

In the Matter of the Arbitration Between:

BURLINGTON NORTHERN SANTA FE

RAILWAY COMPANY

NMB Case No. 17

Claim of G. J. Beran

Dismissal: Getting Off

While in Motion and

Crossing Over the End

Platform While in Motion

and

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of G. J. Beran, for reinstatement to service with payment for all lost wages, account Carrier violated the current Yardmen's Agreement when it imposed the excessive discipline of dismissal against the Claimant as a result of an investigation held on August 10, 2003, without meeting the burden of proving the charges.

FINDINGS OF THE BOARD: The Board finds that the Carrier and Organization are, respectively, Carrier and Organization, and Claimant an employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on December 9, 2004, at Washington, D.C. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts.

Claimant was first employed by the Carrier on August 12, 1987.¹ At the time of this dispute, Claimant was assigned to the position of Conductor, working the Phoenix Subdivision, Road Switcher RSWE036-26, at Industry Spot 942.

On July 26, 2003, Trainmaster Michael Collins arrived at Industry Spot 942 specifically to observe the practices of Claimant's crew in a situational test. Trainmaster Collins concealed himself behind a silo and, for most of his observations, was not seen by the crew. He testified that, at approximately 11:50 a.m., he observed Claimant getting off moving tank car UTLX682266 and, although he did not actually see it himself, had good reason to believe that Claimant crossed over an end platform of the tank car while it was in motion. TY&E Safety Supplement No.

¹Claimant was actually first employed by the Carrier in September 1974. He was dismissed in May 1979 but reinstated in December 1979. He was dismissed again in September 1984 but reinstated in February 1985. He was dismissed again in May 1987 and reinstated in August 1987. He has served continuously since then.

1 (effective October 10, 1999, including revisions) Rule S-13.4.4 (Climbing Over Couplers or Under Moving Cars) states:

Do not climb over couplers and moving cars, or underneath moving cars. When you must cross over moving equipment, use locomotive or caboose steps. [Car. Ex. 8]

TY&E Safety Supplement Rule S-13.5 (Getting On or Off Equipment) states:

Do not get on or off moving equipment except in emergency to avoid injury. [Car. Ex. 8]

The Carrier convened an investigation to determine whether Claimant violated Rule S-13.4.4 and/or Rule S-13.5, which was held on August 10, 2003, at which the evidence described herein was adduced. Claimant was found guilty of the charges brought against him; and he was dismissed from service effective immediately.

The instant claim for Claimant's reinstatement and payment for all time lost, was presented in due course and progressed on the property in the usual manner, but without resolution; and it was submitted to this Board for disposition.

POSITIONS OF THE PARTIES: The Carrier argues that the record contains substantial evidence of Claimant's violating TY&E Safety Rule S-13.5 and S-13.4.4 when he crossed over and dismounted from moving equipment. It contends that the discipline assessed was commensurate with the offense and that no change should be made in its decision.

The Carrier further argues that complying with its rules is a condition of employment because employees are its greatest asset and their health and well-being are essential. It contends, therefore, that it is every employee's obligation to work safely. It maintains that its safety rules, specifically that employees not get on or off moving equipment or climb over couplers or under moving cars, were implemented many years ago and lay the foundation for Carrier's obligation to keep its employees safe. The Carrier asserts that it invests an extensive amount of time and resources teaching employees about the need for safety awareness, including local safety meetings and safety audits. It maintains that, since the rule prohibiting getting on or off moving equipment, except in an emergency to avoid injury, has been in place, injuries have been dramatically reduced.

The Carrier further argues that, despite Claimant's denials, Trainmaster Collins' written statement and testimony are

indisputable. Although it acknowledges that Mr. Collins did not actually observe Claimant cross from one side of the car to the other, it contends that his movement had to have occurred while the equipment was moving.

As to the Organization's complaints that Claimant was denied due process, the Carrier argues that they are without merit. It contends that there is no evidence that Claimant requested Alternative Handling. With regard to the claim of prejudgment shown by withholding Claimant from service pending investigation, it contends that, since the incident involved an aggravated violation of its safety rules, withholding him from service was appropriate.

As to the penalty imposed, the Carrier argues that is is appropriate because Claimant placed himself in a very dangerous position in direct violation of critical safety rules. It contends that, given two Level S rules violations in less than four months, Claimant's dismissal in the instant case was warranted. It urges that the claim be denied. However, the Carrier points out that, if the Board were to be inclined to modify the discipline, Claimant has not been deemed fit for duty since the date of the incident and, therefore, no liability for time lost should accrue. In addition, it contends that any wages provided to Claimant should be offset by any outside earnings made during the time he was out of service.

The Organization argues that the Carrier failed to prove the charges against Claimant and argues further that it failed to provide the Claimant with a fair and impartial investigation, evident when it issued the harsh and excessive discipline of dismissal to the Claimant.

The Organization further argues that the Carrier showed prejudice and prejudgment, violating Article 13, when it pulled Claimant from service the day he allegedly violated the rules. It contends that Claimant was withheld from service as a result of a "proactive safety rating" that was arbitrarily created and applied by the Carrier. It notes that the Carrier admitted it did not withhold Claimant from service as the result of an injury, collision or commitment of one of the "Seven Deadly" violations.

