

PUBLIC LAW BOARD NUMBER 3530

Award Number: 34
Case Number: 34

PARTIES TO DISPUTE

NORFOLK AND WESTERN RAILWAY COMPANY

AND

BROTHERWOOD OF MAINTENANCE OF WAY EMPLOYEES

STATEMENT OF CLAIM

Claim of H.W. Smith for pay for 90 days with seniority and vacation rights unimpaired.

FINDINGS

This dispute involves the conduct of the Claimant, a Machine Operator, on November 29, 1982. A hearing was conducted on January 18, 1983, which discussed the Claimant's "responsibility in connection with Tamper 14278 operated by you, striking a school bus at the road crossing just east of Mile Post N-59, State Route 614. It should be noted, it was also conducted to determine if Mr Jones, Section Foreman, was negligent in allowing the Claimant, who was not rule-qualified to operate the tamper.

The hearing revealed the following information, which was not contested

by either the Carrier or the Organization.

The Claimant was operating Tamper 14278, travelling in reverse, to the east, on a westbound track. Mr. Stringfield was pilot on the tamper. The tamper collided with a school bus at a crossing, tipping the bus on its side and apparently some of the children who were passengers. The tamper was derailed. Mr. Stringfield, who fell from the tamper just prior to the collision, sprained both ankles.

However, the parties did disagree about many of the other facts involved in this incident. The Claimant testified that he was going 20 miles per hour when he approached the crossing. He testified that he had slowed to a speed between 5 and 7 miles per hour by the time he was approximately 60 feet from the crossing. He testified that he had seen the bus at a stop sign before both vehicles had reached the crossing. He was under the impression that the bus would not go across before the tamper, so he released his brakes and moved forward. He did not look at the bus again until it was about to enter the crossing and was less than 12 feet away. He testified that the tamper and the bus arrived at the crossing at the same time.

Mr. Stringfield, a Section Laborer, was serving as pilot on the Tamper. He estimated that the tamper was going 25 to 30 miles per hour as it approached

the crossing. He stated tht he noticed that the bus was not going to stop, so he turned to try to alert the Claimant. Mr. Stringfield said he fell from the tamper about 25 to 30 feet from the crossing. He stated that the tamper was still travelling at 25 to 30 miles per hour when he fell.

Mr. Tribble, Roadmaster, testified that he arrived at the scene shortly after the accident. He stated that there were skid marks for approximately 60 feet just before the crossing. He also noted that the tamper had struck the middle of the bus and that it took workers several attempts to separate the vehicles with a crane. He also noted that it was the momemtum of the bus going through the crossing that derailed the tamper during the collision.

Rule 695 from the Operating Book of Rules for the Norfolk and Western Railway provides that, "when approaching highway crossings at grade, speed must be such that a stop can be made before entering the crossing if the occassion demands. Speed over the crossing must not exceed five miles per hour".

The Claimant testified that he was not aware of this rule at the time of the accident. He stated that he had not been enrolled in the course or been examined on the Operating Book of Rules. The Claimant said that at the time of the incident, he believed that the rules required him to approach at a safe speed, (which he estimated to be 20 miles per hour or less) and be prepared to

stop.

On February 2, 1983, the Claimant was notified that he had been assessed a 90-day suspension. On March 16, 1983, the Organization filed a claim on his behalf. After a series of appeals, Mr. Steele, Assistant Vice President - Labor Relations, denied the claim on October 7, 1983.

The issue in this dispute is whether the Claimant's 90-day suspension was for just cause.

The position of the Organization is that the Carrier failed to show that the Claimant had done anything wrong. The Organization points out that the evidence was conflicting, and did not demonstrate any acts by the Claimant that were wrong. The Organization also argues that the Carrier was at fault for allowing the Claimant to operate the tamper without being rule-qualified.

The position of the Carrier is that the Claimant received a fair hearing, during which it was shown that he had caused the collision. The Carrier argued that the suspension was justified.

It is the opinion of this Board that the Claimant was not at fault for not being qualified under the Operating Book of Rules. The Carrier presented no

evidence that employees have a responsibility to come forward at a certain time and be examined on the rules.

It seems clear that a reasonable person should know that a crossing (where various automobiles, trucks and school buses must drive through) must be approached at a safe speed and the operator of the vehicle on the tracks must be prepared to stop if necessary. The Claimant seemed to be aware of that. The question remains: did he approach the crossing at a safe speed?

The Claimant stated that he had slowed up to 5 to 7 miles per hour 60 feet before the crossing. He was also prepared to stop, and moved forward only when he believed the bus was not going to cross.

However, the Claimant's testimony is contradicted. Mr. Stringfield stated that the tamper was travelling at over 25 miles per hour when he fell from the vehicle, some 30 feet from the crossing. Also, Mr. Tribble, who did not see the collision, testified that there were skid marks beginning 60 feet from the crossing and going up to the point of impact. If these skid marks were caused by the Claimant's tamper, he would have been travelling at a speed greater than 7 miles per hour when he applied the brakes.


But, it should be noted that the testimony of Mr. Stringfield and Mr.

Tribble is conflicting. If the Tamper had been moving at 25 miles per hour and still going at that speed when Mr. Stringfield fell, the skid marks could not have been caused by the Claimant's tamper. On the other hand, if the skid marks were made by the Claimant, the tamper could not have been travelling at the constant speed of 25 miles per hour as Mr. Stringfield described.

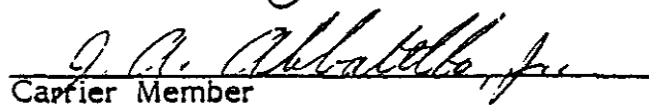
When the Carrier seeks to discipline any employee, the burden of proof falls on the Carrier. In this situation, the Carrier by presenting conflicting evidence, has not met the burden of proof. The Carrier failed to show that the Claimant did not approach the crossing at a safe speed. Therefore, it is the opinion of this Board that the Carrier was not justified in assessing this suspension.

AWARD

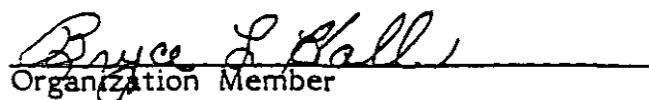
The Carrier shall compensate the Claimant for the full 90 days. The entire suspension shall be removed from the Claimant's service record, with seniority unimpaired and with pay for time lost.



Neutral Member



Carrier Member



Organization Member

DATE:

4/13/86