

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Burlington Northern Railroad Company
(Former St. Louis-San Francisco Railway Company)

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

(1) The dismissal of Track Foreman M. L. West for alleged violation of Rule 63 of the Rules of the Maintenance of Way was unjust, unreasonable and on the basis of unproven charges (System File: B-2149/EMWC 87-7-22B SLF).

(2) The Claimant's record shall be cleared of the charge leveled against him, he shall be compensated for all wage loss suffered and his seniority and all other rights shall be unimpaired as a result of the dismissal referenced in Part (1) hereof."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant was employed as a Track Foreman regularly assigned to District Gang #603. On May 5, 1987, Claimant was a passenger in a Hyrail Truck #8613, with an Assistant Foreman as driver. As they approached a dirt road crossing, the employees became aware of a car on the road approaching the track. A collision occurred between the two vehicles. The Claimant and the Assistant Foreman were removed from service for violation of Rule 63, which reads as follows:

"Road Crossing: In approaching and passing over road crossings, on-track equipment must be handled in the following manner:

- (1) Approach crossing under complete control.
- (2) Stop if necessary.
- (3) Flag crossing if necessary.
- (4) Movements over public crossings must be made in such a manner that there is absolutely no chance for an accident."

The Claimant requested and obtained an Investigative Hearing. Following the Hearing, the Claimant was restored to duty on May 26, 1987. The Organization advanced a Claim for time lost by the Claimant from May 6, 1987.

The Assistant Foreman testified as follows concerning the accident:

"We are easing to the crossing, and all of a sudden out of the corner of my eye I seen this woman come up flying, and I heard Mike [the Claimant] holler at the same time that a car was coming and we weren't traveling over 5 mph, woman come flying up over the track and I automatically stopped and I was stopped at the time she pulled over the track and she turns to the right when she went over the track and caught the bumper..."

The Claimant gave his version as follows:

"We were patrolling between Oklahoma City and Sapulpa, we were just coming through the Davenport bottom at 484 and we were coming around the curve and I was looking to the right we were approaching a road crossing, and I was looking to the right and I hollered to the driver and told him it was clear on my side and when I turned around and looked, we were just barely moving, and I hollered to the driver and told him to stop there was a car coming and he stopped and the car swerved into us and actually hit us, as we had stopped. And that's all there is to it. In fact she was, when I first made contact with her driving she was in the middle

of the road she was looking to the left of steering wheel up over the track she had no idea we were anywhere around she got up to the tracks she swerved over to the right to get on her side of the crossing and that is when the incident occurred. We actually were stopped, if you will look at the pictures it is clearly noticeable because the whole right side of the driver's door it is scrapped all the way down until you get to the back tire."

There was no contradictory testimony or evidence to these accounts. The Assistant Foreman accepted a 15-day suspension and was thereupon restored to service.

The Board finds that the Claimant was not at fault in reference to the accident. The vehicle was under "complete control" of the driver. At the last moment, the Claimant warned the driver as to an approaching car from the driver's side of the Hyrail. The vehicle was brought to a stop a few feet after entering the crossing. There is no support to find that flagging would have been required in these circumstances.

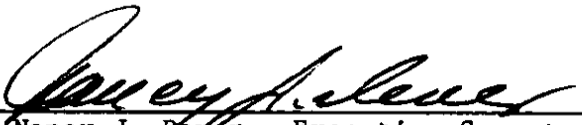
The Carrier points out that the Claimant, as Foreman, was in charge of the Hyrail's operation. However, there is no basis to determine that the Claimant failed in his responsibility. The Carrier reduced the Assistant Foreman's discipline to a 15-day suspension. In view of this, and the circumstances involved, the Board finds no convincing basis for suspension of the Claimant.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Deyer - Executive Secretary

Dated at Chicago, Illinois, this 7th day of August 1990.