

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 4055

*
BURLINGTON NORTHERN RAILROAD COMPANY *
* (Former Frisco) *
* -and- * CASE NO. 5
*
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES *
*
***** AWARD NO. 5

On January 21, 1986, the Brotherhood of Maintenance of Way Employees (hereinafter the "Organization") and the Burlington Northern Railroad Company (hereinafter the "Carrier") entered into an Agreement establishing a special board of adjustment in accordance with the provisions of Section 3, Second of the Railway Labor Act, Public Law 89-456. The Agreement was docketed by the National Mediation Board as Public Law Board No. 4055 (hereinafter the "Board").

This Agreement contains certain relatively unique provisions regarding the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction is limited to disciplinary disputes involving Carrier employees represented by the Organization. Although the Board consists of three members, a Carrier Member, an Employee Member and a Neutral Member, awards of the Board only contain the signature of the Neutral Member, and the parties have agreed that such awards will be final and binding in accordance with the provisions of Section 3 of the Railway Labor Act.

In accepting the assignment, the below-signed Neutral Member agreed to render awards in disputes submitted within thirty (30) days of the date required documentation was received from the parties.

In initiating a case before the Board, the parties have agreed that they will provide the Neutral Member, by mail, with the following documentation: the notice of investigation; the transcript of investigation; the letter assessing discipline; and, the correspondence exchanged on the property. The Board has the authority to require or permit the production of such additional written evidence as the Neutral Member may decide is appropriate for review. The above documentation shall constitute the record of proceedings before the Board. The parties have agreed that it is not necessary to have oral hearings in the cases presented to this Board.

The Board's review is limited to the documentation provided and any additional argument, evidence or awards which the Board might require after review of the initial submission of the dispute. In deciding whether the discipline assessed should be upheld, modified or set aside, the Neutral Member shall determine (1) whether there was compliance with the applicable provisions of Schedule Rule 91; (2) whether substantial evidence was adduced at the investigation to prove the charges made; and (3) if discipline is found to be appropriate, whether the discipline assessed was excessive.

Background Facts

Mr. G.C. Bridgeman, hereinafter the "Claimant", entered the Carrier's service on August 29, 1979 as a Trackman. He was subsequently promoted to the position of Machine Operator, and he was occupying that position when he was dismissed from the Carrier's service effective April 15, 1985. The Claimant was dismissed as the result of an investigation which was held on May 9, 1985 in Birmingham, Alabama. The investigation, originally scheduled for April 25, 1985, was postponed due to the conflicting schedules of the Organization and the Carrier representatives. The Claimant appeared at the investigation and he was represented by the Organization. The Carrier dismissed the Claimant based upon its findings that he had been responsible for an accident which had occurred while he was operating track machine Double Broom BNX 05-0051, which machine collided with a highway vehicle at a public grade crossing on Highway 184 located at Mile Post 896.5 near Cantonment, Florida, at approximately 6:45 a.m. on April 15, 1985. By letter dated August 19, 1985 the Carrier's Division Superintendent reinstated the Claimant to service with all rights intact effective May 14, 1985. On its face, this letter converted the Claimant's dismissal from service to an approximate thirty (30) day suspension without pay.

Findings and Opinion

On April 15, 1985 the Claimant was working as a member of surfacing gang S5-25, and he was assigned to operate a Double Broom. It was necessary for the Claimant to drive his vehicle over a portion of track which was intersected by a road crossing at MP 896.5. This crossing was not protected by a gate, but did have warning signals which are activated when trains approach the crossing. The Double Broom, a track vehicle which weighs approximately 28,000 pounds, does not activate the warning signals because of a shunting device employed in its operation. The Double Broom is equipped with air operated brakes and can travel at a top speed of 28 mph. The vehicle is approximately 20 to 25 feet long, 10 to 11 feet wide and is equipped with an air horn. The Double Broom is designed to groom the track by sweeping excess ballast off the ties and away from the rail. It is called a Double Broom because it has a broom mounted on either end of the chassis. The operator sits in the middle of the machine.

At approximately 6:45 a.m. on the morning in question the Claimant approached the grade crossing traveling east to west. A truck proceeding north to south struck the front end of the Double Broom and damaged the broom mechanism on the rear end of the Claimant's vehicle, as the Double Broom was traveling backwards at the time.

The accident was investigated by the Florida Highway Patrol, and an accident report, prepared by the Highway Patrol, was attached as an exhibit to the investigation transcript.

