

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN AND SANTA FE
RAILWAY COMPANY**

and

NMB Case No. 14
Claim of H.W. Kudsk, Jr.
Dismissal: Going Between
Equipment without Proper
Protection and without
50 Feet of Separation

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of H. W. Kudsk, Jr., for reinstatement to service with payment for all time lost and all seniority rights and benefits unimpaired, account Carrier violated the current Yardmen's Agreement when it imposed the excessive discipline of dismissal against the Claimant as a result of an investigation held on May 1, 2003, without meeting the burden of proving the charges.

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 December 9, 2004, 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 first employed by the Carrier on November 12, 1963. At the time of his dismissal he had 41 years of service. At the time the claim arose, Claimant was assigned to the position of Switchman in Carrier's Richmond, California, terminal.

By letter dated March 10, 2003, Claimant was assessed a level S 60-day record suspension and placed on a three-year probation for going between equipment on January 15, 2003, in a manner that was outside Carrier's "best practices" instructions.¹ By letter dated May 14, 2003, Claimant was assessed a level S 30-day record suspension and placed on a three-year probation for failure to comply with instructions on March 26, 2003.²

¹PLB 6721, Case No. 13.

²Appeal from this discipline, if any, is not at issue in the instant case.

On April 13, 2003, Claimant was operating as switchman of a crew on Yard Job Y-RIC0101-13A. At approximately 0700, Road Foreman of Engines John W. Warner, while driving to work, observed switch engine 101 stopped on the east end of the yard. Foreman Warner stopped his vehicle, put on his safety equipment and boarded the engine where he found Engineer Rob Lindsay. The engine made a number of movements and eventually pulled over a switch, proceeded into a track and stopped short of a coupling because the coupling devices were not aligned. Mr. Warner observed Claimant grab a pin lifter with his left hand to open the knuckle and give Engineer Lindsay an ahead sign by hand, indicating he wanted the locomotive to move forward. Engineer Lindsay did not take the sign initially and Claimant again gave Engineer Lindsay the ahead sign and he proceeded to release the air brakes. At that time, Mr. Warner observed Claimant reach in, step in over the rail with his right foot, and grab the knuckle and/or drawbar in order to adjust the couplers. Mr. Warner stopped the movement, departed the train, and talked to Claimant about his concerns. Claimant was withheld from service at that time and remained out of service until he retired in April 2004.

TY&E Safety Rule S-13.1.1 (Going Between or Working on the End of Rail Equipment) states, in pertinent part:

Going between or working on the end of rail equipment means an employee has placed all or part of his body where it could be struck by rail equipment if it were to move. Operating an uncoupling lever is not considered going between rail equipment.

Before crew members may go between or work on the end of rail equipment they must wait for the movement to stop, slack to adjust, and ensure that all members of the crew have a clear understanding of the work to be performed. Unless another form of protection has been established, the following steps must be taken:

If a locomotive is not coupled to the rail equipment:

1. By radio or hand signal, notify all members of the crew who could affect movement in that track.
2. Crew members who could affect any movement of the equipment in that track must acknowledge that they understand a crew member will be going between or working on the end of rail equipment.

If a locomotive is coupled to the rail equipment:

1. Announce by radio "going between" or give the prescribed hand signal.
2. The crew member at the controls of the locomotive must fully apply the independent brakes, center the reverser, and then acknowledge by radio response "set and centered" if radio is being used or sound whistle signal "one long" if hand signals are being used. If no crew member is at the controls of the locomotive, another form of protection must be . . . established.
3. The brakes must remain applied and the reverser centered until the crew member requesting protection gives a radio or hand signal to move or announces by radio "in the clear".

Prescribed hand signals to indicate "going between":

1. By day, give a stop signal. Raise arm farthest from the rail equipment straight above the head. Point the arm nearest the rail equipment at a 90-degree angle toward the rail equipment.
2. By night give a stop signal. With the arm extended forward parallel to the ground, move the light from left to right.

When stepping from between rail equipment, be alert for movement on adjacent tracks or vehicles moving on the walkway or roadway. [Car. Ex. 4, p. 12]

TY&E Safety Rule S-13.2.4 (Adjusting Mismatched Couplers) states, in pertinent part:

Do not adjust the coupler or knuckle of an approaching engine or car.

Do not attempt manual adjustment of couplers unless they move when you apply limited effort. If drawbar does not move with this limited effort, use an approved alignment device.

A. Adjusting Mismatched Couplers Without Using a Device

To adjust a mismatched coupler without using a device, follow this procedure.

1. Stop the movement.
2. Allow at least 50 feet of working room between the equipment and obtain positive confirmation of protection from train movement in all directions.
3. Wait for the movement to stop completely and for the slack to adjust and settle. (Be alert for unexpected movements from liquids sloshing in tank cars.)
4. Check for other equipment movements on the same track.
5. Adjust the coupler as follows:
 - a. Establish good footing and hand holds to avoid stumbling, and keep fingers and hands clear of pinch points.
 - b. Make sure the knuckle is secured. (Keep your feet clear of the area beneath the knuckle unless the knuckle is secured.)
 - c. Stand to the side of the knuckle and lean against it. Do not lift.

