

NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 925

BURLINGTON NORTHERN RAILROAD COMPANY

- and -

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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CASE NO. 122

AWARD NO. 122

On May 13, 1983 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 the Railway Labor Act. The Agreement was docketed by the National Mediation Board as Special Board of Adjustment No. 925 (hereinafter the Board).

This Agreement contains certain relatively unique provisions concerning the processing of claims and grievances under Section 3 of the Railway Labor Act. The Board's jurisdiction was limited to disciplinary disputes involving employees dismissed from service. On September 28, 1987 the parties expanded the jurisdiction of the Board to cover employees who claimed that they had been improperly suspended from service or censured by the Carrier.

Although the Board consists of three members, a Carrier Member, an Organization Member and a Neutral Referee, awards of the Board only contain the signature of the Referee and they are final and binding in accordance with the provisions of Section 3 of the Railway Labor Act.

Employees in the Maintenance of Way craft or class who have been dismissed or suspended from the Carrier's service or who have been censured may chose to appeal their claims to this Board. The employee has a sixty (60) day period from the effective date of the discipline to elect to handle his/her appeal through the usual channels (Schedule Rule 40) or to submit the appeal directly to this Board in anticipation of receiving an expedited decision. An employee who is dismissed, suspended or censured may elect either option. However, upon such election that employee waives any rights to the other appeal procedures.

The Agreement further establishes that within thirty (30) days after a disciplined employee notifies the Carrier Member of the Board, in writing, of his/her desire for expedited handling of his/her appeal, the Carrier Member shall arrange to transmit one copy of the notice of investigation, the transcript of investigation, the notice of discipline and the disciplined employee's service record to the Referee. These documents constitute the record of proceedings and are to be reviewed by the Referee.

In the instant case, this Board has carefully reviewed each of the above-described documents prior to reaching findings of fact and conclusions. Under the terms of the Agreement the Referee, prior to rendering a final and binding decision, has the option to request the parties to furnish additional data; including argument, evidence, and awards.

The Agreement further provides that the Referee, in deciding whether the discipline assessed should be upheld, modified or set aside, will determine whether there was compliance with the applicable provisions of Schedule Rule 40; whether substantial evidence was adduced at the investigation to prove the charges made; and, whether the discipline assessed was arbitrary and/or excessive, if it is determined that the Carrier has met its burden of proof in terms of guilt.

Background Facts

Mr. Roger D. Hubregtse, hereinafter the Claimant, entered the Carrier's service as a Sectionman on April 9, 1991. The Claimant was subsequently promoted to the position of Truck Driver and he was occupying the position when he was censured and suspended by the Carrier for a period of fifteen (15) working days effective February 21, 1992.

The Claimant was suspended as a result of an investigation which was held on January 25, 1992 in the BN Edgemont Depot in Edgemont, South Dakota. At the investigation the Claimant was represented by the Organization. The Carrier suspended the Claimant based upon its findings that he had violated Rules 336(E), 567(A) and (C), 338 and 359 for driving Vehicle 3848 when that vehicle was struck by Westbound Train OWY 9026 at 1:45 p.m. on January 13, 1992 near Belmont, Nebraska.

Findings of the Board

On January 13, 1992 at approximately 1:45 p.m. the Claimant was the driver of Carrier Vehicle 3848. As he was negotiating the crossing at Milepost 406.3 one or more of the wheels on the vehicle "slipped" because of the icy conditions in the vicinity of the rail. As will be more fully discussed below, the Claimant "backed" the vehicle, a "boom truck" which is approximately thirty-one (31) feet in length, and then again made an attempt to effect a crossing of the track.

The vehicle was struck, in the rear section by westbound Train OWY 9026. The vehicle sustained substantial damage and one employee, a Mr. Everton, suffered a cut on his forehead. Roadmaster John A. Powers, who investigated the incident, testified regarding the track territory involved and his view as to the conditions which existed on the day and at the time in question.

Roadmaster Powers testified, relevantly in this Board's opinion, that in the past there had been no problems "with vehicles getting across this crossing" and that the only condition that was different on the day in question "was that the road was icy".

The evidence of record establishes that westbound Train OWY 9026 was traveling at an approximate speed of between 47 to 49 miles per hour, and that the train can be seen as it comes around a curve in the track at a distance of approximately one quarter of a mile away. Neither the engineer of westbound Train OWY 9026 nor the speed recorder tapes from that train were produced at the January 25, 1992 investigation, and thus the Board must rely upon the estimates of speed of the train testified to by available witnesses.

The Organization introduced evidence in the record through the testimony of witnesses and by use of a video tape, copy of which was provided to the Board, which established that it takes approximately 16 to 20 seconds for a thirty-one (31) foot boom truck to "clear" the crossing at Milepost 406.3.

