

PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

NMB Case No. 176

Claim of N. K. Lee

Dismissal - Failure to
File Written Statement
As Instructed

and

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of Southwest Division Switchman N. K. Lee requesting reinstatement to service, restoration of seniority rights unimpaired, restoration of all fringe benefits and pay for any time lost.

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 October 10, 2014, in Washington, D.C. Claimant was present at the hearing.

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 hired on January 19, 1998. On May 10, 2013, he was working as a Foreman on Yard Job Y-PHX1051-10A in Winslow, Arizona. During Claimant's work day the Arizona Corporation Commission - whose responsibilities include rail industry safety - notified Trainmaster Jason Wade of a violation (equipment fouling a connecting track). Trainmaster Wade instructed Claimant and two other employees to shove the equipment clear of the track, after which he instructed the three employees, including Claimant, to provide a written statement regarding the report from the Commission. However, Claimant, after tying up, went home without providing the written statement.

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant in violation of GCOR Rules 1.13 (Reporting and Complying with Instructions), 1.2.7 (Furnishing Information), 1.4 (Carrying Out Rules and Reporting Violations) and 1.6 (Conduct - Indifference to Duty) and dismissed him from service.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property up to and including the highest designated official, but without

resolution. The Organization invoked arbitration, and the dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burdens to prove Claimant's violation of the Rules and the appropriateness of the penalty. It maintains that, as both Trainmaster Wade and Claimant's helper testified, Claimant was clearly instructed to provide a written statement with respect to the violation but did not do so. BNSF contends that, instead, Claimant ignored his responsibility and went home. It asserts, noting that Claimant acknowledged his violation, that his actions represent blatant indifference to duty.

As to the Organization's arguments that Mr. Wade did not provide clear instructions and the incident was simply a misunderstanding, BNSF maintains that they are without merit. It contends that Claimant's testimony makes clear that he understood what was required but simply failed to comply. Although the Carrier concedes that Claimant disputed whether the cars were in the foul (and therefore whether a violation occurred), it points out that he called his Organization representative, who advised him to provide a statement and that he did so the next morning. BNSF asserts that none of this relieves him of his duty to comply with his supervisor's instruction. The Carrier maintains, citing a prior award, that Claimant should have fulfilled the supervisor's instruction and, if he felt the instruction to be unwarranted, later challenged it.

As to the penalty, BNSF argues that, according to the PEPA, an employee stands for dismissal when he or she has two active Level S violations within a three-year period. It points out that, at the time of this incident, Claimant was already on probation as a result of a prior Level S incident less than a year earlier¹ and that, during his career, Claimant has violated the rules some 15 times.

The Carrier urges that the Claim be denied as without merit.

The Organization argues that the Carrier failed to meet its burden to prove Claimant's guilt by substantial evidence. It contends that Mr. Wade, who had been a trainmaster for only six months at the time of the incident, was unsure as to what he needed

¹The Board takes note of the correction to the record which the Carrier made at the October 2014 hearing: Its Submission refers, mistakenly, to a March 2011 waiver for an alleged Level S failure to properly secure cars resulting in derailment. The Parties agreed that the March 2011 violation was not a Level S violation. Thus, at the time of the incident at issue, Claimant had one active Level S violation.

to do to comply with the Arizona Corporation Commission's request.

The Organization asserts that Mr. Wade did not clearly instruct the crew to prepare a written statement - he testified that he asked them to "provide information" so that the Carrier could respond - and, more importantly, he did not instruct the crew to fill prepare a statement prior to tying up and departing the property. It maintains that Claimant complied with the request to "provide information" by giving Mr. Wade a verbal statement as to what he knew about the incident, *i.e.*, that all he knew was that he was requested to shove the car in the clear. The Organization contends that Claimant is being held to have failed to comply with his supervisor's instruction when the Carrier's officer did not provide clear and concise instructions. It asserts that, without proof that Mr. Wade instructed the crew to fill out a statement prior to tying up, Claimant's dismissal cannot stand. The Organization points out that, even if there was an instruction that a statement needed to be completed, Claimant complied with that instruction the next day. It points out, in addition, that no discipline was assessed to the crew engineer.

The Organization urges that the Claim be sustained, that Claimant be reinstated and restored with his seniority unimpaired and that he be made whole for wages and benefits lost.

DISCUSSION AND ANALYSIS: The Board is persuaded that the Carrier met its burden to prove that Claimant violated the rules but concludes that the penalty imposed was excessive.

There is no dispute that the Rules require employees to "comply with instructions from supervisors" and to "cooperate and assist in carrying out" instructions. Similarly, the Rules prohibit employees from "fail[ing] to give all the facts" with respect to incidents and displaying "indifference to duty." The evidence demonstrates that Mr. Wade instructed Claimant and his co-workers to "provide information" so that the Carrier could respond to the Arizona Corporation Commission. Claimant testified that he thought he complied with the instruction by orally telling Mr. Wade that all he know about the situation was that he was requested to shove the car in the clear.

The Organization suggests that Mr. Wade's instructions to Claimant and the crew were unclear and that they did not know that he wanted them to fill out a written statement. However, its position is partially undermined by the fact that, when Claimant contacted his representative, he was directed to provide a written statement, which he did not do until the following morning. Apparently Claimant understood the instruction to provide a written

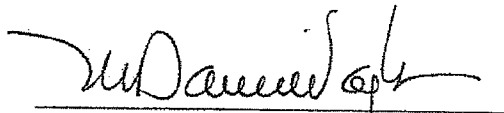
statement because he described the instruction to his Organization representative.

The Board, therefore, is persuaded that Claimant understood Mr. Wade's instructions sufficiently but did not *fully* comply with them; however, he did tell Mr. Wade at the time what he knew and completed a statement the next day. The Board, therefore, is convinced that, given Claimant's partial misunderstanding of what he was expected to do, or at least what he was expected to do, he was not guilty of indifference to duty. In the future, Claimant would be well advised to abide by the labor relations adage "to obey now and grieve later." In case of some confusion or uncertainty as to what is required, Claimant should inquire further to determine exactly what he is being instructed to do.

As to the penalty, it is clear that the Carrier based its determination to dismiss Claimant based on erroneous information, *i.e.*, that he had two active Level S violations. The Carrier concedes that Claimant, in fact, only had one. The Award so reflects.

AWARD: The Claim is sustained in part and denied in part. The Carrier proved that Claimant was guilty of some of the charges. However, it failed to prove that termination was an appropriate penalty. The Carrier shall rescind Claimant's dismissal and return him to service with his seniority intact; however, he shall receive no payments for any time lost. The June 2012 Level S for failure to properly protect movement while shoving cars remained in effect.

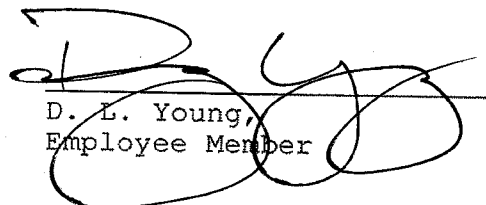
Dated this 5th day of November, 2014.



M. David Vaughn,
Neutral Member



Jason Ringstad,
Carrier Member



D. L. Young,
Employee Member