Do not adjust the coupler by kicking it with your foot.

[Car. Ex. 4, p. 11] [Emphasis in original; surrounded by highlighted box.]

By letter dated April 28, 2003 (Car. Ex. 1; Org. Ex. 1), sent UPS Overnight Mail to Claimant's address of record (Car. Ex. 2), and delivered thereto the next day (Car. Ex. 3; Org. Ex. 5), the Carrier convened an investigation to determine whether Claimant had gone in between equipment and locomotives without proper protection and without having 50 feet of separation while adjusting mismatched couplers, in violation of Safety Rules S-13.1.1 and S-13.2.4, which was held on May 1, 2003, at which the evidence described herein was adduced. Claimant was found guilty of the charges brought against him; and he was dismissed from service on May 27, 2003 (Car. Ex. 5; Org. Ex. 2).

The instant claim for Claimant's reinstatement to service with all seniority and rights unimpaired and pay for all time lost beginning on April 13, 2003, until returned to service including payment of Health and Welfare Benefits, was presented in due course³ 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 the record contains substantial evidence of Claimant positioning himself between railroad equipment and stepping between railroad rolling equipment after giving his engineer a signal to proceed, in blatant violation of Carrier's rules. It contends that Road Foreman of Engines Warner personally observed Claimant's actions, which violated Rule S-13.2.4, which prohibits the adjustment of couplers on an approaching engine and requires that there be at least 50 feet of working room between equipment when couplers are adjusted. It maintains that Foreman Warner also personally observed Claimant step between railroad rolling equipment after giving his engineer a signal to proceed, thereby violating Rule S-13.1.1, which obligates employees to wait for equipment to stop before going between equipment and to assure that all crew members have a clear understanding regarding the work to be performed.

As to the Organization's protest that the Carrier failed to properly direct Claimant to attend the investigative hearing and that the entire proceeding should therefore be invalidated, the Carrier contends that it is without merit. It maintains that Claimant was properly directed in the letter dated April 28, 2003, transmitted via UPS Overnight Mail to his address of record and that UPS confirmed delivery of the letter in its "Delivery Notification" to his porch. It contends that it is the responsibility of Claimant to take all necessary measures to ensure that mail properly addressed to him is received by him, but that he failed to do so. The Carrier notes that Claimant's notice of dismissal, dated May 27, 2003, was sent to the same address; and there is no allegation that it was not received. It asserts that Claimant's due process rights were not impinged as a result of his not being present at the investigative hearing. It maintains that he was properly notified of the hearing and the reason he was not present was due to his exercising his right not to attend.

Finally, the Carrier argues that, contrary to the Organization's claim, Claimant was not prejudged and he was not

³By letter dated July 15, 2003, Claimant submitted his own appeal to have the discipline overturned (Car. Ex. 6; Org. Ex. 3). Thereafter, the Organization processed his appeal.

withheld from service as a result. It asserts that the Agreement permits it to withhold employees from service in "aggravated" cases and that, given Claimant's safety record, it was completely appropriate to take him out of service pending the results of the hearing.

As to the penalty imposed, the Carrier argues that, while Claimant's conduct warrants significant discipline under any circumstances, his personal record clearly renders dismissal the appropriate penalty. It points out that, during January 2003, Claimant was assessed a level S record suspension and placed on three years' probation for going between equipment in a manner that was outside its "best practices" instructions and that, just two-and-a-half months later, he was again assessed a level S record suspension and placed on three years' probation for failing to work in a safe manner. It asserts that the instant disciplinary action is completely appropriate and likely saved Claimant's life. The Carrier argues that Claimant made no effort to justify his actions, had no intention of changing his behavior and challenged the Carrier to dismiss him. It cites Mr. Warner's conversation with Claimant, during which Claimant stated that, with 39 years of experience, he "can't change" and the Carrier should "fire" him.

The Carrier 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 issued the harsh and excessive discipline of dismissal to him. It argues that the record shows Claimant was withheld from service on April 13, 2003, but a decision was not issued until May 27, 2003.

The Organization further argues that the Carrier failed to properly notify Claimant of the investigative hearing as required under Article 24(a) of the Agreement and that his failure to attend the hearing was a direct result of his not receiving written notice. It contends that the Carrier provided no documentation that Claimant received the notice letter, that it was, apparently, delivered to "Location: Porch," not to Claimant or any other person at the address. It maintains that the evidence is that Claimant did not find the notice until May 2, 2003. It asserts that, even if Claimant had received the notice on April 29, 2003, he was only given two days to prepare for the investigation and obtain representation. It contends that this violates Article 24(c) of the Agreement which requires the Carrier to notify yardmen "of the charges or of the case to be investigated sufficiently in advance of the time set for investigation to allow reasonable opportunity to secure the presence of necessary witnesses and representatives."

The Organization maintains that, when Claimant did not appear at the investigative hearing, Carrier made no effort to telephone Claimant or an Organization representative to determine why they were not in attendance. It further argues that, during the investigative hearing, the Carrier violated Claimant's due process rights when the Hearing Officer allowed hearsay testimony into the investigation.

