

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 40

Carrier File No. 7MWA 90-6-20B

Organization File No. C-90-090-2

STATEMENT OF CLAIM

1. The discipline [censure and two (2) day's suspension] imposed upon Welder M. Kober for alleged violation ". . . Rules 58(A) and 58(B) of the Burlington Northern Safety Rules and General Rules . . .", on January 3, 1990 was without just and sufficient cause, based upon unproven charges and in violation of the Agreement.

2. The Claimant's record shall be cleared of the charge leveled against him and he shall be compensated for all wage loss suffered.

F I N D I N G S

Following an investigative hearing, the Claimant was assessed a two-day disciplinary suspension in connection with his "failure to exercise care to prevent an accident when your personal vehicle was struck by BN 6196, Switch Engine, Westbound, at the Railroad Crossing M.P. 579.14, Denver Division, Fifth Subdivision, which resulted in excessive damage to your vehicle and War Car FWD 196 at approximately 2:15P.M., January 3, 1990".

Rule 58 reads in pertinent part as follows:

58. Employees must:

a. Expect the movement of trains, locomotives, cars, or other movable equipment at any time, on any track, in either direction.

b. Before crossing tracks or stepping out from between equipment, look in both directions for approaching equipment.

There is no doubt that the Claimant's vehicle was struck by the leading way car of a switch engine train as the vehicle was crossing a double set of tracks. Although some responsibility by the Claimant can reasonably be assumed and the resulting penalty was relatively modest, the Board nevertheless finds that the investigative hearing did not provide for presentation of all relevant information. This point was raised by the Organization at the hearing and emphasized in its submission.

The Claimant testified that he had complied with Rule 58 in taking the required precautions prior to crossing the tracks in his vehicle.

There was testimony by the Trainmaster, who was allegedly directly at the scene of the accident when it occurred, as to the conditions under which the train approached the crossing. This included an allegation that the train engine whistle had been sounded and that a crew member was in the way car at the time of impact. Both of these contentions were denied by witnesses called by the Organization. There is also the matter of the reported excessive speed at which the train was traveling.

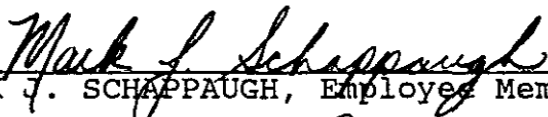
No member of the train crew was called to the investigation, either as a witness or as a principal. The Board finds this was a substantive defect in the hearing. When an accident occurs, logic dictates that inquiry must be made of the possible responsibility of all concerned. The Trainmaster's indirect report of what crew members may have stated to him is not sufficient for this purpose.


It is a significant omission that the hearing officer's failed to insure such inquiry prior to the Carrier's reaching a conclusion as to the Claimant's responsibility is a major defect. Because of the lack of a fair and complete hearing, the Board must necessarily sustain the claim.

A W A R D

Claim sustained. The Carrier is directed to place this Award into effect within 30 days of the date of this Award.


HERBERT L. MARX, Jr., Chairman and Neutral Member


MARK J. SCHAPPAUGH, Employee Member


D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED: February 19, 1993