

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE  
RAILWAY COMPANY**

and

NMB Case No. 13  
**Claim of H.W. Kudsk, Jr.**  
60-Day Record Suspension:  
Operating Outside of  
Best Practices

**UNITED TRANSPORTATION UNION**

**STATEMENT OF CLAIM:** Claim on behalf of H. W. Kudsk, Jr., for exoneration and removal of the alleged violations, account Carrier violated the current Yardmen's Agreement when it imposed the excessive discipline of a 60-day record suspension and three-year probation period against the Claimant as a result of an investigation held on February 11, 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. He has 41 years of credited service. At the time of this dispute, Claimant was assigned to the position of Engine Foreman in Carrier's Richmond, California, terminal.

On January 15, 2003, Claimant was operating as foreman of a crew on Yard Job Y-RIC1011-15A. At approximately 1300, Road Foreman of Engines Glenn Mirts and Division Trainmaster Terry Sindelar, who were conducting Operations Testing, observed Claimant give Engineer Rob Lindsay an "in the clear" signal while Claimant was still standing between two coupled pieces of equipment. Later on they observed Claimant standing and moving about while riding a moving flat car. They contacted the trainmaster-on-duty and instructed him to stop Claimant's movement; and, once the movement was stopped, they approached Claimant and spoke to him about their concerns.

General Code of Operating Rules (effective April 2, 2000)  
1.1.1 (Maintaining a Safe Course) states, "In case of doubt or uncertainty, take the safe course." Rule 1.1.2 (Alert and Attentive) states:

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

TY&E Safety Supplement No. 1 (effective October 10, 1999) Rule S-13.1.1 (Going Between Cars or Locomotives Coupled to Locomotives) states, in pertinent part:

Before going between or working on the end of cars or locomotives:

\* \* \*

The engineer and other crew members must ensure the equipment being secured will not move until the crew member requesting protection has either reported by radio or hand signal that he/she is no longer between or on the end of the equipment. [Car. Ex. 2, p. 66]

TY&E Safety Rule S-13.1.5 (Riding In or On Moving Equipment) states, in pertinent part:

C. Riding In or On Flat Cars  
When any type of flat car is involved:

\* \* \*

Ride on the deck of an empty flat car, or on a TOFC/COFC flat car with an empty stanchion or table, only if you can:

- Mount the car safely and kneel or sit as near as possible to the center of the car or the empty space.
- Face the direction of the movement.
- Maintain a kneeling or sitting position before the equipment moves and until the equipment stops and the slack is adjusted.

The Carrier convened an investigation to determine whether Claimant had operated outside of best practices, in violation of General Code of Operating Rules 1.1.1, and 1.1.2 and TY&E Safety Rules 13.1.1 and 13.1.5. The hearing was held on February 11, 2003, and the evidence described herein was adduced. Claimant was found guilty of the charges brought against him; and he was assessed a 60-day record suspension from service and a three-year probation period.

The instant claim for Claimant's exoneration and payment for any time lost while attending his investigation, 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 the record contains substantial evidence of Claimant's operating outside of best practices and in blatant violation of Carrier's rules. It contends that two Carrier officers personally witnessed Claimant announce himself by radio to be "in the clear" well before he actually was in the clear, thereby violating TY&E Safety Rule S-13.1.1. It asserts, in addition, that both Carrier officers witnessed Claimant standing, rather than kneeling or sitting, on the flat car, thereby violating TY&E Safety Rule S-13.1.5. It maintains that Claimant admitted he stood up on the flat car while it was in motion in order to get a clear view of the movement.

The Carrier further argues that, despite Claimant's effort to justify his action, there is no acceptable justification for violating safety rules. It contends that, if a car cannot be ridden in a safe and appropriate manner, then it should not be ridden at all. It maintains that its safety rules are in place to protect employees from accidents and that Claimant blatantly violated two of those rules.

The Carrier further argues that, even if the Organization's contention that the Carrier officers should have immediately stopped Claimant's movement is correct, it does not excuse Claimant from his responsibility to follow the rules. It points out that the officers did, eventually stop Claimant's movement and discuss the rules violations with him.

Finally, the Carrier maintains that a 60-day record suspension is the appropriate penalty for Claimant's actions. It contends that, considering the rules violations and Claimant's admission, a 60-day record suspension is neither harsh nor excessive. 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 issued the harsh and unwarranted discipline of a 60-day record suspension to the Claimant. It argues that the record shows that, while Claimant did pass between rail equipment, he was breaking the plane as he gave the "in the clear" signal, pulled the cut of cars out to a switch which he lined and then proceeded to shove the cars into an adjoining track. It maintains that the two Carrier officers were at such a distance - some 300 feet away - and angle askew to the plane - some 20 degrees - that it only appeared that Claimant was still breaking the plane of the cars when he gave the in the clear signal.

