

In the Matter of the Arbitration Between:

BNSF RAILWAY COMPANY

and

NMB Case No. 104

Claim of M. C. Ortiz

Dismissal: Stepping

Between Equipment

Without Protection

UNITED TRANSPORTATION UNION (COAST LINES)

STATEMENT OF CLAIM: Request on behalf of Switchman M. C. Ortiz asking for reinstatement to service and to be payment for all time lost until returned to service; the restoration of any seniority and all benefits and the removal of any mention of this incident 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 August 19, 2010 in 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 (the "Agreement") which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts including Claimant. The Board makes the following additional findings.

Claimant was employed at relevant times as a Switchman assigned to Los Angeles. He had 16 years of service. On August 6, 6, 2009, he was working as a Yard Foreman. That date, Carrier Officers located in the cab of a locomotive approximately 150 feet away observed Claimant walk and place himself between equipment in order to release a handbrake on a car. They did not observe him to have protection when he did so. They concluded that his action was in violation of the Carrier's Life-Critical/Safety Critical Rules, which prohibit such practice. In connection with working around equipment, TYE Safety Rules S-1.2.5 and S13.1.1 and GCOR Rules 1.6 and 1.3.1 apply. S-13.1.1 prohibit employees from placing themselves between equipment where they might be struck if the equipment were to move, without having protection. Claimant later acknowledged that he was aware of these Rules.

The Carrier scheduled an investigation, which was held on September 3, 2009. At that investigation, the Officers described their observations. Although each testified somewhat differently, each described Claimant placing himself between equipment without protection. The Organization challenged whether the Officers were

in a position to observe Claimant. They asserted they were. The Organization also challenged the consistency of their testimony.

Claimant described in detailed testimony what he did leading up to the incident. See Transcript pp.85-108. He did not dispute that he placed himself between cars in order to release the brakes on one. However, he testified that, before placing himself in that position, he conducted a series of job briefings with his crew, had his Helper place a flag and had radio communications to the Engineer to "set and center" before doing so, thereby establishing the required protection. He denied that he had violated the Rule.

Based on the evidence adduced at hearing, by a letter dated October 1, 2009, the Carrier found Claimant to have violated the Rules cited. The dismissal followed a 30 day Level S record suspension and one year of probation issued to Claimant in consequence of an incident which took place on February 25, 2009. In Case No. 103, this Board upheld the discipline which the Organization had challenged. The Carrier dismissed Claimant from service.

The Organization protested the discipline as being without evidentiary support, asserting that the Officers could not have actually seen what they described, based on their location, and that they gave testimony contrary to the sequence of events which occurred and inconsistent with each other. The Carrier denied the claim, which the Organization appealed on the property in the usual manner up to the Carrier's highest designated official, but without resolution. The Organization then invoked arbitration, and the claim was referred to this Board.

POSITIONS OF THE PARTIES: The Carrier argues that it carried its burden of proof, by substantial evidence based on the record as a whole, to demonstrate that Claimant, without protection, improperly placed himself in between equipment while releasing an hand brake, in violation of the cited Rules, which are designed to protect employees from injury in making Life-Critical/Safety Critical decisions. It points out that Claimant acknowledged being aware of the Rules. In light of the potentially serious safety consequences of the violation of the Rule and Claimant's previous Level S record suspension and probation, the Carrier urges that the penalty of dismissal is appropriate and should not be overturned. It urges that the claim be denied.

The Organization argues that the Carrier failed to meet its burden of proof. It maintains that the evidence adduced at hearing makes clear that the Officers who testified against Claimant did

not actually witness the alleged violation because they were too far away. It maintains that the implausibility of their actual observations is underscored by the inconsistencies between the stories they told. Citing authority from this Board, the Organization maintains that discipline cannot stand if the Carrier's witnesses could not have observed what they testified they saw.