The Carrier has a published rule regarding approaching and passing over public crossings not protected by a watchman or by gates. Track cars and track equipment are to be handled in the following manner: (a) Approach crossing under complete control; (b) Stop if necessary; (c) Flag crossing if necessary; and (d) Movements over public crossings must be made in such a manner that there is absolutely no chance for an accident. When passing over public crossings protected by a watchman or gates in charge of a watchman the equipment must not proceed until gates are down or until given a proceed signal by the watchman. Public or private road crossings should not be used to set off track cars or track equipment when there is a set off available near by. If necessary to set off at a crossing, such equipment must be left clear of the highway and rail traffic and must not obstruct the view of highway crossing signals.

Evidence of record indicates that there was an unobstructed line of vision of approximately 200 to 300 feet from the crossing in

the direction from which the truck with an attached semi-trailer approached. There was some fog/mist in the early morning hours, however, there is no showing that this condition substantially interfered with the Claimant's line of vision. Evidence at the site of the accident revealed skid marks, apparently left by the truck that struck the Double Broom, of approximately 54 feet.

There seems to be no dispute that the Claimant operated in the manner disclosed by the following questions and answers:

- "Q. Are you familiar with the operation and the travel capabilities of Double Broom BNX 05-0051?
- A. Yes sir.
- Q. How about on April 15th, were you familiar with them then?
- A. Yes sir.
- Q. On April 15th, did you stop the machine BNX 05-0051 before proceeding across the crossing MP 896.5?
- A. Yes sir.
- Q. Please describe in your own words just exactly what did happen. The events leading up to the collision and the collision itself, could you narrate that for us?
- A. I pulled up to the crossing, stopped, sounded the horn, the crossing was clear and proceeded to pass and the truck came around the curve.
- Q. Came around the curve and then what?
- A. And then he hit me. I was about half way into the crossing.
- Q. That means the crossing, I believe we attest that it was somewhere around 32 ft. Somewhere around 15 or 16 ft. into the crossing, this lowboy strikes the machine, is that correct?
- A. Yes sir.
- Q. When did you first see this lowboy coming toward you?
- A. When I was half way in the crossing.
- Q. I believe you said that's when you were struck?

- A. Yes sir, he came around the curve see as I started off.
- Q. You didn't see the truck before it struck you?
- A. Yes sir.
- Q. How long an interval before it struck you did you see it?
- A. He just came around the curve when I started to go across the crossing and he was at a high rate of speed.
- Q. Why didn't you stop at that point?
- A. I did. It was too late."

The thrust of the Carrier's case seems to be that the Claimant was deserving of discipline because he was involved in an accident at a grade crossing, irrespective of the amount of negligence for which he was responsible. The Carrier has not alleged that the Claimant was somehow responsible for the accident because he failed to obtain a flagman to protect his movement. In fact, part of the Organization's defense is that the Carrier's failure to fill a vacancy on the day in question was the cause of the accident; because had the vacancy been filled the Claimant would have had adequate flagging protection.

A review of the totality of the record establishes that movements similar to the one made by the Claimant on the day in question have been made, with some regularity and successfully, without the protection of a flagman; and in fact, the Claimant had made numerous such moves prior to the accident which occurred on the morning of April 15, 1985. We do not find that the Carrier was contributorily negligent because it did not provide flagging protection for the Claimant. On the other hand, there is minimal evidence in the record to establish negligence on the part of the Claimant. There is no showing that the Claimant did not follow operating procedures. He stopped, he sounded his warning horn, and he proceeded through the crossing. He was hit; he did not hit the highway vehicle. The Board's view of the evidence indicates that it was the highway vehicle that was responsible for the accident. The highway patrol report places no blame on the Claimant; the Claimant apparently followed standard operating procedures; and there appears to be reasonable cause to conclude, based upon the skid marks at the scene of the accident, that the highway vehicle was traveling at an unsafe speed and made an unwise attempt to swing behind the Double Broom. This Board is unaware of any principle of absolute liability which is placed upon machine operators in the Maintenance of Way

Department. Obviously, when moving equipment over grade crossings, special care is required. There is no showing that the Claimant did not exercise special care, and merely because he was involved in an accident does not establish his guilt which would subject him to discipline. The guidelines of this Board require the Carrier to establish guilt by the presentation of substantial evidence. In the instant case, the Carrier has failed to meet that burden. Accordingly, the claim will be sustained.

Award The claim is sustained. The Carrier is directed to make the Claimant whole, to the extent that he was not made whole as a result of the letter of reinstatement dated August 19, 1985. The Carrier shall pay the Claimant for lost time within fifteen (15) days of the receipt of this Award and shall also expunge from his Personal Record any reference to this incident.

This Award was signed the 8th day of May 1986 in Bryn Mawr, Pennsylvania.

Richard R. Kasher
Richard R. Kasher, Neutral Member
Public Law Board No. 4055

