PUBLIC LAW BOARD NO 5850

Award No.
Case No. 115

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes

(The Burlington Northern Santa Fe Railroad

STATEMENT OF CLAIM:

1. The Carrier violated the Agreement when on November 23, 1998, the Carrier issued a Dismissal to Mr. L.J. Rael for the alleged violation of Rules S-1.2.5 and S-12.1.1 of the Safety Rules and General Responsibilities for All Employees, effective March 1, 1997, and Rule 1.6 of the Maintenance of Way Operating Rules, effective August 1, 1996, as supplemented or amended in connection with driving company vehicle No. 93811 around signal gates on Highway 47 near Mile Post 879.1, on October 6, 1998.

2. As a consequence of the Carrier's violation referred to above, Claimant shall be reinstated to his former position with seniority restored, he shall be paid for all wages lost and discipline shall be removed from his record.

FINDINGS

Upon the whole record and all the evidence, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended. Further, the Board is duly constituted by Agreement, has jurisdiction of the Parties and of the subject matter, and the Parties to this dispute were given due notice of the hearing thereon.

Claimant hired out July 22, 1996, as a Trackman. On October 6, 1998, he was suspended from service pending the results of an investigation that was held October 29, 1998, and on November 23, 1998, the suspension was converted to a dismissal.

Claimant was charged with and dismissed for:

"...violation of Rules S-1.2.5 and S-12.1.1 of Safety Rules and General Responsibilities for all Employees, effective March 1, 1997, and Rule 1.6 of Maintenance of Way Operating Rules, effective August 1, 1996, as supplemented or amended, concerning your alleged safety violation of driving around signal gates on Highway 47 at Milepost 879.10 on October 6, 1998, at approximately 1610 PM and endangering the safety of yourself and members of gang 27649, while performing duties as a truck driver...."

Claimant and the crew he was working with started at 4:00 AM at their headquarters at

Belen, New Mexico, to complete a project approximately 50 miles southeast of Belen. At about 4:00 PM, the crew was wrapping up when the assigned truck driver of the 33,000 lb. boom truck complained of not feeling well. He asked Claimant if he would drive. Claimant told him he was not licensed, whereby the driver stated he would ride in front with him and if anything happened, they would swap seats.

Claimant then agreed to drive. Shortly after starting for home base, the truck was stopped by the Foreman who was looking for a volunteer to return to the work site to clean out gravel from a frog.

The driver, who claimed to be too sick to drive, volunteered to return with the Foreman, leaving Claimant and three crew members in the truck. One moved to the front passenger seat, the remaining two stayed in the cab built on the truck bed. The road driven to home base was in a northerly direction. It crossed the Carrier's tracks.

After completing an "S" curve that turned first to the left, then to the right, the road straightened out about 77 feet from the crossing. The posted speed limit for the curve was 35 miles per hour.

Claimant testified that the crossing lights began flashing when he was very close to the tracks, so observing the approaching train, he elected to proceed across the tracks, and did so without damaging either crossing gate.

Besides Claimant, the Carrier found eight witnesses to the incident and each testified as to their version of the crossing.

In the locomotive cab of the approaching train, besides the Engineer and the Conductor, was a Manager of Safety. There were three passengers in the truck Claimant was driving, and parked on the north side of the crossing checking their truck engine for oil was

a welding truck driven by a Welder who was accompanied by a Welder-Trainee.

The Manager of Safety testified that when the train was about 1/4 of a mile from the crossing, he saw the company boom truck (what Claimant was driving) swerve around the gates and cross the tracks. The Engineer testified he saw the section truck go around the gate as it was coming down. The Conductor testified, at first, that the truck got to the crossing at about the time the gates were coming down. Then he corrected his testimony to reflect that the gates were not down when the truck got to the crossing.

The Welder-Trainee testified that the boom truck crossed when the gates were coming down. He testified he heard the bells, then saw the truck approaching the crossing. He also testified he believed the truck would overshoot the crossing (apparently thinking it was going to stop) then it proceeded on over the crossing without stopping. It was his estimate that the truck was going about 20 to 25 miles per hour. The Welder testified that he heard the truck because of the noise the tire makes, and from the reduction in noise he believed the truck was slowing. He testified he did not see the truck go through the crossing. He testified further that he remembered hearing the bells after the truck went through the crossing, but only after a lapse of several seconds.

