

D-1948-2

PUBLIC LAW BOARD NO. 6102

Award No. 11

Case No. 11

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
and
Burlington Northern Santa Fe Railway
(Former St Louis - San Francisco Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the current Agreement when it unjustly dismissed Mr. R. E. Haile from service for allegedly violating Rules S-12.8 and S-26.8 of the BNSF Safety Rules and General Responsibilities in connection with his allegedly providing false information in regard to a company vehicle accident.
2. As a consequence of the Carrier's violation referred to above, the Claimant shall be returned to service, the discipline shall be removed from the Claimant's personal record, and he shall be compensated for all wages lost in accordance with the Agreement. (The Claimant was returned to service on May 14, 1998)" [Carrier's File MWC980616AA. Organization's File B-1948-2]

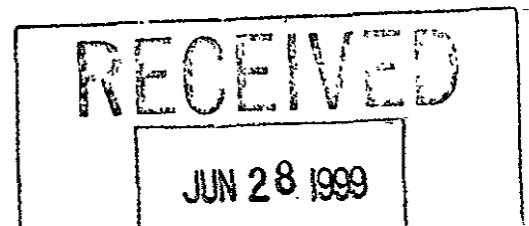
FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction over the dispute herein.

The Claimant, Mr. R. E. Haile, was hired by the Carrier on October 18, 1976, and was employed as a Traveling Mechanic on March 16, 1998. In the early morning hours of that date, he was driving a vehicle owned or leased by the Carrier from Springfield, Missouri to Memphis, Tennessee. He stopped at a Snappy Mart truck stop in West Plains, Missouri, to use the restroom. Upon leaving this site, he was involved in a low speed traffic accident in the parking area. There were no injuries. Damage to the other vehicle totaled \$2,570.37. Damage to the Carrier vehicle consisted of a bent handle on a vise mounted on the rear of the truck.

An investigation was held on April 23, 1998, for the following purpose:

". . . (A)scertaining the facts and determining your responsibility, if any, in connection with your alleged violation of Rule S-12.8 and S-26.8 of the BNSF Safety Rules and General Responsibilities for all Employees on March 16, 1998, when you allegedly gave false information to your Manager M. D.



Meyer and Supervisor R. L. Hunziger, and allegedly recorded false information on BNSF Company Vehicle Accident Data Collection form dated March 16, 1998."

Following the investigation, the Carrier's Director Roadway Equipment, Mr. J. W. Upward, wrote the Claimant:

"After reviewing the transcript from the investigation afforded you on April 23, 1998 at 10:00 am at 3253 East Chestnut Expressway, Springfield, MO 65802 for violation of Rule S-12.8 and S-26.8 of the BNSF Safety Rules and General Responsibilities for all Employees, the Level S suspension of 45 days and probation period of 3 years is appropriate.

"You will be reinstated to service on May 14, 1998. . . ."

The Claimant was represented at the investigation by his Union's General Chairman, who subsequently filed appeals of the discipline administered, finally bringing this case before this Board.

Rule S-12.8 reads as follows:

"S-12.8 Backing.

Position the vehicle, when possible, to avoid backup movement.

Before backing, inspect area to the rear to ensure that no persons or objects are in the path of movement.

When backing vehicles other than automobiles and pickup trucks:

- Position someone near the back of the vehicle to guide movement, when available.
- Sound the horn three blasts in vehicles not equipped with backup alarms.
- Stop if the person guiding the movement disappears from view."

The Board notes that the vehicle driven by the Claimant is licensed and classified as a pickup truck, although its gross weight is 14,500 pounds. It is equipped with an operable backup alarm. The Claimant was unaccompanied while driving this vehicle on the day of the accident.

The accident occurred in the following manner, according to the Claimant's account. It was cloudy, dark, and raining when he stopped at the Snappy Mart. In compliance with the precautionary admonition in Rule S-12.8, he pulled into a parking space on the side of the Snappy Mart building. A painted "No Parking" area was immediately in front of the vehicle.

He stated it was his intention to pull through the restricted zone as he departed, making a U-turn, which would not entail backing the vehicle at all.

Upon returning to the vehicle, he walked behind it and noted there were no persons or vehicles parked behind it. Upon entering the cab of his truck, he observed a vehicle parked in front of his truck, in the restricted zone, obstructing his planned departure route. He stated that he turned on his lights, including a backup light, looked in both of his mirrors, looked to his left toward a truck parking area, and slowly began backing with the backup alarm sounding.

