

PUBLIC LAW BOARD NO. 6721

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

NMB Case No. 28

Claim of H. A. Farris

Dismissal: Violation of
TY&E Rule S-13.2.4,
Failure to Separate Equip-
ment By 50 Feet While
Adjusting Mismatched
Couplers

and

THE UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Request leniency re-instatement to service of Southern California Division Brakeman H. A. Farris for violation of Rule S-13.2.4, Adjusting Mismatched Couplers, TY&E Safety Supplement.

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 March 11, 2006, 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.

On July 20, 2004, Claimant was working as a brakeman performing switching work. He and his crew were being observed by Carrier Officials, looking for rules violations. They observed Claimant give his engineer an "ahead" signal but then advised that he was going between equipment to adjust a mismatched coupler, obtained a "set and center" response and then went between the equipment to make the adjustment.

TY&E Safety Supplement Rule S 13.2.4 requires separation between equipment of 50 feet before an employee may pass between the cars. The Carrier has classified the offense as a Serious Rule Violation, one of the "seven deadly sins". An employee's failure to comply with the separation requirement increases the potential for injury or death in the event the equipment is moved while the employee passes between the cars. It is not disputed that the equipment between which Claimant passed was not separated by that

distance. Carrier officials estimated the distance as 15 feet; Claimant estimated it as 25 feet. No one measured the distance. Carrier officials stopped the movement and discussed the violation.

The Carrier scheduled an investigation to ascertain Claimant's responsibility in connection with the incident. The hearing was held on September 10, 2004. Claimant was found guilty of violating TY&E Safety Supplement Rule S 13.2.4 and was dismissed from all service.

Claimant's hire date is 1970. He had approximately 34 years of service at the time he was dismissed. Claimant had previously been issued two Level S violations, including one for a safety violation three months prior to the incident at issue. He had been trained and retrained on the new safety rules prior to the incident at issue.

The Organization filed the instant claim, which 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 it proved Claimant's violations by substantial evidence. It asserts that Claimant was aware of and responsible to comply with the requirement to maintain at least 50 feet of working room between equipment when working between them. The Carrier points out that both testimony from Carrier officials and Claimant's own admission establishes his violation of the Rule.

The Carrier argues that the offense has properly been designated as a Level S Serious Rule Violation. It is, in the Carrier's view, one of the "Seven Deadly Sins", violation of which creates serious safety risks to employees involved. The Carrier rejects the Organization's argument that Claimant should be retrained, pointing out that he was previously retrained two and one-half years before. The Carrier asserts that, in light of Claimant's two previous Level S violations, the most recent of which occurred only three months prior to the incident at issue, dismissal was the appropriate penalty.

The Carrier maintains that Claimant's personnel record and evident disregard for safety warrant his dismissal, his long service notwithstanding. It urges that the claim be denied.

The Organization argues that Claimant was a 34 year employee of the Carrier who was, according to the evidence, a good and valued employee. It concedes that Claimant may have made a

mistake, although it disputes the precise distance the equipment was separated, but maintains that he should receive another chance. The Organization points out that Claimant is committed to learning and abiding by the rules. The Organization urges that Claimant's long service and willingness to change warrants a sustaining award, returning him to work on a leniency basis.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to prove Claimant's violations of the rules as charged by substantial credible evidence on the record as a whole. For the reasons which follow, the Board is persuaded that the Carrier met its burden to establish that Claimant violated the Rule and was properly assessed the discipline.

The Carrier has clearly made the promulgation and enforcement of safety rules a priority. It is clearly within its rights to have done so. The rule at issue is intended to minimize employee injuries resulting from working between equipment. The Carrier properly treats violations of the rule as serious. The right of Carriers to dismiss employees for a second level S violation within a prescribed period has repeatedly been upheld in arbitration. Thus, Claimant's dismissal was presumptively appropriate.

The Organization's claim is for reinstatement on a leniency basis. The Organization's position concedes, in essence, Claimant's violation and the availability of dismissal as an appropriate penalty, but asserts the existence of mitigating circumstances. The Board notes that, while leniency is generally a response reserved to the carrier, the Coast Lines Agreement specifically provides for the handling of claims seeking leniency reinstatement.

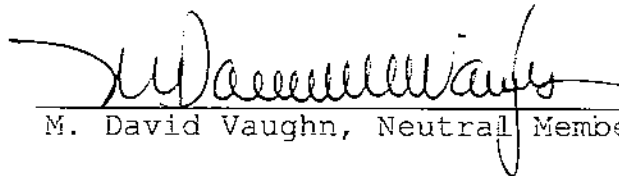
The Board notes that Claimant acknowledged the violation and indicated his willingness to be retrained and to comply fully with the rules if given another opportunity. The Board further notes that Claimant did comply with the remaining aspects of the Rule, obtaining as he did positive assurance from his engineer prior to adjusting the coupler. His violation was not to ensure sufficient distance between the cars before doing so. While the violation was clear, Claimant's conduct in this incident does not evidence a pattern of blatant disregard for all aspects of safety.

Most critically, the Board notes Claimant's 34 years of service to the Carrier. His last three years were marked by three Level S violations, but insofar as the record indicates, his previous 31 years of service were satisfactory. There is no indication that Claimant had previously been dismissed, or threatened with dismissal. There is, therefore, reason to believe

that Claimant's future work can be corrected through the use of corrective discipline. In this case, Claimant's absence shall be deemed a disciplinary suspension of time served and he shall be reinstated to service on a leniency basis

AWARD: The Claim is sustained in part and denied in part. Claimant is guilty of the charges against him. The seriousness of his violation notwithstanding, Claimant's dismissal shall be rescinded and he shall be reinstated to employment on a leniency basis. Claimant's reinstatement shall be on a probationary basis based on his Level S violation. He shall be retrained in safety rules prior to being assigned to service.

Dated this 20 day of June, 2006.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


R. L. Marceau, Employee Member