The Organization further argues that, even if the rules were violated, it was the duty of the two observing officers to stop the movement at the earliest time possible and coach Claimant in his non-acceptable practice. It contends that the observing officers determined that the infractions were not sufficiently serious to stop the movement immediately. It asserts that the Carrier is more interested in its test to failure ratio than the safety of its employees.

Finally, the Organization argues that Claimant was denied the right to a fair and impartial hearing. It contends that it should have had the opportunity to question the Investigating Officer, Terminal Manager Nathan Murray, but could not because he was Chairman of the Investigative Hearing. It maintains that this demonstrates the Hearing Officer was prejudiced toward Claimant, thus providing a fatal defect to the proceeding. The Organization further asserts that Claimant should have been provided Alternative Handling in lieu of investigation, as he requested when he acknowledged receipt of the notice of investigation (Car. Ex. 2, p. 63), but was not. It points out that the Carrier never looked into whether Claimant qualified for Alternative Handling. 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 a 60-day record suspension was the appropriate response. For the reasons which follow, the Board is persuaded that the Carrier met its burden to establish that Claimant violated General Code of Operating Rules 1.1.1, and 1.1.2 and TY&E Safety Rules 13.1.1 and 13.1.5 as he was charged and that he was properly subject to discipline.

The evidence persuades the Board that Claimant was going in between cars, apparently to relieve himself (Tr., p. 20), and he

said "in the clear" to Mr. Lindsay before he was in fact in the clear. As a result the cuts started moving before he turned around and walked out, in clear violation of TY&E Safety Rule 13.1.1. The Organization's suggestion that the observing officers were too far away to see precisely what Claimant was doing or the angle did not permit them to see that he actually was at or beyond the plane of the cars when he gave the "in the clear" signal is mere conjecture.

Even if the Board were persuaded that Claimant did not violate Rule 13.1.1, it is undisputed that he did not kneel or sit as near as possible to the center of the flat car on which he was riding, as required by paragraph C of TY&E Safety Rule S-13.1.5. Carrier Officer Mirts testified that Claimant "was standing in the middle of the flat car" (Tr., pp. 20-21) and Carrier Officer Sindelar testified that Claimant "was a quarter of the way back from the end of the flat car towards the middle and was standing up walking back and forth. . . . [Claimant] continued to move back and forth walking around on top of the flat car." (Tr., pp. 28-29) Claimant himself admitted he violated Rule S-13.1.5 when he stood on the flat car while it was in motion. "I had to stand up so I could observe - get a clear view into the movement which you need to have with the trucks and people moving around." His explanation does not persuade the Board that he was justified in violating the Rule.

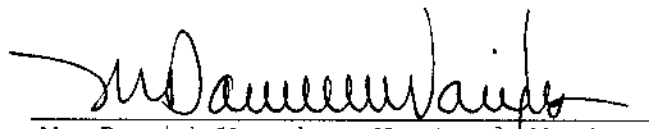
The Board has considered the Organization's complaint that, even if Claimant violated one or both rules, its Officers should have immediately stopped the movement and counseled him. Carrier Officer Mirts admitted that he and Mr. Sindelar should have immediately stopped Claimant's movement. Their failure to do so provides a measure of how serious the Carrier officials believed Claimant's conduct to be; it does not, however, excuse Claimant from his responsibility for compliance with Carrier's safety rules.

The Board has considered the Organization's complaint that the Carrier violated Claimant's due process rights, but concludes that the Organization presented insufficient evidence to support its claim. Hearing Officer Murray had no personal knowledge of the events of January 15, 2003, that were being investigated; and the Organization provided no indication of what relevant evidence was otherwise unavailable because Mr. Murray did not testify. With regard to Alternative Handling, the Board notes that, even if Claimant qualified for Alternative Handling, he had no right to be treated under it.


As to the penalty imposed, the Board concludes that the penalty of a 60-day record suspension and a three-year probation period was appropriate under the circumstances and is certainly not excessive. The Award so reflects.

**AWARD:** The claim is denied. There is substantial evidence that Claimant is guilty of the charges against him.

Dated this 3<sup>rd</sup> day of February, 2005.

  
M. David Vaughn, Neutral Member

  
Gene L. Shire, Carrier Member

  
R. L. Marceau, Employee Member