

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

NMB Case No. 47
Claim of R.H. Brown
Dismissal:

and

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Request on behalf of California Division Conductor, R.H. Brown for reinstatement to service with pay for all time lost without the deduction of outside earnings beginning January 30, 2006 until returned to service, with all rights, seniority and all Health and Welfare Benefits restored unimpaired and removal of the alleged violation of Rules 1.4, 1.47, Air Brake and Train Handling Rules 100.1, 100.15, 102.10 and 102.14; System Special Instructions Rule 2(A); and Rule S-1.1 of the TY&E Supplement No. 1 in effect April 1, 1998, from his personal record

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 June 14, 2007, at Kansas City, Missouri. 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. The Board makes the following additional findings.

Prior to the dismissal at issue in this proceeding, Claimant was employed by the Carrier as an Engineer. He had 13 years of service, having begun employment in 1993. Claimant had never been injured or filed any action against the Carrier during his employment. However, had received Level S discipline under the Carrier's Policy for Employee Performance Accountability ("PEPA") for failure to comply with a Form A restriction approximately one year prior to the incident at issue.

On November 22, 2005, the date at issue, Claimant was working as a Conductor. Claimant was called to relieve the crew of Z-ALTRICI-20A, whose hours had expired at Marcel. As the crew was operating en route to Bakersfield, the Dispatcher instructed the crew to pick up the consist and crew of helper K-BAKBAKO-22A on the rear of their train and drag the locomotives and crew into Bakersfield. Claimant and his crew made the joint, but, according to the event recorder on the lead locomotive of his consist,

Claimant's crew neither repositioned the End of Train Device ("ETD"), coupled the air hoses between the train and the helper consist nor did they perform an air test or job briefing.

The Carrier convened an investigatory hearing to ascertain Claimant's responsibilities, if any, in connection with the incident. At the hearing, Claimant's Engineer testified that Claimant failed to perform the tasks required of him by the cited rules. Claimant explained that he believed that the ETD was properly set and did not move it, that he was not familiar with an air test for power coupled on the end of the train, since air was already set on the train. He asserted that he was simply trying to comply with instructions. The result of the failures was that there was no braking available on the three locomotives at the end of the train in the event of an emergency, creating the possibility of a serious derailment in the event slack had suddenly run in from such event. That event did not occur; the trip was uneventful.

Following the hearing, the Carrier concluded that Claimant was guilty of violations of GCOR Rules 1.4 (Carrying Out Rules and Reporting Violations) and 1.47 (Duties of Crew Members), Air Brake and Train Handling Rules 100.1 (Compliance with FRA Regulations), 100.15 (Application and Releases Test (Class 3 Air Brake Test), 102.1 (Coupling Brake Pipe Connections) and 102.14 (Emergency Application Capability from Rear of Train), System Special Instructions 2 (A) and TY&E Rule S-1.1 (Job Safety Briefing). The violations were deemed serious under PEPA. Under that Policy, an employee who commits two serious rules violations within a 36 month period is subject to dismissal, and the Carrier dismissed him from service based on his second Level S violation within the period.

The Organization filed a timely claim on Claimant's behalf, which was progressed on the property in the usual manner, but without resolution. The dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burden to prove, by substantial evidence considered on the record as a whole, that Claimant is guilty of the violations charged and, as they constitute his second Level S violation in little more than a year, he was properly dismissed from service. BNSF maintains that Claimant's violations were, in fact, serious and warrant dismissal in consequence thereof.

It contends that the charges were sufficiently clear and that all save GCOR Rule 1.17 pertained to Claimant. The Carrier concedes that relocating the ETD was a responsibility shared with the helper brakeman, but maintains that does not relieve Claimant of his

responsibility to ensure that he had communication with the end of the now-combined train. BNSF argues that the Organization's assertion that the crew's possible request to the Rapid Responder to authorize them to tow the engines dead would have been improper because the Rapid Responder is a non-craft employee cannot prevail because the non-craft status of that resource is not established in the record.

The Carrier rejects the Organization's claim that the crew was forced to break the rules in order to comply with the dispatcher's instructions as unsupported by the record. In specific, the Carrier denies that the dispatcher ever instructed Claimant not to couple the air hoses between the train and the helper consist, to forego the air test or not to reposition the ETD; and it asserts that Claimant never contacted the dispatcher to explain any possible better manner to accomplish the task and was never authorized to engage in actions which would place the crew in danger.

The Carrier asserts that it views dismissal of employees as a last resort, pointing to the early internal reviews conducted prior to disciplinary determinations which it maintains have reduced dismissals by half, making such actions "rare". BNSF urges that the claim be denied and Claimant's dismissal upheld. Citing authority, the Carrier urges that, in the event the claim might be sustained, or sustained in part, and reimbursement ordered for any lost wages, any amounts due should be offset by any outside earnings.

