

PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE  
RAILWAY COMPANY**

and

**UNITED TRANSPORTATION UNION**

NMB Case No. 56

**Claim of B. C. James**

Dismissal: Improper  
Inspection, False Report

**STATEMENT OF CLAIM:** Request on behalf of California Division Conductor B. C. James that he be returned to service with the BNSF Railway Company and that he be compensated for all time lost until returned to service without the deduction of outside earnings and paid in accordance with Memorandum of Agreement dated October 23, 1984 and also including the time lost while attending the investigation, that all Health and Welfare benefits be reinstated unimpaired and that his personal record be expunged of any mention of his alleged violation of rules 1.1.1, 1.6, 1.47, 6.29.2 of the General Code of Operating rules, in effect April 3, 2005; System Special Instruction No. 11, Item 8D; as amended by Special General Order No. 28, and System Special Instruction No. 11, Item 8E.

**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 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.

Claimant was employed by the Carrier as a Conductor. He had 12 years of service. At the time of the incident at issue, Claimant was in Level S probationary status for personally acknowledged previous rules infractions.

On February 22, 2006, Claimant was assigned as the Conductor on a train S-ALTSC01-03. At 1515 that day, a hot box detector identified a problem journal on axle 123 on the south side of Claimant's train; and the train stopped on Main Line Track 3 near Mile Post 32. As required, Claimant dismounted the train to inspect the problem.

Contrary to the standard procedure, he walked the north side of the train, because the south side of the train was adjacent to Main Line Track 2, on which high speed commuter trains operated, and the right of way was a steep ravine, and then crossed over to the south side. He inspected what was identified on the wheel report as axle 123 and 12 axles in either direction, but reported that he found no problem. He did not count the axles on the train to find the suspect axle 123, as Carrier

procedures require (See System Special Instruction 11, Item 8(D)) and misidentified the car on which the suspect axle was supposedly located.

Claimant then reported the results of his inspection to the Mechanical Desk by radio. When Mechanical asked him the method he used to determine the axles he inspected, and he advised them, truthfully, that he had used the wheel report. Mechanical then advised him of the required side of the train and the required physical count. He expressed concern at walking that side of the train. The dispatcher was then notified to provide warning of oncoming traffic.

Claimant then used the required counting procedure and located a dangerously damaged journal, which was replaced on site by Mechanical forces. Carrier officials took statements from those involved and also found that Claimant lacked a heat indicating crayon or other device to test overheated bearings, as he was required to possess. The axle was within the range of axles which Claimant asserted he had inspected, but later acknowledged he did not inspect, and was smoking, and so should have been obvious had he conducted the inspection he reported.

The hotbox had apparently resulted from improper installation of the wheels.

The Carrier convened a hearing to determine Claimant's responsibility in connection with the improper inspection. At the investigation, the preceding information was adduced. The Carrier found Claimant to have been in violation of several GCOR Rules requiring employees to perform proper inspections.

Claimant had shortly before the incident at issue received Level S discipline under the Carrier's Policy for Employee Performance Accountability ("PEPA"). On the basis of the seriousness of Claimant's violations and his prior Level S, the Carrier dismissed Claimant.

The Organization submitted the instant claim protesting Claimant's dismissal and seeking his reinstatement. It was progressed on the property in the usual manner, but without resolution and was then submitted to this Board for hearing and decision.

**POSITIONS OF THE PARTIES:** The Carrier argues that it proved, by substantial evidence based on the record as a whole, that Claimant violated the Rules with which he was charged and was properly dismissed. It points out that Claimant acknowledged using the wrong inspection procedure and lacking a journal temperature testing device.

The Carrier asserts that Claimant's violations are not excused because he reported the problem to Mechanical, truthfully told Mechanical the procedure he used and then used the proper procedure to find the hot box. It maintains that the Mechanical Desk was merely a safety backup not intended to excuse Claimant's failure to comply with proper

procedures. It points out that, but for a certain amount of luck and Mechanical's alertness, a serious accident might well have occurred.

The Carrier rejects the Organization's arguments, denying that its wording of the notice of investigation reflects prejudgment, denying that Claimant's violations are excused by his report to the Mechanical Desk and denying that Claimant's obligations to conduct a proper inspection were excused or mitigated by the dangers on the south side of the train. It contends that Claimant had several alternatives which would have reduced the danger, none of which he used at his initiative.

