guilty of the misconduct and Rules violations alleged, and assessed him a 30-day record suspension with a three-year review period.

Carrier MOWOR 6.50.2 Approaching Road Crossings, provides:

On-track equipment must approach all grade crossings prepared to stop and must yield the right of way to vehicular traffic. If necessary, flag the crossing to protect movement of on-track equipment. The use of horns at grade crossings by all roadway machines and hy-rail equipment is optional at the discretion of the operator. (Emphasis added).

Carrier Structures Supervisor Donald Creamer testified at the investigation that he was part of a team performing operational testing at the time of the incident. He stated that he, Roadmaster Tim Wilson and Roadmaster Chad Heanderson, were sitting back, parked about 150 feet off the road crossing, watching equipment spacing to make sure everyone approached the crossing properly. He stated that he saw several machines, which all slowed down, and the operators looked both ways and then proceeded.

Claimant's machine, Mr. Creamer stated, came up to the crossing without slowing down and proceeded through, unlike the others. He added that he was sitting in his vehicle's backseat and had a clear view of Claimant's machine, and actually saw the machines in front of him slowing down. He stated that he did not know how fast Claimant was traveling, but he was "absolutely" going faster than the other machines. He explained that Claimant maintained his same speed all the way up to and through the crossing. He stated that Claimant could not have stopped given the speed at which he was traveling.

Roadmaster Wilson testified at the investigation that he was also part of the Operations Testing Team for the incident at issue. He stated that they were parked 100 to 150 feet off the crossing, west of the tracks, facing east. He was in the front passenger seat, and had a clear view of the crossing.

Mr. Wilson explained that they observed five to six machines before Claimant's slow down, as if they were attempting to stop at each of the crossings. As Claimant approached the crossing, he testified, it did not appear that he had slowed down or made any attempt to stop as he went through the crossing, and he was traveling considerably faster than the other machines. He stated that it appeared Claimant just maintained his speed and did not slow down at all, although he could not state Claimant's actual speed. He did not believe Claimant would have been able to stop for vehicular traffic.

Mr. Wilson added that Claimant was traveling southbound, and, from his location, he could see one and one-half to two machines north of the crossing, about 80 feet. He stated that there was no vehicular traffic on the roadway at the time, and there were no hazards at the crossing. He acknowledged that there was nothing at the crossing which would have required Claimant to stop.

Roadmaster Heanderson testified at the investigation that he was also part of the testing team for the incident at issue. He explained that he chose the crossing at issue because the visibility was difficult, that it was a blind crossing. He stated that he had a clear view of the road crossing, and observed Claimant approach the crossing. Claimant, he added, never slowed down, and failed to approach the crossing ready to stop. He added that all of the other machines slowed almost to a stopping point, but Claimant rolled through the crossing, maintaining the same speed. There was, he stated, a noticeable difference between Claimant's speed and that of the other vehicles.

Mr. Heanderson stated that the testing team was parked about 100 feet from the road crossing, and his sight distance on each side of the crossing was about 10 feet. He acknowledged that he was not able to see Claimant's vehicle until it was about 10 feet from the crossing, but, he stated, at that point the machine should be traveling at a speed where it could stop. He did not know the speed at which Claimant's vehicle was traveling, but, he stated, he knew for a fact that Claimant would not have been able to stop if he needed to. He added that there was a considerable difference between Claimant's speed and that of the other vehicles. He stated that there was no vehicular traffic and no other hazards at the crossing at the time.

Claimant testified at the investigation that he observed the testing team's vehicle when he was approximately 85 to 100 feet from the crossing. He maintained that at the speed at which he was traveling, he would have been able to stop or yield to vehicular traffic. Claimant stated that he did not know his actual speed, and the crossing was not completely blind.

Claimant maintained that he began to slow down when he observed the crossing, enough so that he could come to a complete stop if necessary. He explained that the crossing was clear and safe so there was no reason to stop.

Claimant's personal record shows no previous discipline.

The Carrier states that this case is not complicated. Three witnesses testified that they saw several machines go across the crossing, and Claimant, unlike the other vehicles, did not slow down as he approached. There is no merit, to the Carrier adds, to the claim that its Operations Testing Reference Guide exonerates Claimant. The Carrier states that where, as in this case, there is conflicting testimony, it is the responsibility of the Hearing Officer, not this Board, to make credibility determinations. The Carrier asserts that there can be no doubt that Claimant violated the Carrier Rule as alleged, and it has met its burden of proving his guilt by substantial evidence.