The Organization argues, as an initial matter, that the notice is ambiguous, obscure and indistinct as to what rules Claimant violated, in violation of the Carrier's obligation. UTU asserts that the Carrier failed to meet its burden of proving that Claimant failed to give a job briefing, pointing to Claimant's testimony in the record. Moreover, the Organization maintains that the helper crew could have made an emergency brake application on the units had it been required, and contends that no one saw the helper crew take the brakes out of suppression mode.

The Organization rejects the Carrier's assertion that it was the responsibility of the Conductor to ensure that the helper crew sets up the brakes and places the ETD, asserting that such responsibilities ordinarily rest with that crew, not Claimant and his crew. It maintains that the helper crew was not dead under Hours of Service when Claimant's crew coupled up and asserts that the helper crew could have performed the tasks. UTU asserts that Claimant understood the helper crew to be able to provide application of air should that have become necessary.

UTU asserts that Carrier's suggestion that the crew could call a Rapid Responder to place the helper units dead in tow would be improper because it would violate Article 4 of the 1981 National Crew Consist Agreement. It maintains that the alternative to set up the job safely would have been to bring out a new crew, which would not have met the Dispatcher's objective, which was communicated to the crew, to get the helper units back to Bakersfield on an expedited basis. The Organization argues that the Carrier had a number of options to accomplish the movement in a safe manner, but failed to instruct the crew to undertake such moves; it asserts that Claimant and his crew simply made the best decision to accomplish the work safely and did so.

The Organization urges that the claim be sustained and that Claimant's dismissal be rescinded and that he be reinstated to service, with seniority unimpaired, and made whole for wages and benefits lost, without deduction for outside earnings. It contends that, in any event, the penalty of dismissal was excessive and, citing authority, maintains that it should be reduced.

DISCUSSION AND ANALYSIS: It was the Carrier's burden to prove, by substantial evidence considered on the record as a whole, that Claimant is guilty of the violations charged and, as they constitute his second Level S violation in little more than a year, that he was properly dismissed from service. The fact that Claimant is "subject to dismissal" under PEPA for a second Level S violation does not make his dismissal automatic; however, BNSF maintains that Claimant's violations were, in fact, serious and warrant dismissal in consequence thereof. The Board holds that the Carrier met its burden.

Claimant was the conductor on the train which was directed to tow the helper units and was in charge of its operation. At the point his train coupled onto the helper units for the purpose of towing them to Bakersfield, those units became a part of Claimant's train, and he became responsible to treat them as a part thereof for purposes of compliance with applicable operating and safety rules. The record establishes that those rules made Claimant responsible to relocate the ~~ETP~~ ^{ETP}, connect the air hoses and conduct an air test. Those actions were necessary, as the lack of train brakes on the helper units would be very dangerous in the event of an emergency air application: the unbraked units would continue to move forward as the train would slow, creating the possibility of derailment and jack-knifing.

The Organization raises a number of arguments seeking to deflect responsibility for the violations away from Claimant. None are convincing to the Board. It was Claimant's train - including

the helper units once coupled - and he was responsible for its safe operation. That clearly included all steps necessary to ensure that the units had train air and that the end of the train was both protected and able to communicate with the head end. Claimant cannot duck his responsibility by blaming the helper crew, which went dead under Hours of Service well prior to the end of the trip. Once those units were coupled into Claimant's train, he was responsible.

Claimant cannot blame the Dispatcher, who did not direct Claimant to violate rules and, absent emergency, would not have authority to do so. Claimant remained responsible for the safe operation of his train, and, by leaving many tons of dead, uncontrolled and unprotected weight on the end of his train, he failed to carry out the responsibility. The options the Organization suggests might have been utilized to avoid the unsafe result are impractical and are not, in any event, required.

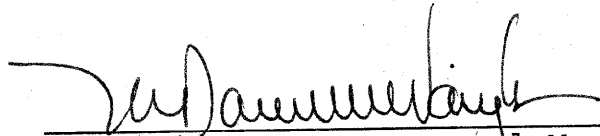
The Organization's procedural challenges are likewise unpersuasive. The charges against Claimant are certainly clear enough to allow his representatives and him to prepare a defense to the charges. There is no showing of prejudice from the way the charges were stated.

Claimant's misconduct was serious. His failure to accept responsibility for his actions is troubling. The Board is not convinced that Claimant's years of service outweigh the circumstances of his second Level 3 violation.


The Board concludes that the penalty of dismissal which was imposed is not, under the circumstances, arbitrary or excessive. The Award so reflects.

AWARD: The Carrier sustained its burdens to prove Claimant guilty of the charges against him and that dismissal was an appropriate penalty. The claim must be, and hereby is, denied.


Issued this 21 day of November, 2007.



M. David Vaughn, Neutral Member



Gene L. Shire, Carrier Member



R. L. Marceau, Employee Member
