

**PUBLIC LAW BOARD NO. 4901**

AWARD NO. 235

CASE NO. 235

PARTIES TO  
THE DISPUTE:

United Transportation Union

vs.

The Burlington Northern Santa Fe Railway Company  
(Coast Lines)

ARBITRATOR: Gerald E. Wallin

DECISIONS: Claim denied.

STATEMENT OF CLAIM:

“Request of Southwest Division Conductor A. D. Baslee for the removal of the Level S Record Suspension of thirty (30) days and one year probation period and exoneration of the alleged violation of Rule 1.1, 1.13, and 6.32.2 of the General Code of Operating rules, Fourth Edition, effective April 2, 2000, as supplemented or amended from the Claimant’s personal record, and pay for all time lost attending the formal investigation conducted on September 24, 2002.”

FINDINGS OF THE BOARD:

The Board, upon the whole record and on the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by agreement of the parties; that the Board has jurisdiction over the dispute, and that the parties were given due notice of the hearing.

Claimant was given a record suspension for violating the Carrier’s rule about protecting a road crossing where warning devices were not functioning properly. The discipline, therefore, only consists of a written entry in Claimant’s work record and does not involve loss of pay. Claimant had some thirty-five years of service at the time of the event on August 28, 2002. His work record shows this incident was his third record suspension for a safety violation within two years.

The basic facts are undisputed. As Claimant’s train began its trip, he was notified by the dispatcher that he would have to protect the Dysart Road crossing per Rule 6.32.2 due to problems with the automatic crossing device there. Apparently a motor home broke off one of the two crossing arms. Claimant acknowledged the dispatcher’s directive and he discussed the situation with his engineer.

Rule 6.32.2 specifies several alternative means for providing suitable protection depending on the attendant circumstances. If no other means is available, the train must stop short of the crossing and a crew member must dismount to the ground with a flag to stop traffic while the train proceeds to cross the road. In addition, however, if the crew has been notified that a suitably equipped flagger will be present to warn traffic, then the train need not stop. Depending upon the capability of the equipped flagger, the train can either cross at normal speed or cross at 15 miles per

hour. The rule requires a properly equipped flagger to be wearing an orange vest, shirt, or jacket and hold a red flag or stop paddle during daylight. This was a daylight situation.

Unbeknownst to the crew, a signal maintainer was already at the crossing with a Carrier truck to repair the crossing arm. He was wearing an orange hard hat but was not carrying any flag or paddle. He was not there to provide flagging protection; his only mission was to repair the crossing arm. As he began his work, the device activated to warn of an approaching train. The other crossing arm lowered and the lights flashed. All traffic on Dysart Road was stopped.

As the crew approached the Dysart Road crossing, Claimant went out on the nose of the engine with a flag prepared to go to the ground and flag the crossing. Upon coming into sight of the crossing, both Claimant and the engineer spotted the company truck and saw the signal maintainer wearing orange in the distance. They could see one crossing arm down with flashing lights and that the traffic was stopped. As the engine drew closer, the signal maintainer turned and waved to the oncoming locomotive with Claimant out on the nose. The maintainer testified he was just waving a greeting to the crew and was not providing crossing protection. Moreover, the manner of his wave did not conform to the standard "Proceed" hand signal prescribed by Carrier rules.

Both crew members, however, took the maintainers wave to be a "highball" signal telling them they should proceed. Accordingly, the crew did not stop but proceeded through the crossing at 15 mph. Both Claimant and the engineer admitted they did not see any red flag or paddle in the maintainer's hand at the crossing.

As it turned out, a Carrier operations testing team happened to hear the dispatcher's directive over their radio and chanced to be driving in the vicinity of the Dysart Road crossing at the time. Accordingly, they decided to stop and watch how the crew handled the situation.

Our review of the record does not reveal that any procedural shortcomings of significance were advanced to this Board. Although the transcript of the investigation had some 36 inaudible entries among its 153 single-spaced pages, the transcript was not invalid. Indeed, the transcript shows that the key facts were explored, repeatedly, in great detail. This Board had no trouble whatsoever determining precisely what transpired and what the operative circumstances were.

Among other defenses, the Organization contends that Claimant's discipline should be rescinded because a Locomotive Engineer Review Board found there was insufficient evidence to support the Carrier's decertification action against the engineer. There are two reasons why this contention must be rejected. First, the LERB decision suffers from a significant factual flaw. Its decision was premised upon the determination that "... the crossing gates were down and the lights used to warn motorists were working." This was not a mere typographical error because it was repeated later when the LERB noted again that "... the gates at the crossing were down and the lights were working." The transcript of investigation makes it crystal clear that the crew saw that one of the gates was broken off and lying on the ground as they approached. The second reason is that LERB decisions do not control the collectively bargained dispute resolution process. Each case must stand or fall on the basis of its own evidentiary record.

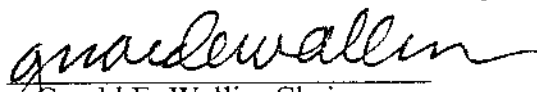
In light of the foregoing discussion, we must find that Claimant did violate Rule 6.32.2 despite the presence of mitigating factors. Although the record does not show that safety was actually jeopardized as a result of the crew's conduct, it does show they did not comply with the


technicalities of the rule. There was no advance communication to them that flagging protection would be provided nor did the signal maintainer meet the "equipped flagger" requirements of the rule; he did not have a red flag or paddle and they knew it. Thus, they should not have assumed he was an "equipped flagger" within the meaning of Rule 6.32.2.

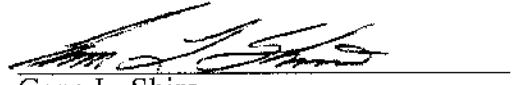
Given the nature of the incident, when taken together with the fact that Claimant was still in a probationary period from previous record safety rule violations, we do not find the Carrier's decision to have been excessive or unreasonable.

AWARD:

The Claim is denied.

  
Gerald E. Wallin, Chairman  
and Neutral Member

  
Rick Marceau,  
Organization Member

  
Gene L. Shire,  
Carrier Member

DATE: 05/11/2005