One of the truck passengers, riding in the cab of the truck testified that when the truck came out of the "S" curve, it was in the left lane. He testified the gates were coming down, and that Claimant slowed the truck then accelerated through the crossing.

A second passenger testified that the truck went through the crossing when the gates were above half way down.

The third passenger said he did not notice if the gates were coming down. In fact, he felt no apprehension about the crossing. He believed they were just cruising along.

It is fact that neither gate was damaged. It is also fact that the crossing protection system was functioning as programmed, i.e., with flashing lights, bells, crossing gates that lowered or raised as programmed.

Some question was raised as to the conditions of the truck as it was placed in the shops the very evening of the incident to repair the power steering that went out, but the garage also advised of faulty brakes. The brake issue, however, is a non-entity. Whatever was wrong with the brakes, did not, in this Board's opinion, create a mitigating circumstance. Neither Claimant nor the truck driver complained of braking difficulties.

Unfortunately, two basic facts were not established. For instance, at what point did Claimant and the passengers see the approaching train. Was it at the moment they saw the flashing lights, or was it before they entered the "S" curve, as once in the "S" curve, when traveling to their left, the train was to their back. The other point not established was the location of the truck when the flashers started.

Testimony developed that 11 seconds after the flashers started, the gates would start down. Testimony also established that when the truck completed the "S" curve, there was 77 feet of straightaway before the crossing. Testimony also developed that the truck was estimated as traveling between 20 and 25 miles per hour when it crossed the tracks. At that speed, the truck would travel 36.67 feet per second, and in a little over two seconds, it would be on the crossing. In this scenario, then the testimony of the Welder and the Conductor support Claimant in that if at first coming out of the "S" curve, the flashers started and the truck would cover the 77 feet to the crossing in a little over 2 seconds with still just under 9 seconds remaining before the gates would come down.

On the other hand, five witnesses testified the truck was just crossing when the gates

started down, thus leaving this Board with the impression that the truck was over 400 feet from the crossing when the flashers started. This would place the truck at a point 200 feet or so from the start of the "S" curve when the flashers started. The unanswered question is could the driver and/or his passengers see the crossing flashers when the truck would be located 200 or so feet to the east and south of the crossing.

The Board concludes that when the truck cleared the "S" curve, the flashers were going. Claimant was in the left lane and continued in the left lane until he cleared the gate in the event it started down, then swerved to the right (as verified by the Manager's testimony) to move to the right lane to clear, if necessary, the gate that would block the southbound traffic.

From the Board's view, the Carrier must accept some responsibility for permitting an unqualified driver behind the wheel of the boom truck. Claimant told the regular driver he was not qualified, yet the driver encouraged him to drive. The Foreman never asked Claimant if he had a license, let alone requested to see such license.

Secondly, it is the Board's view that when Claimant was clearing the "S" curve, he saw the flashers going. Whether they just started is an unknown, but in the Board's view he could have stopped the truck in the 77 feet of straightaway, albeit it may have been a rather abrupt stop. It has not been established that he drove around the crossing gates, but he surely proceeded across the crossing when the flashers and bells were working.

The Board believes Claimant used poor judgment in this instance. He should have stopped the truck. It is not only a violation of Carrier Rules to move across a track when the warning lights are flashing, but it is also a violation of New Mexico's traffic laws. However, this Board cannot second guess a New Mexico Traffic Judge, and will not base its findings upon

a violation of a traffic ordinance as the Board has no authority to do so.

Under the circumstances, this Board finds Claimant guilty of poor judgement, but does not find he acted in reckless abandonment.

Claimant's dismissal is reduced to a long suspension. All of his seniority rights are to be reinstated. He is to be returned to service (providing he successfully completes his reemployment physical and/or whatever else is required of employees off as long as Claimant), but there is no pay for time lost.

AWARD

Claim sustained in accordance with the Findings.

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 date the award is adopted.

Robert L. Hicks, Chairman & Neutral Member

Rick B. Wehrli, Labor Member

Thomas M. Rohling, Carrier Member

Dated: 6/29/99