Truck Driver Lee D. Miller, who has driven for the Carrier since 1977 and who is familiar with the territory involved, testified in response to a question from the Conducting Officer that he had "gone across this crossing many times" and that he has had "trouble negotiating the crossing". Truck Driver Miller continued and stated that "the only way you can really be sure of your trains unless you want to completely trust your mirrors would be to pull the right hand lane open your door. You can't just look out your window because the dog box blocks your vision. You have to open the door, take at least one step out and look, get back in, put your truck back in gear and then make your crossing. Its not just one of those things you pull up, glance out and take off." Mr. Miller testified that "When I drove across the crossing, I'm nervous every time. When I get across, I try to 'haul ass' because its a short distance of sight and"

There is no evidence in the record which casts any doubt upon the testimony of Mr. Miller or others regarding the short distance of sight after a train has come around the curve and the somewhat difficult "Z-type" maneuver that is required of a truck driver to negotiate the crossing at Milepost 406.3.

The critical evidence in the record is found, in this Board's opinion, in the Claimant's response to the Conducting Officer regarding the incident.

When asked to state what occurred on the date and at the time in question, the Claimant made the following statement:

I was in completely unfamiliar territory driving a boom truck, without my foreman, trying to negotiate in slippery conditions. I approached this crossing, no others in sight. I wasn't sure which direction to go and I looked to follow tracks. I could see, after I approached the crossing, that I could not negotiate it, so I backed up, looked in my mirror and at this time I had my window down so I could hear anything approaching. I backed up, I started to go forward, the wheels slipped, lost traction. I reversed my direction to get away from that slippery spot, and then I proceeded to try to gain forward momentum. I had to ease into it, you understand, because of the conditions. I looked again through my window, and at that time I was quartered [presumably quarter way] into the crossing so I couldn't see out my mirror. I saw nothing was coming. I gained by momentum, and at that time I began to follow the crossing, I looked again and I saw the train. At that time, I deduced that it was better that I try to maintain my forward momentum, and even increase it if possible then to stop and reverse my direction in those slippery conditions. I did that and luckily enough my traction held out. Unfortunately, the rear end of the truck was caught by the train. The next thing I knew, I was facing railroad east. I quickly got out to see if my passengers were okay and they were all okay except for Mr. Everton who had a cut on his forehead. At that time, the Roadmaster, after being called, and the truck driver from the other side of the tracks, approached and tried to get first aid to Mr. Everton.

In response to subsequent questions from the Organization Representative, the Claimant testified that prior to January 13, 1992 he had never driven a section truck in the Belmont area or driven a truck across the crossing at Milepost 406.3. The Claimant testified with certainty that before he attempted to negotiate crossing he "looked to the east to check for train traffic" and that "There was no train coming". The Claimant further testified, as did other employee witnesses, that had the Claimant not continued the forward movement of the vehicle but had he instead attempted to "reverse off the crossing" it is likely that "death and disaster" would have occurred.

There can be no doubt that an accident occurred and that considerable damage was done to a Carrier vehicle on January 13, 1992 at the crossing at Milepost 406.3. The facts in the record do not constitute substantial and convincing evidence which would establish that the Claimant violated any of the cited rules or that he was generally careless or negligent in the manner in which he operated his vehicle on the day in question. Clearly, had the vehicle not "slipped" on the icy roadway the accident would not have occurred. There is no showing that the Claimant knew or should have known that the road conditions were such or that sight lines were so short as to have created an inherently dangerous condition. It is significant, to note, that the Claimant was "a newcomer" to the territory.

The evidence supports the Organization's contention that the crossing conditions at Milepost 406.3 are at best difficult and at worst inherently dangerous. It is also clear that the Claimant was given no specific instruction regarding the difficulty in negotiating this crossing and that he was not "piloted" through this area so that he might familiarize himself with the difficulties that might be encountered. It is the Board's opinion that the Carrier has failed to meet its burden of proof, and, accordingly, the claim will be sustained.

In several cases decided by this Board in the past we have found it appropriate to comment upon the demeanor and conduct of certain hearing officers; and, on occasion, we have "thrown a bouquet" to a investigating officer who has, in this Board's opinion, shown the ability to conduct a particularly fair, impartial and professional investigation. In this case, the Board would be remiss if we did not observe that Organization Representative Nickens provided the Claimant with exemplary representation. He was thorough and precise. Although we did not attend the investigation and could not observe his demeanor, it is clear that Representative Nickens conducted himself in a most professional manner.

Award: The claim is sustained. The Carrier is directed to expunge the Claimant's Personal Record of any reference to the involved discipline and to make him whole for all lost wages and benefits. This Award was signed this 30th day of June, 1992.

Richard R. Kasher

Richard R. Kasher

Chairman and Neutral Member

Special Board of Adjustment No. 925