

BEFORE PUBLIC LAW BOARD NO. 7602

CASE NO. 68

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BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION

and

BNSF RAILWAY

BNSF 10-17-0077  
BMWE C-17-Do40-6  
Claimant: A. Miller

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STATEMENT OF CLAIM

The Organization requests that the discipline of Mr. Miller be overturned, no reference to this discipline be placed in Mr. Miller's personnel record and he be made whole.

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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 7602 has jurisdiction over the parties and the dispute involved herein.

In the instant matter, Claimant received a letter dated October 26, 2016, advising him of an investigation:

An investigation has been scheduled at 1000 hours, Tuesday, November 1, 2016, at the Holiday Inn, 4000 Market Street, Hannibal, MO 63401, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to reduce speed before incident and failure to stop within half the distance of sight vision.

This is to advise ANDREW MILLER is being withheld from service pending results of investigation.

Claimant received a Corrected Notice dated October 26 2016:

An investigation has been scheduled at 1000 hours on Tuesday, November 1, 2016 at the Holiday Inn at 4000 Market Street, Hannibal, Mo, 63401 for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your failure to reduce speed to avoid an incident and failure to stop within half the distance of sight vision. In addition striking a civilian tractor at MP 220. 1x on the Brookfield subdivision.

This is to advise ANDREW MILLER is being withheld from service pending results of investigation.

Another Corrected Notice was issued on November 1, 2016:

An investigation has been scheduled at 1000 hours, Tuesday, November 1, 2016, at the General Conference Room, 600 Depot Road Taylor, MO, 63471, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to reduce speed before incident and failure to stop within half the distance of sight vision. In addition striking an occupied civilian tractor at MP 220.1x on the Brookfield subdivision.

This is to advise ANDREW MILLER is being withheld from service pending results of investigation.

Another Corrected notice dated November 1, 2016 was issued:

An investigation has been scheduled at 1000 hours. Tuesday, November 1, 2016, at the General Conference Room, 600 Depot Road Taylor, MO, 63471, for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged failure to reduce speed before incident and failure to stop within half the distance of sight vision. In addition striking an occupied civilian tractor at MP 220.1x on the Brookfield subdivision on October 25, 2016 @ approx. 1445.

This is to advise ANDREW MILLER is being withheld from service pending results of investigation.

Following investigation, Claimant was sent a letter which provided:

As a result of investigation held on Tuesday, November 1, 2016 at 1000 hours at General Conference Room, 600 Depot Road, Taylor, MO, 63471 you are hereby assessed a Level S Actual Suspension for your failure to reduce speed before incident and failure to stop within half the distance of sight vision. In addition striking an occupied civilian tractor at MP 220.1x on the Brookfield subdivision on October 25, 2016 @ approx. 1445.

This actual suspension will be served as 30 days Actual Suspension as follows: November 1, 2016 through November 30, 2016.

In addition, you are being assessed a Three (3) Year Review Period that commences on October 25, 2016. Any rules violation during this review period could result in further disciplinary action.

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

In assessing discipline, consideration was given to your discipline record . . .

The Carrier maintains that Claimant violated the rule by operating through a private crossing unable to stop after seeing a tractor approaching in a nearby field. Although the tractor was in Claimant's blind spot he did not act appropriately in order to avoid a collision. On the Organization's procedural claims, the Carrier asserts that the hearing was fairly held and the corrected notices added minor facts. The Carrier also maintains that the discipline was appropriate to the violation.

The Organization responds with procedural error allegations based upon the timing of the notice of the Corrected Notice of Investigation. It was a fatal error to submit two corrected notices at the beginning of the investigation. On the merits the Organization contends that Claimant was alert and attentive. He was operating at 5 mph when he noticed the tractor in the field. The tractor driver was at fault when he pulled onto the tracks in front of the oncoming equipment. The Sheriff's Department found that the tractor driver was at fault and violated Illinois law regarding crossing railroad tracks.

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 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.

The pertinent part of MWOR 6.5.02 provides:

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 machine and hyrail equipment is optional at the discretion of the operator.

The following testimony from Claimant discusses the incident:

MICHAEL MESSNER: Okay. So what can you tell me about the incident on October 25th?

ANDREW MILLER: Uh, I was, I was, was in a position, I wasn't doing what I normally do. I was moving flags for the Foreman. I was traveling eastbound down the Brookfield Sub roughly between Mile Post 220.1x and 220, uh, 1x and I seen a tractor out in the field as I was approaching the crossing, so I started to slow and then, uh, the tractor came out of my blind spot and he went straight through the crossbucks and without stopping and I hit the front end of him, of the, uh, hit the front end of the tractor with the 60- front of the 6700 at roughly five miles per hour.

MICHAEL MESSNER: Okay. So you said you, he came out of your blind spot. When did he go into your blind spot \_\_\_\_ (20:11 inaudible)?

ANDREW MILLER: I, he was in my blind, the only time I seen him, he was out in the field and then there was a high bank and the road is on top of the bank actually, so he came out of that field and he would have been right in my front right side where I can't see and he must have followed down and then when I finally seen him, it was almost too late.

MICHAEL MESSNER: Okay. So you said you start, you saw him and then you started to slow down, is that correct?

ANDREW MILLER: Right.

MICHAEL MESSNER: So when you said you started, did you mean when you saw the crossing or when you saw him?

ANDREW MILLER: When I was approaching the crossing, I seen him out, he was out in the field. So I seen him, I seen the crossing, I just started slowing the machine down.

MICHAEL MESSNER: Okay. Were there any issues with how the machine was going down?

ANDREW MILLER: No.

This Board has reviewed the evidence. There are no procedural defects which void the discipline. The corrected notices added additional specificity but did not change the allegations under investigation. On the merits this Board finds that there is substantial evidence in the record of the rule violation. The evidence shows that Claimant was operating the tamper at a low speed as he approached the private crossing. He noticed a tractor moving in an adjacent field in the direction of the private crossing and then it entered Claimant's blind spot. Although he saw the tractor moving towards the crossing, he did not slow enough to be able to avoid a collision when the tractor entered the crossing. Claimant struck the tractor.

Although the Organization argues that Claimant should be exonerated because the tractor operator was at fault, that argument misses the point. The tractor operator violated the Illinois Vehicle Code. The tractor operator was not a Carrier employee. The Carrier rules exist irrespective of the local vehicle code. Although the farmer was at fault and citation may have been issued, those were issues for Illinois courts and not Carrier investigations. The fault of the tractor operator may affect which party is responsible for reimbursement, but does not affect the Carrier's rules.

This Board has reviewed the discipline and finds that the carrier has not abused its discretion with the imposed discipline.

Claim denied.

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Carrier Member

A blue ink signature, appearing to read "Zachary...", is written over a horizontal line.

Organization Member

A blue ink signature, appearing to read "B. Chen", is written over a horizontal line.

Neutral Member

Dated: 02-04-2019