

**BNSF Trial Argument:**

**Sometimes you have to violate the rules to be safe**

**It is a violation of the rules not to violate the rules in that situation**

<sup>169</sup> Respondent did not contend that the rule did not exist or that it was not in effect at the time of the collision. Respondent conceded the fact of the rule and its applicability at the crossing. In fact, Respondent was emphatic about it. “(F)or anybody to be watching this trial and try to contend that it is theory of our defense of the case, that rule 12.1.2 does not apply, is really not paying attention to the evidence and our argument, because that is absolutely false.” Tr. 1286:18-22. Respondent elicited testimony that it was permissible to violate the rule at this crossing. Tr. 910:18-911:3, 911:22-25. Respondent elicited testimony that on its railroad, sometimes an employee has to violate its safety rules to make themselves safe. Tr. 452:9-14 (“Q. Are there situations where the rules don’t quite jive? If you

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were to put them together for a particular situation where you would say, well you’ve got to do this but you are going to break that, you know, it doesn’t quite work black and white according to the rules? Does that ever happen? A. Yes, it does”). This was not a method of railroad operation the Federal Railroad Administration Railroad Safety Oversight Manager, Mr. Lydick, had ever heard of. Tr. 493:1-10 (“I’ve never heard that before”). Nor had Appellant. Appellant testified that he would have been fired if he were caught violating this rule at the crossing. Tr. 642:11-643:15. If Respondent did, in fact, expect its employees to violate the rule at the crossing, this should have been the subject of job safety briefings that Respondent did not provide Appellant or the crew. App 108-109, Tr. 491:16-492:17 (Maintenance of Way Safety Rule S-1.1), 539:3-9 (complete set of Maintenance of Way Safety Rules admitted into evidence); App 110, Tr. 422:13-423:24 (Maintenance of Way Operating Rule 1.1, discussed in context of Maintenance of Way Operating Rule 1.1.2); App 111-112, Tr. 956:15-957:23. (Maintenance of Way Operating Rule 11.4).

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16	Q.	Okay. Don't check your common sense when you get
17		behind the wheel, I mean, is that burned over, and over, and
18		over into what's ingrained in these rules?
19	A.	Yes, that's correct.
20	Q.	Was Mr. Inglis paging through a rule book as he was
21		going across that crossing, is that what we're talking about
22		here?
23	A.	I hope not.
24	Q.	I mean, are we talking semantics here between death
25		and serious permanent injury, or take the safe course? Is that

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1		what we're talking about here.
2	A.	That's right, that's right.