The Organization further argues that, as to the merits of the case, both the Claimant and Engineer Andrade testified that Claimant did not dismount from moving equipment and that Mr. Andrade stated that Claimant was "at all times" in full view of him. It contends that, contrary to Trainmaster Collins' statement and testimony, Claimant did not violate Safety Rule S-13.5.

Additionally, the Organization maintains that, since Mr. Collins admitted that he did not actually observe Claimant illegally cross over the platform of the tank car, there is no evidence whatsoever proving that Claimant violated Safety Rule S-13.4.4. It asserts that Mr. Collins' knowledge of the rules is suspect, as evidence by his admission that he is "not a [sic] expert on the rules."

Finally, the Organization argues that, in order for the Board to find Claimant guilty of the charges, the Carrier must provide facts, rather than assumptions and suppositions. It contends that the Carrier has not met its burden to prove the charges and that Claimant should be returned to service, with pay for time lost and without deduction of outside earnings. The Organization urges that a sustaining Award be issued.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to introduce substantial credible evidence on the record as a whole of Claimant's guilt and to establish that the penalty of dismissal was the appropriate response. For the reasons which follow, the Board is persuaded that the Carrier failed to meet its burden to establish that Claimant violated Safety Rules S-13.5 and S-13.4.4 as he was charged.

The Carrier has offered no evidence whatsoever concerning Claimant's alleged violation of Rule 13.4.4. In his written statement (Car. Ex. 2, p. 40), Trainmaster Collins acknowledged that he did not see Claimant climb over any couplers or move underneath any moving cars:

. . . By default, I figured [Claimant] had either walked across while in motion or walked across before the engineer acted on his command. . . . I assumed he moved across while in motion. I could not confirm this due to myself not physically seeing it. . . .

In his testimony, while claiming that he had good reason to believe Claimant crossed over the end platform, he confirmed that he did not actually see him do so:

Q: Now, you stated that you didn't actually see [Claimant] climb over or cross over the equipment?

A: No, I did not visually see him in the act . . .
[Car. Ex. 2, p. 16]

Additionally, Trainmaster Collins was not even sure of the relevant requirements of the Carrier safety rules he was charged with enforcing:

- Q: . . . Is there a rule that states that in order to cross over equipment, you must find a car that has a continuous crossover platform and a continuous handhold?
- A: I'm not a [sic] expert on the rules to every one of them. Should we take a recess and look it up? [Car. Ex. 2, p. 23]

This Board must weigh the evidence presented by the Parties; it cannot base decisions on assumptions and conjecture. The Board is persuaded that insufficient evidence has been presented to prove that Claimant violated Safety Rule S-13.4.4.

There is conflicting evidence with regard to Claimant's alleged violation of Safety Rule S-13.5, i.e., dismounting moving equipment. Although acknowledging that the tank car was moving at only three miles per hour, Trainmaster Collins insisted that he could see the car moving and that Claimant alighted the car while it was moving. It is undisputed that, at the time Mr. Collins approached him to discuss what he had seen, Claimant insisted the car "was stopped before he got off." (Car. Ex. 2, p. 40) Claimant testified similarly at the investigative hearing. Claimant's testimony was supported by Engineer Andrade, who testified that the car was stopped when Claimant got off:

- Q: When you came to a stop, did you have a clear view of [Claimant]?
- A: Yes, I had a clear view of him during the whole time we were shoving into the industry.
- Q: And when you came to a stop, was [Claimant] still on the car?
- A: Yes, he was.
- Q: When [Claimant] got off the car, was your reverser centered?
- A: I was set and centered.
- Q: Your independent brake was set, too?
- A: Yes.
- Q: And then [Claimant] got off?
- A: Yes, he did.
- Q: And . . . what happened then?
- A: After we had stopped, [Claimant] got off and was approached by Trainmaster Collins . . .

* * *

- Q: Did [Claimant] get off moving equipment?
- A: Negative.

* * *

Q: Did you see [Claimant] break any BNSF safety rules?

A: No.

Q: Would you take exception if you saw an employee violate a BNSF safety rule?

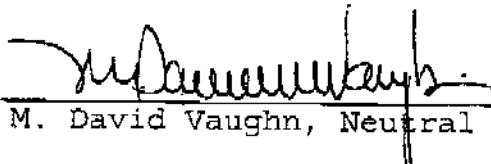
A: Absolutely. [Car. Ex. 2, pp. 26-27

The Carrier has provided some evidence - the written statement and testimony of Trainmaster Collins - to support its charge that Claimant violated Rule S-13.5. However, given the lack of evidence and the contrary testimony from both Claimant and Engineer Andrade, the Board is persuaded that the Carrier did not introduce substantial credible evidence of Claimant's guilt.


Since the case has been determined on the merits, it is not necessary to resolve the Organization's protests that the Carrier failed to meet its obligations to afford Claimant due process.

AWARD: The claim is sustained. The Carrier failed to prove that Claimant violated Safety Rules S-13.4.4 and S-13.5. Claimant's dismissal is rescinded and he is hereby reinstated with payment for all lost wages retroactive to July 26, 2003.

Dated this 4th day of March, 2005.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


R. L. Marceau, Employee Member