

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE  
RAILWAY COMPANY**

and

NMB Case No. 23

**Claim of P. L. Donnelly**

30 Day Suspension:

Rules 1.6, Insubordination  
and 1.29, Avoiding Delays

**THE UNITED TRANSPORTATION UNION**

**STATEMENT OF CLAIM:** Request on behalf of Southwest Division Conductor P. L. Donnelly for the removal of the Level S, Actual Thirty-(30) day Suspension and exoneration and removal of all alleged rule violations from his personal record and pay for all time lost from October 1, 2004 and ending October 31, 2004.

**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 10, 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.

Claimant was called to service as a Conductor on Train E-JCCMCM2-80A on October 1, 2004 to report at 7:15 a.m. His assignment required him to be transported from Winslow, Arizona to his train at Joe City in a van, No. 4167, a 2003 Chevrolet, which was operated under contract to the Carrier.

Claimant repeatedly refused to board the van, despite several attempts by Carrier officials to have him do so. He asserted that the van was unsafe and declined to be transported in it for that reason. Claimant was eventually withheld from service and replaced on the crew. His refusal to ride in the van caused a delay in the departure of the train.

It is not disputed that the van in question had been involved in a serious accident in September of 2003 and had been "totaled" and subsequently rebuilt, a fact of which Claimant had been made aware by the contractor's lead driver. The van had returned to service in April of 2004 and had been inspected and certified as safe. It was inspected on October 1, 2004. No exceptions were taken. Claimant had ridden in the van on at least four occasions

subsequent to the van's return to service. Claimant had learned of the van's history several months prior to the incident.

To justify his refusal to ride in the van, Claimant relied on TY&E Safety Supplement S-1.2.10, the "Bill of Rights" relative to employees riding in transport vehicles. That Rule provides, in part, that employees have a right to be transported in safe vehicles and, provides, in Right 13, that ". . . employees are empowered with the right to refuse to be transported in an unsafe vehicle." Those rights make safety a "two way street" and also require that "all employees are responsible to abide by all rules, processes and procedures that govern their working environment."

As a result of this incident, by letter dated October 4, 2004, Claimant was directed to attend a formal investigation concerning possible violation of GCOR Rules 1.4. The Carrier convened an investigation, that date at which the evidence described herein was adduced. Claimant was found guilty of having violated Rules 1.6 (prohibiting insubordination) and 1.29 (avoiding delays); and he was assessed a 30 day Level S disciplinary suspension and was placed on three years probation in consequence of the Level S violation.

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 maintains that Claimant improperly relied on the van passenger's "Bill of Rights" to justify his refusal to ride in the contract van in question. The Carrier concedes that the van had been damaged and repaired, but points out that the van was properly safety-certified and had been diligently maintained, that Claimant had been aware of the van's history for "several months" and he had previously ridden<sup>in</sup> the van on four occasions after its return to service.

The Carrier asserts that Claimant's right to refuse transportation in the exercise of his self-help rights is limited to situations which present an "immediate hazard to health and/or safety. This situation clearly did not rise to such a level, maintains the Carrier. Citing authority, the Carrier maintains that, absent such immediate threat, Claimant was obligated to obey the instructions and meet his obligations, then grieve any perceived violation. Since he did not, he was properly disciplined.

The Carrier argues that the incident was aggravated, as the Carrier cannot tolerate blatant insubordination, particularly when it resulted in Claimant failing to protect his assignment and in the unnecessary delay to a train. It maintains, on that basis, that its action withholding Claimant from service pending the hearing was appropriate.

As to the Organization's protest that the Carrier used a "shotgun" approach to the discipline, citing four rules, it points out that the Carrier found Claimant guilty of having violated two rules. It denies that charging an employee with four rules violations constitutes an impermissible "piling on".

As to the merits of the dispute, the Carrier rejects the Organization's defense that the vehicle was unsafe, thereby excusing him from riding in it. It contends that the Organization's argument constitutes an affirmative defense, which the Organization failed to prove. It points out that the van was unsafe at the time Claimant was instructed to ride in it and contends that there is no proof to the contrary. It maintains that Claimant's feeling like he did not want to ride in the van because he thought it was unsafe is insufficient to justify his insubordination.

The Carrier maintains that it proved Claimant guilty as charged and asserts that the penalty of a 30 day suspension was appropriate. It urges that the claim be denied.

**The Organization** argues that Carrier failed to provide the Claimant with a fair and impartial investigation, evident when it accepted opinion from the Carrier witnesses as to his violations, rather than requiring the adducement of facts, and thus failed to prove the charges against Claimant.