The Carrier argues that it views dismissal as a last resort and carefully screens all disciplinary decisions. It asserts that only those dismissals intended to be permanent are approved. BNSF urges that this is such a case and that the claim be denied.

**The Organization** concedes Claimant's mistaken inspection procedures, but argues that the Carrier failed to sustain its burden to prove that he made any false report and it challenges the appropriateness of the penalty of dismissal. It asserts that the evidence establishes that Claimant conducted an inspection of the train and reported his findings to the Mechanical Desk. He responded truthfully when asked the procedure he used and, after permission to move the train was denied, complied with the instructions to physically count the journals. He also truthfully described to the Carrier officials who interviewed him how he had inspected the train.

On that basis, the Organization argues that Claimant did not falsely report inspecting the suspect car. He simply told Mechanical what he had done; and the Desk told him to use a different procedure, which he did, thereby preventing a derailment and damage.

The Organization argues that the Carrier's accusation that Claimant engaged in such conduct indicates prejudgment, which prevented a fair and impartial hearing.

UTU also argues that the Carrier has given ambiguous and contradictory guidance to employees, stressing safety while requiring compliance with other rules which create risks to that safety. It points out that the Carrier had only limited ability to improve safety in the area where Claimant's train had stopped by slowing down trains, and then only after the fact. The Organization asserts that Claimant was trying to be safe in carrying out his job by staying on the north side of his train and crossing over. The Organization points out that even Road Foreman of Engines Ewing was

uncertain in his testimony whether anyone other than conductors are required to carry heat crayons.

UTU denies that Claimant is guilty of any false reporting. It asserts that he honestly reported what happened and, when instructed, performed the inspection as the Mechanical Desk instructed. The Organization urges that the claim be sustained and that Claimant be promptly returned to service with his seniority unimpaired and with all pay and benefits restored, without deduction for outside earnings.

**DISCUSSION AND ANALYSIS:** The Carrier charged Claimant with failing to properly inspect his train following a signal from a hotbox detector, as well as having falsely reported inspecting the car and dismissed him for those reasons. It was the Carrier's burden to prove, by substantial credible evidence on the record as a whole, Claimant's guilt of the rules violations charged and to establish that the penalty of dismissal was not arbitrary or excessive. The Board concludes that the Carrier met its burden with respect to Claimant's guilt of the charges and that the penalty of dismissal was not arbitrary or excessive.

Hotboxes create the potential for serious accidents. Hotbox detectors provide important warnings of such problems in advance of bearing failure and derailment. The Carrier's procedures to inspect trains to verify and report hotboxes are carefully crafted to minimize the chances of an undetected hotbox causing such an accident. The procedure utilized requires employees to walk the side of the train on which the hotbox has been detected and to count the axles to locate the offending journal, rather than to rely on the wheel report, which might be in error (and apparently was in error in the instant situation). The Mechanical Desk is a check on the inspection, but does not relieve the employee of responsibility to conduct a proper and thorough inspection.

Claimant acknowledges that he did not conduct his inspection in accordance with the required procedure. He walked the wrong side of the train and used the wheel report - later found to be incorrect - instead of counting the axles. He reported having inspected a range of axles including and bridging the defective axle, but later conceded he had not found the axle on his first inspection and misidentified the car on which the suspect axle was supposedly located. Had he located the correct axle, it is difficult to believe that he would not have detected it, even without a heat indicating crayon.

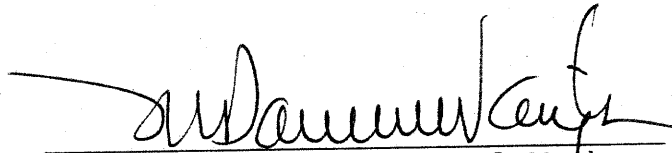
Claimant's concern for safety is appropriate; however, he had a number of alternatives to reduce the danger other than by walking the wrong side of the train, to none of which he availed himself.

The Board has considered the Organization's arguments that Claimant was honest in his answers to questions from the Mechanical Desk; and it


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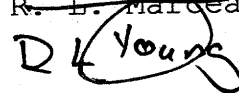
**AWARD:** The Carrier proved by substantial credible evidence that Claimant is guilty of the charges against him and that dismissal was an appropriate penalty. The claim is denied.

Dated this 14 day of JAN, 2007.

  
M. David Vaughn, Neutral Member

  
Gene L. Shire, Carrier Member

  
R. L. Marceau, Employee Member

  
D. Young