UTU maintains that, even if the testimony were accurate, the Board has discretion in dealing with "slight violations", as it contends is the case here in which Claimant was described as being in a "stable position," as the Organization contends the evidence establishes he was. It maintains that no discipline is appropriate and that, in any event, dismissal is arbitrary and excessive. The Organization urges that the claim be sustained.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to prove Claimant's guilt of the violation charged by substantial evidence, considered on the record as a whole. For the reasons which follow, the Board determines that the Carrier failed to provide substantial evidence, considered on the record as a whole, to establish that Claimant violated the Rules with which he was charged and sustains the claim.

The Board's view of the Eight Deadly Decisions and the disciplinary consequences of violating the Rules prohibiting conduct to prevent such decisions is stated in Case No. 103 before this Board and involving the same Claimant and type of violation. That discussion is incorporated herein by reference and will not be repeated.

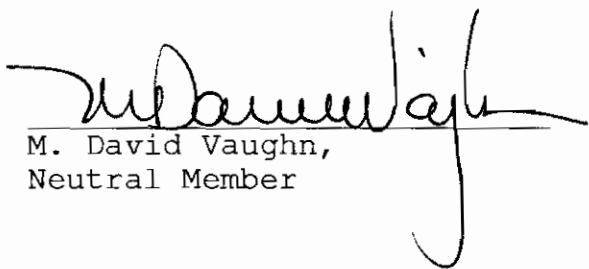
The fact at issue is not whether Claimant stepped between cars on Track 7 to release a hand brake. He acknowledges that he did. The question is whether Claimant had protection when he did so. Carrier witnesses testified that he did not. However, Claimant provided a detailed, plausible and comprehensive description of his work on the date at issue, which establishes his efforts to ensure safety for himself and his crew, including providing protection when he had to step between cars to release a brake. He described a complicated operational situation, with many variables, on the day at issue. He testified that he obtained the required protection before stepping between cars, by conducting required job briefings, confirming that his crew was the only one working the area, by radioing his Engineer to "set and center" the throttle on the engine, protecting it from moving, and by obtaining a confirming honk on the air horn. He also testified that his Engineer put out a red flag to protect the track.

The four Carrier Officers conducting the observation clearly observed Claimant step between cars to activate a hand brake, which constitutes a serious rules violation unless the employee is protected. They each understood that Claimant was not protected when he stepped between the cars. Only Mr. Bowles heard a first radio transmittal from Claimant announcing that he was walking between Tracks 4 and 5, crossing over to track 7, knocking off a brake and coming back down; the other Officers did not. They did not hear or see the other actions Claimant took to provide protections, but assumed that he did not do so. Those assumptions were likely incorrect.

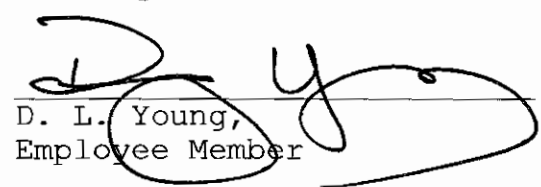
The Board is not convinced that the Officers "fabricated" their testimony or that they necessarily conspired with each other as to what they said. However, the Board is persuaded that the observers did not hear or understand the entire exchange between Claimant and his crew. When the entire period of operations and communications period is considered, the Board is not convinced that "substantial evidence" of Claimant's guilt remains in the record as a whole. The lack of such evidence requires a sustaining Award.

AWARD: The Carrier failed to prove Claimant guilty of violating the Safety Rules with which he was charged. The Claim is sustained. Claimant's dismissal is reversed and shall be expunged from his record. The Carrier shall reinstate Claimant to employment with seniority unimpaired and make him whole for wages and benefits lost. The Carrier shall make this Award effective not later than 30 calendar days from its issuance.

Dated this 4 day of November, 2010.


M. David Vaughn,
Neutral Member


Gene L. Shire,
Carrier Member


D. L. Young,
Employee Member