

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33141
Docket No. MW-33324
99-3-96-3-828**

The Third Division consisted of the regular members and in addition Referee Hyman Cohen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc. (former Louisville and
(Nashville Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [ten (10) day suspension] imposed upon Mr. R. H. Myers for alleged violation of CSXT Operating Rule 723 on October 25, 1995 was unwarranted, without just and sufficient cause and on the basis of unproven charges [System File 7(24) (95)/ 12 (95-1298) LNR].
- (2) The Claimant shall receive the benefit of the remedy prescribed by the parties in Rule 27(f).”

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

This dispute involves the ten day suspension of the Claimant that was assessed him as a result of an Investigation that was held on November 16, 1995. The discipline stemmed from the collision of a brushcutter that collided with a pick up truck at the Veneer Road grade crossing near Winchester, Kentucky.

On October 25, 1995, Mechanic R. E. Sturgill was needed to repair a brushcutter that was disabled. Claimant R. H. Myers and B. S. Burns, both of whom are Equipment Operators, were assigned to operate a brushcutter to pick up Sturgill and bring him to the disabled machine.

While traveling to pick up Sturgill, Burns and the Claimant approached a standing train waiting to travel south on No. 1 track. Burns, who was operating the brushcutter on No. 2 track, radioed the train crew and informed them that he was traveling past them to pick up Sturgill, after which they would return.

While traveling north on No. 2 track, the train on No. 1 track was traveling southbound. The brushcutter that Burns was operating was nearing Veneer Road and slowed down as he approached the crossing, while the Claimant sounded the horn.

Burns observed that the train blocked vehicular traffic to the crossing on his left. He also observed that a tractor trailer was waiting to proceed over the crossing on his right.

As Burns reached the crossing and before he cleared the crossing, a pick up truck traveling west came around the last car of the train in the eastbound lane directly into the path of the moving brushcutter. The brushcutter struck the pick up truck causing damage to the right rear portion of the truck and to its bumper. No apparent damage was done to the brushcutter and no one was injured in the accident.

Following the Investigation, the Carrier determined that the Claimant "had responsibility in connection with failure to perform [his] duties safely and properly, "because the brushcutter collided with the pick up truck on October 25, 1995 "in violation of . . . Operating Rule 723." As a result, the Claimant was suspended ten days.

Rule 723 provides as follows:

"On-track equipment must approach road crossings at grade prepared to stop short of the crossing. The equipment must not proceed over the

crossing until the way is known to be clear. If necessary, highway traffic must be stopped by a flagman.”

In order to establish that the Claimant violated Rule 723, the Carrier must prove that the Claimant failed to act safely and properly under the circumstances. Based upon the record, the Carrier failed to satisfy its burden of proof.

Whether the Claimant was operating the brushcutter is an issue that must be resolved at the outset of this discussion. The record discloses that Burns, alone, was operating the brushcutter during the events surrounding the collision. The Claimant stated that he did not have “hold of the controls.” Indeed, in his written statement on October 25 when the accident occurred, Burns acknowledged that he “applied the air brakes, but was unable to stop” the brushcutter from colliding with the truck. Accordingly, the Claimant was merely a “passenger” of the machine, rather than a “co-operator” when the collision occurred.

It is undisputed that when the brushcutter approached the crossing at approximately eight to ten miles an hour, the line of sight of Burns, Sturgill and the Claimant was obstructed on the left by the train and a tractor trailer had the track blocked to the right. None of the occupants of the brushcutter provided flag protection.

The act by the driver of the pickup truck cannot be ignored in determining the cause of the accident. The Claimant testified that the driver of the truck “went into the other lane to come around the end of the car, he didn’t wait until it cleared his lane. . . .” Immediately after the accident, the driver of the pick up truck said to the Claimant and Burns that “when I gunned it, if I hadn’t . . . hesitated, I would have beat you.”

Consistent with the testimony of the Claimant and Burns is Sturgill’s description of the conduct of the driver:

“. . . when the truck came out behind that last car, it was going south, he came out with such a rate of speed that really, I didn’t see the truck except just like a blur coming in front of me, and there was . . . he came so fast that there was no time for anybody to really respond to hardly to anything, it was just like a bullet.”

Thus, the evidence in the record establishes that there was no need to provide flag protection at the crossing, because the Claimant believed the crossing to be clear. As previously stated, the Claimant exercised due care when he sounded the horn as the brushcutter approached the crossing.

None of the occupants of the brushcutter could foresee that the driver of the pickup truck was in a race to beat the brushcutter over the crossing, by pulling out behind the last car of the train. It would be unreasonable for the Claimant to foresee such a reckless act. Accordingly, the Board finds nothing in the record that discloses an act or failure to act by the Claimant that was in violation of Rule 723.

The Carrier's burden is to prove that the Claimant's conduct was wrongful or negligent by failing to exercise a duty of due care in light of the circumstances surrounding the collision. The accident, in and of itself, is hardly adequate to establish fault by the Claimant. Clearly, the Carrier failed to satisfy its burden of proving by substantial evidence that the Claimant violated Rule 723.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of March 1999.