There was an automobile parked immediately on the right of the Claimant's vehicle, headed up against the Snappy Mart building. The other vehicle involved in the accident, driven by a non-employee, Mr. Robert Armstrong, backed out from its parking place against the building and beyond the vehicle on the Claimant's immediate right. In backing, it made a sharp turn to the left, placing it perpendicularly behind the Claimant's backing truck. It was a gray automobile and was not observed by the Claimant in his rain-spotted mirrors in the semi-darkness. The vise mounted on the truck's rear struck the car's rear door.

The Claimant notified the West Plains Police Department, which sent an officer to prepare the accident report, and then he called Supervisor of Roadway Equipment Hunziger, who instructed the Claimant to be sure a police accident report was filed, and to proceed to Memphis. The Claimant did as he was instructed. Upon his arrival in Memphis, he was interviewed by Manager of Roadway Equipment Meyer and he prepared a Carrier Vehicle Accident Data Collection Report.

A reenactment of the accident was carried out on March 20, 1998. Photographs of this reenactment show that it was fully daylight and the vehicle used to simulate the vehicle struck by the Claimant's truck was a white, extended cab pickup truck. This stands in marked contrast to the lighting, the weather conditions, and the size and color of the vehicle actually struck.

The Board is persuaded that this event is nothing more blameworthy than an accident. The Claimant did not act unreasonably, nor in violation of Rule S-12.8 under the circumstances of that day. He purposely positioned his vehicle to avoid a backup movement, although the Rule does not rigidly prohibit backing up; hence the qualifying phrase, "when possible." His purpose was thwarted by an improperly parked vehicle blocking his intended escape route. He observed no persons or objects were behind his vehicle before backing. There was no one available to guide his backward movement. His vehicle was equipped with a working backup alarm. The other vehicle, gray in color, perhaps almost invisible in rain-spotted mirrors in the overcast darkness, backed into the Claimant's path from beyond another vehicle, which also obscured the Claimant's range of vision. Nothing in the totality

of the circumstances points to reckless disregard of due care. Some accidents occur in spite of efforts to avoid them.

The Claimant was also charged with violation of Rule S-26.8, which reads, in part, as follows:

"S-26.8 Complete and Accurate Reporting of All Accidents, Incidents, Injuries, and Occupational Illnesses Arising from the Operation of the Railroad

The Burlington Northern Santa Fe (BNSF) Railroad is committed to complete and accurate reporting of all accidents, incidents, injuries, and occupational illnesses arising from the operation of the railroad. Harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting an accident, incident, injury, or illness has not and will not be permitted or tolerated."

The Board considers this the more serious of the two charges, since it implies an act of dishonesty by the Claimant, if the charge is proven. The Claimant had 22 years of employment with no recorded disciplinary entries prior to the instant case. For that reason, the Board has given scrupulous attention to the evidence of alleged misrepresentation of the details of the accident by the Claimant.

The basis for the Carrier's decision with respect to Rule S-26.8 is summarized in Mr. Upward's letter of June 9, 1998, in response to the General Chairman's appeal:

"Testimony by Mr. Meyer and Mr. Hunziger indicate a discrepancy between what Mr. Haile related at the re-enactment and what was shown on the police report. This is further substantiated by Mr. Hunziger's testimony regarding Mr. Robert Armstrong stating that Mr. Haile's truck was pulled straight into a parking spot in front of the building. It appears Mr. Haile provided false information to his supervisor regarding this incident to hide the fact that he did not comply with Rule S-12.8."

The Claimant's representative objected to the introduction of the police report, without the presence of the police officer for cross-examination on the matters in the report. He also objected to the hearsay evidence concerning Mr. Hunziger's conversation with Mr. Armstrong concerning the accident. These objections were not abandoned in his appeals. The Board realizes that the Carrier cannot compel the presence of these non-employees, but there is no indication that an attempt was even made to obtain their voluntary presence, or that the investigation could not have been held in West Plains, more convenient and conducive to the

presence of these two persons. Furthermore, the record indicates the police report was replete with erroneous data, which calls into question whether it correctly depicts precisely where the Claimant's vehicle was parked when he began backing up. Under these circumstances, the Board gives little credence to the accounts at variance with the Claimant's description of events.