The Organization asserts that Claimant was simply utilizing his right, recognized by the Carrier's own rules, not to place himself in danger by riding in a vehicle which he reasonably believed to be unsafe. Thus, since Claimant was acting in compliance with that rule, UTU asserts that he was not insubordinate and did not improperly cause delay in the operation of his train. Indeed, since Mr. Krzeger gave Claimant a choice of riding in the van or going home, and he elected to take the choice of going home, it maintains that he violated no rule.

The Organization also argues that the Carrier improperly withheld Claimant from service, pending a hearing, in violation of Article 13 (a) of the governing Agreement, which limits such action to aggravated violations or serious collisions. This was neither,

it asserts. Indeed, the Organization points out that the Carrier's rules require employees to take the safe course in situations where the employee is uncertain. In specific, the Organization asserts that Claimant knew that the van had been damaged severely and merely took the safe course in refusing to ride in the van in an unsafe condition.

The Organization protests that the Carrier used a "shotgun" approach to discipline, charging him with four violations, which it contends was abusive and overbroad.

The Organization urges that the claim be sustained, that the suspension be revoked and Claimant made whole for wages and benefits lost and his record cleared.

**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 GCOR Rules 1.6 and 1.29 and was properly assessed the discipline.

The evidence establishes that Claimant was required to be transported to his train in a van provided by the Carrier pursuant to a contract with the van's operator, but that he refused, despite several efforts by the Carrier to obtain his compliance. It is also established that Claimant's refusal to comply with instructions to do so resulted in his being withheld from service and required his being replaced, thereby delaying his train.

The Organization seeks to excuse Claimant's action on the basis that he believed that the van which the Carrier provided and instructed him to ride was unsafe. His general basis for that belief was that the van had been badly wrecked and repaired and that he observed loose trim evidencing the crash. However, he had been aware of the van's history for some months and had ridden in it on several occasions, without protest or incident.

The Carrier accurately describes the standard necessary to justify non-compliance with otherwise legitimate Carrier instructions: that there be an imminent danger which would result from complying.

The evidence does not support Claimant's apparent belief that the van was unsafe. The evidence establishes that it had been inspected on multiple occasions subsequent to its return to service, including the day of the incident, and found to be safe. The observations which Claimant reported - essentially loose trim -

are not sufficient to constitute - or lead Claimant to reasonably conclude - that the van was unsafe to travel in. Indeed, the evidence establishes that Claimant had been aware of the prior crash for several months but had not previously refused to ride in the van and had done so on previous occasions.

The Organization's argument that Claimant did not defy orders because he was simply given a choice and elected to go home rather than ride the van is not persuasive. The evidence establishes that Claimant was instructed to comply and that the choice given to him to go home was simply to tell him he would be withheld him from service if he chose not to comply with the instruction. That was not a choice without disciplinary consequences and Claimant was not entitled to treat it as such.

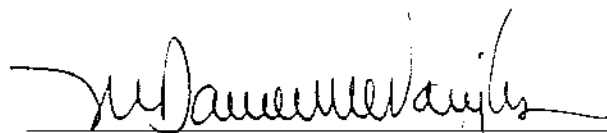
The Organization raises a legitimate concern that the Carrier not use the language of Article 13 (a) to routinely suspend employees pending a hearing. The governing Agreement limits such advance suspensions to aggravated violations and serious collisions. The determination to suspend an employee prior to a finding of guilt must be reviewed on a case by case basis to determine whether the violation is, in fact, aggravated. In this situation, Claimant's actions were willfully defiant and, as the Board has found, without justification. Claimant's refusal to ride in the van left the Carrier without a conductor for its train. There was no way to ensure that Claimant would not commit similar violations in the future. The Carrier was not obligated to endure Claimant's conduct or to risk similar consequences in the future. The Carrier did not violate Article 13 (a) by suspending him pending hearing.

As to the penalty imposed, the Board concludes that Claimant's insubordination was clear, repeated and without justification. His insubordination had a direct, negative effect on Carrier operations. The penalty of a 30-day suspension was appropriate under the circumstances. The violations were properly designated as Level S; and the probationary consequences of Level S violations are set forth in Carrier policy. The Award so reflects.

The evidence contains some indication of a larger problem with the van service provided by the contractor; and Claimant could have protested the service provided under any of several provisions of the Carrier's van passengers "bill of rights". However, absent a reasonable and objective perception of imminent harm, Claimant was not privileged to express his concerns by failing to obey the Carrier's instructions, protect his assignment and avoid delay to his train.

**AWARD:** There is substantial evidence that Claimant is guilty of the charges against him. The penalty of a Level S, 30 day suspension was appropriate. The claim is denied.

Dated this 20 day of June, 2006.

  
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M. David Vaughn, Neutral Member

  
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Gene L. Shire, Carrier Member

  
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R. L. Marceau, Employee Member