Finally, citing authority, the Organization argues that dismissal is an exceedingly harsh discipline for an incident when Carrier had no proof and simply assumed that Claimant had received a notice. The Organization urges that a sustaining Award be issued.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to introduce substantial credible evidence on the record as a whole of Claimant's guilt and to establish that the penalty of dismissal was the appropriate response. For the reasons which follow, the Board is persuaded that the Carrier met its burden to establish that Claimant positioned himself between railroad equipment and stepped between railroad rolling equipment after giving his engineer a signal to proceed, thereby violating Rule S-13.2.4 and Rule 13.1.1 as he was charged, and that he was properly subject to discipline.

The facts of the case are undisputed. Despite the fact that neither Claimant nor the Organization were represented at the investigative hearing, each had an opportunity to challenge the essential facts of the case. However, neither Claimant, in his appeal letter dated July 15, 2003 (Car. Ex. 6; Org. Ex. 3), nor the appeal letter from General Chairman Young, dated September 18, 2003 (Car. Ex. 8), challenged the facts which gave rise to his dismissal. Road Foreman Warner personally observed Claimant give Engineer Lindsay one signal to proceed while he was in the process of opening the knuckle and, his signal having been ignored, saw him give Engineer Lindsay another signal indicating that he wanted the locomotive moved forward. Then, after the engineer released the brakes, Mr. Warner observed Claimant step over the rail, in front of the movement, in order to adjust the coupler. Claimant's actions clearly violated Carrier safety rules and neither Claimant nor the Organization have offered any justification for them.

The Board has considered the Organization's complaints that the Carrier violated Claimant's due process by denying him a fair and impartial investigation. The Board is not persuaded by most of them.

Contrary to the Organization's claim, the Board is not persuaded that Claimant was prejudged and was withheld from service

as a result. The Board takes note that the Agreement permits it to withhold employees from service in "aggravated" cases and that, given Claimant's safety record, it was appropriate to take him out of service pending the results of the investigative hearing. As for the Organization's complaint that, during the investigative hearing, the Carrier violated Claimant's due process rights when the Hearing Officer allowed hearsay testimony into the investigation, the Board recognizes that an investigative hearing is not a court of law and the rules of evidence do not apply. Finally, the Board finds Claimant's suggestion that the Carrier is required to enter all statements and testimony into the investigative record to be legally incorrect. The Carrier needs to enter such evidence as will meet its burden of presenting "substantial" evidence to support its actions. The Hearing Office may not exclude relevant probative evidence submitted by the Organization to establish Claimant's innocence or explanations; however, is not the Carrier's obligation to present evidence or testimony which contradicts its position or is duplicative of other testimony.

With regard to notice to Claimant of the investigative hearing, the Board is persuaded, that the Carrier violated Article 24(c) of the Agreement which required that Claimant be notified of the case to be investigated "sufficiently in advance of the time set for investigation" to allow him to secure witnesses and representation. The evidence demonstrates that, even if he had received the notice letter when it was delivered to his home at 5:35 p.m. on April 29, 2003, he was only given, at most, approximately 40 hours to obtain representation and prepare his defense. This, concludes the Board, clearly is not "sufficiently in advance" of the time set for investigation, that is, 10:00 a.m. on May 1, 2003, to allow Claimant to obtain representation and prepare his defense.. This limited amount of time *might* have been sufficient had the Carrier confirmed that Claimant had received the notice and would be able to prepare his defense in time. In the instant case, however, confirmation of delivery of the notice letter to the "porch" was not even secured until after the investigative hearing was concluded and the Carrier made little effort to locate Claimant, prior to the hearing, when he did not appear.

Under many circumstances Carrier's failure to comply with Article 24(c) would result in any resulting disciplinary action being overturned for failure to provide the employee with due process. Notice of the hearing and the right of Claimant to be present and represented at the hearing are the cornerstones of due process. In the instant case, however, the Board is persuaded that, given the totality of circumstances, the disciplinary action

against Claimant did not result in his being harmed and should not be overturned. The Carrier clearly demonstrated that Claimant violated its rules. Although neither Claimant nor the Organization attended the investigative hearing, each had an opportunity, through the appeal process, to provide Claimant an opportunity to present his side of the story, i.e., to challenge the Carrier's case on the merits, but did not. Indeed, neither the Organization nor Claimant contest the facts adduced by the Carrier with respect to Claimant's conduct. Their appeals were based on procedural violations, and neither disputed the merits of Carrier's case. Given the recent series of rules violations committed by him, the Carrier viewed Claimant as a walking safety hazard which further disciplinary action, short of dismissal, would not change. However, given the more than 40 years of service Claimant rendered to the Carrier, and after withholding him from service for more than a year, the Carrier ultimately permitted Claimant to retire in April 2004. This is a final result which benefits both Carrier and Claimant and should not be tampered with. The Award so reflects.

AWARD: The claim is denied. There is substantial evidence that Claimant is guilty of the charges against him. None of Claimant's retirement benefits shall be negatively impacted by this Award.

Dated this 3rd day of February, 2005.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


R. L. Marceau, Employee Member