As for the penalty, the Carrier states that it was appropriate due to the seriousness of the violation, the Carrier's Policy for Employee Performance Accountability (PEPA), and Claimant's personal record. The Carrier urges that the claim be denied.

The Organization asserts that Claimant did not violate MOWOR 6.50.2. The Organization notes that three Carrier witnesses testified that they were performing Operations Testing at the time of the incident, the Carrier's Operations Testing Reference Guide

defines a "failure" as when an on-track equipment operator does not yield for vehicular traffic at a road crossing. It is therefore clear that Claimant did not violate MOWOR 6.50.2.

The Organization notes that all three Carrier witnesses stated that their vehicle was parked and not moving. Carrier witness Mr. Wilson, the Organization notes, acknowledged that there were no hazards when Claimant went through the crossing, there was nothing to make Claimant stop and there was no vehicular traffic at the crossing. The Organization maintains that as the Rule states that the operator must yield to vehicular traffic and there was none, he was allowed to proceed through the crossing. None of the three witnesses, the Organization adds, could state how fast Claimant was traveling and none could truly state he was not traveling at a speed prepared to stop. The Organization asserts that all the witnesses could offer were their opinions.

The Organization adds that the Carrier witnesses did not agree on the sight distance from the crossing to the first point where they viewed Claimant's machine. The Organization points out that Mr. Creamer stated that it was 30 feet, while Mr. Wilson testified that the distance was 80 feet and Mr. Henderson that it was only 10. This is too much of a discrepancy for these witnesses' testimony to be considered credible, the Organization states.

To the contrary, Claimant stated that he saw the Operations Testing Team when he was 85 to 100 feet from the crossing and was indeed traveling at a speed where he could have stopped short of any vehicular traffic. The Organization also notes Claimant's testimony that he was traveling at a speed where he could have stopped short of any vehicular traffic, but there was none, nor were there any other hazards. The Organization maintains that Claimant slowed down as he approached the crossing, and could have stopped in 40 to 50 feet, which was less than half his range of vision.

The Organization asserts that since there was no vehicular traffic at the crossing Claimant cannot be disciplined for failing to yield to it. The Organization maintains that Claimant approached the crossing prepared to stop, verified that there were no hazards and proceeded. The Organization concludes that the Carrier has failed to meet its burden of proving him guilty, by substantial evidence, of any Rules violations.

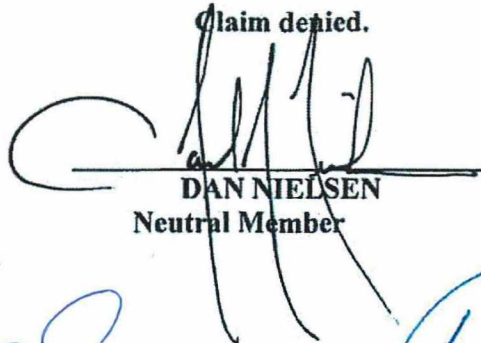
Moreover, the Organization states, even if the Carrier had proven its charges, the Level S 30-day record suspension is an excessive measure of discipline and should be overturned. The Organization urges that the claim be sustained.

We have carefully reviewed the record in its entirety. As the Carrier states, three witnesses testified consistently that they had clear views of Claimant as he approached the crossing and he did not slow down and would have been unable to stop for vehicular traffic. While Claimant testified to the contrary, it is well settled that credibility resolutions are the province of the Hearing Officer, not this Board. Moreover, to the extent that this is a question of opinions, rather than credibility, we note that the three supervisors were of the opinion that he was traveling too fast, an opinion apparently shared by all of the other operators, since every one of them found it prudent to slow down as they approached the crossing. The Organization's contention that because there was no vehicular traffic Claimant committed no violation ignores

both the purpose of the Rule, which is that employees must be prepared for all events at a crossing, including unexpected traffic, and the language of the rule, which requires an Operator to be prepared to stop. The Carrier has met its burden of proving Claimant's guilt by substantial evidence. We see no reason to disturb the penalty determined appropriate by the Carrier.

AWARD

Claim denied.



A handwritten signature in black ink, appearing to read 'Dan Nielsen', is written over a horizontal line.

DAN NIELSEN
Neutral Member



A handwritten signature in blue ink, appearing to read 'Joy Menendez', is written over a horizontal line.

JOY MENDEZ
Carrier Member



A handwritten signature in blue ink, appearing to read 'David Scoville', is written over a horizontal line.

DAVID SCOVILLE
Organization Member

Dated this 12th day of Oct, 2016.