

BEFORE PUBLIC LAW BOARD NO. 7590

CASE NO. 54

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION

V

BNSF RAILWAY

(Former ATSF Railway)

BNSF FILE NO. 14-16-0296
BMWED FILE NO. 2433-SL13S1-1637
Claimant: J. Rasch

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

The claimant shall be made whole for all financial losses as a result of the violation, including compensation for: 1.) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service); 2.) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the claimant was out of service; 3.) overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time claimant was removed from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the claimant not been removed from service; 4.) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service commencing June 22, 2016, continuing forward and/or otherwise made whole. All notations of the dismissal should be removed from all Carrier records.

Findings:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier or employee within the meaning of the Railway Labor Act as approved June 21, 1934.

Public Law Board 7566 has jurisdiction over the parties and the dispute involved herein. Parties to said dispute were given due notice of hearing thereon.

Claimant was involved in a collision between the Hyrail vehicle he was operating on the track and a vehicle that was crossing at a crossing. Claimant received a letter dated May 19, 2016, that provided:

An investigation has been scheduled at 1000 hours, Friday, May 27, 2016, at the BNSF Conference, Room 305, Bldg 12, 1625 N. Lexington Avenue, Springfield, MO, 65802, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to operate on-track equipment at a speed that allowed stopping within half the range of vision short of a road crossing and your alleged failure to yield the right of way to vehicular traffic prior to colliding with a vehicle at or near MP 128.8, Ft. Scott Subdivision, on May 16, 2016.

This investigation will determine possible violation of MWOR 6.50 Movement of On-Track Equipment and MWOR 6.50.2 Approaching Road Crossings.

Contact Michael Watkins at 918-445-2538 or Michael.Watkins@BNSF.com with any questions regarding this investigation, postponement or waiver.

Arrange for representation and any witnesses you may desire at the investigation as provided under applicable provisions of the labor agreement.

Following an investigation, Claimant was notified in a letter dated June 22, 2016:

As a result of investigation held on Friday, May 27, 2016 at 1300 hours at BNSF Allen Conference Room, 1625 North Lexington Avenue, Springfield, MO, 65802 you are hereby dismissed effective immediately from employment with the BNSF Railway Company for failure to operate on-track equipment at a speed that allowed stopping within half the range of vision short of a road crossing and your failure to yield the right of way to vehicular traffic prior to colliding with a vehicle at or near MP 128.8, Ft. Scott Subdivision, on May 16, 2016.

It has been determined through testimony and exhibits brought forth during the investigation that you were in violation of MWOR 6.50 Movement of On-Track Equipment and MWOR 6.50.2 Approaching Road Crossings.

In assessing discipline, consideration was given to your discipline record and the discipline assessed is in accordance with the BNSF Policy for Employee Performance and Accountability (PEPA).

Enclosed are copies of the investigation transcript and exhibits entered during the investigation. Copies of these documents have been sent to your Representative.

This letter will be placed in your personnel record.

The Carrier argues that Claimant saw the on-coming vehicle but did not immediately prepare to stop to yield the right-of-way. Claimant said he did not try to stop the Hyrail until after he realized the driver of the other vehicle did not intend to stop. MWOR 6.50 and MWOR 6.50.2 clearly state that the driver or operator of on-track equipment must approach the crossing prepared to stop within half the range of vision of the crossing in order to yield to vehicular traffic.

The Organization counters with procedural violation arguments. Further, the Organization argues that Claimant thought the other driver was going to stop, that there was no evidence of a job briefing, and Claimant bid the position because he would otherwise be forced to take a position in Oklahoma City.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against Claimant. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

MOWOR Rule 6.5 and 6.50.2 provide:

6.50 Movement of On-Track Equipment

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

- Train
- Engine
- Railroad car
- Men and equipment fouling the track
- Stop signal
- or
- Derail, movable point frog or switch lined improperly.

6.50.1 Maximum Authorized Speed

On-track equipment must not exceed the manufacturer's recommended speed or any of the following speeds, whichever is less:

| Type of Equipment | Speed |
|---|--------|
| Hy-rail vehicles over 15,000 GVW..... | 25 MPH |
| Bridge Inspection/Hy-rail vehicles 15,000 GVW or under..... | 45 MPH |
| Locomotive Cranes (with or without cars)..... | 30 MPH |
| Trackmobile without Cars..... | 20 MPH |
| Trackmobile with Cars..... | 10 MPH |
| Other on-track equipment..... | 30 MPH |
| On-track equipment towed by other on-track equipment..... | 20 MPH |

Exception: Speed of on-track equipment designed for high speed travel will be governed by the System Special Instructions.

Working Limits

- Do not exceed 20 MPH within established working limits on other than main track.
- Do not exceed 20 MPH within established working limits on a main track, controlled siding or other track where CTC is in effect unless otherwise instructed by the EIC.

When determining the proper speed, take into consideration the following:

- Track conditions, such as grade, curvature and rail condition
- Load
- Sight distance
- Visibility
- Other conditions that might adversely affect the safe operation of on-track equipment.

6.50.2 Approaching Road Crossings at Grade

On-track equipment with manually activated track shunts may use the track shunts only to assist with movements over road crossings at grade.


On-track equipment (including those with activated track shunts) must approach road crossings at grade prepared to stop and must yield the right of way to vehicular traffic. If necessary, warn vehicular traffic to protect on-track equipment movement. The use of horns at crossings by roadway machines and hy-rail equipment is optional at the discretion of the operator.

The Board has reviewed the evidence. There are no procedural violations which void the discipline. On the merits we find that there is substantial evidence in the record to support the discipline. The evidence shows that Claimant was operating the Hyrail in violation of the cited Rules. He was not able to stop in the Rule-required distance and collided with a vehicle in the crossing. The Rules are clear in their requirements and Claimant violated them.

A review of Claimant's disciplinary history indicates that the instant matter was Claimant's fourth Level S violation within a 36 month period. The Carrier's decision to dismiss Claimant was not an abuse of Carrier discretion.

Award:

Claim denied.



Organization Member



Brian Clauss
Neutral Member



Carrier Member