However, because the disposition of this dispute hinges on the Carrier's burden of proof, rather than the above procedural issue, the Board does not find it necessary to address with greater particularity the fairness issues raised during the investigation, with respect to the Carrier's failure to have present the West Plains police officer and Mr. Armstrong. In all other respects, the Board finds there was compliance with the applicable provisions of Schedule Rule 91, the Discipline Rule.

The Carrier points to testimony which it characterizes as admission that the Claimant lied about the circumstances of the accident, to cover up his violation of Rule S-12.8. Indeed, the word "lie" does appear in the record:

- "131. Q. Then why would you reenact the vehicle incident at this location?
A. [By Mr. Meyer]. When we met Ralph [Haile] at the Snappy Mart on the 20th, he indicated to me that he might have lied to me on where the vehicle was and basically in the direction that the vehicle was headed. So, when we reenacted the incident, Ralph pulled his truck into the, into a location other than where he'd identified to me on Monday."
- "143. Q. [By Mr. Haile]. . . . Once again, Mark, was the, word parallel with the scales, that I used or did I say, the truck was facing east on the scale side of the building?
A. My understanding was from our conversation, that you were parked parallel. And, the reason I say that is because I specifically asked how you backed your truck up, because of the question of which way you were going to exit. And, the conversation went, that you backed your, the back of your truck out to the left so that you could drive along side the scale."
144. Q. Did I say I was facing east on the scale side of the building?
A. That I do not remember in the conversation.
145. Q. Was that, was it on the accident report that I put down east and then as you said, I did tell you, I didn't say I might have lied, I

said I lied, now I know it, because the police officer said the truck was facing east. But, of course the car was the one that was facing east. And, I assumed that he was talking about my truck. And, I told you at that time when we reenacted it, that no, I was north and it is changed on the accident report.

A. That is correct."

"183. Q. Did I say that I lied, that instead of east, it was north? Did I make that statement, did you hear me make that statement that day? And, that's the reason I changed that to north?

A. [By Mr. Hunziger]. Well, I don't recall, I know, all I know is we went over it and corrected it, and you agreed that everything was correct on it."

"314. Q. [By Conducting Officer]. . . . Mr. Meyer indicated earlier in his testimony that you specified that you were parked parallel initially to the scale. Why would Mr. Meyer say that?

A. [By Mr. Haile]. I explained what I said to Mr. Meyer in, already in this. And what I said, I was parked eastbound and yes I was on the scale side of the building. And, that would be parallel to the scales, but I did not say parallel to the scales. I said I was on the east side and I was headed east, and at that time, the police officer had said that the truck, and like I said, mine was the only truck, it was actually a car. But, that was an error in the policeman, evidently."

The picture that emerges reflects more than a little confusion on the Claimant's part. The Board has considered whether the Claimant could reasonably expect to successfully misrepresent the actual events of the accident, to conceal any personal culpability. He had ample opportunity while driving from West Plains to Memphis, which took almost eight hours, to reflect on the events. He knew a police accident report was prepared. He knew that he would be required to fill out a Carrier accident report form, and there might be a reenactment. He knew the driver of the other vehicle would probably be interviewed by the Carrier's Claim Agent. Any effort to fabricate a false location for the scene of the accident would be altogether ineffective. Under the circumstances, no reasonable mind could expect to successfully carry out such a misconstruction of events. The Board notes again that the Claimant's employment record reflects no previous instance of dishonesty.

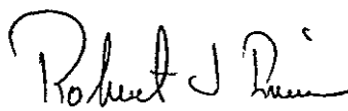
True enough, he said he lied. The Board believes this was an artless, perhaps crude mode of expression in admitting that he was mistaken in the details of which direction he was headed. The record indicates some confusion as to the compass direction of the vehicles, but

not about their relative movements. The Carrier Accident Report contains the same error, showing the Claimant's truck headed east instead of north. The report was changed by the Claimant on the day of the reenactment. The Board is persuaded that these were errors, rather than deliberate attempts to falsify the report.

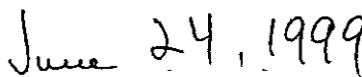
Although the police report attributes the accident to inattention by the Claimant, the question before the Board is whether the Claimant violated BNSF Safety Rules 12.8 and 26.8. There was insufficient evidence adduced at the investigation to prove that he violated BNSF Safety Rules S-12.8 and 26.8. The claim is sustained.

AWARD

Claim sustained. The Claimant shall be compensated in accordance with the opinion above within sixty (60) days from date of this Award.



Robert J. Irvin, Referee



Date