

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

NMB Case No. 16

Claim of G. J. Beran

45-Day Actual Suspension:
Riding Car While Not in
the Center and Not in a
Kneeling/Sitting Position

and

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of G. J. Beran, for reinstatement to service with payment for all lost wages, account Carrier violated the current Yardmen's Agreement when it imposed the excessive discipline of a 45-day actual suspension against the Claimant as a result of an investigation held on April 24, 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 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 August 12, 1987.¹ At the time of this dispute, Claimant was assigned to the position of Conductor on assignment R-SWE0036-01-C.

On April 1, 2003, Claimant's assignment involved a shove move which was observed and videotaped (Org. Ex. 9) by a System Operations Test Team consisting of Manager of Rules Timothy J. Byram and Manager of Rules Rodney C. Riley. At approximately 6:21 p.m. the Team observed Claimant in a crouched down position, leaning against the bulkhead of a center beam bulkhead flat car. Carrier rules require that certain cars be ridden in particular ways due to the great potential for serious injury. TY&E Safety Supplement No. 1 (effective April 1, 1998) Rule S-13.1.5 (Riding In or On Moving Equipment) states, in pertinent part:

¹Claimant was actually first employed by the Carrier in September 1974. He was dismissed in May 1979 but reinstated in December 1979. He was dismissed again in September 1984 but reinstated in February 1985. He was dismissed again in May 1987 and reinstated in August 1987. He has served continuously since then.

- 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 Test Team took exception to his position on the car, concluding that Claimant was not riding in the center of the car while maintaining a kneeling or sitting position.

The Carrier convened an investigation to determine whether Claimant violated Rule S-13.1.5, which was held on April 24, 2003, at which the evidence described herein was adduced. Claimant was found guilty of the charges brought against him; and he was assessed a 45-day actual suspension from service.

The instant claim for Claimant's exoneration and payment for all time lost 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 establishing Claimant's violation of TY&E Safety Rule S-13.1.5 when he did not ride a bulkhead flat car in the very center of the car and did not maintain a kneeling or sitting position. It contends that the discipline assessed was commensurate with the offense and that no change should be made in its decision.

The Carrier further argues that the videotape of the incident, Mr. Riley's testimony based on his own observation, as well as Claimant's own testimony, demonstrate that Claimant was improperly positioned at the far end of a moving flat car in a crouching position leaning against the bulkhead. It maintains that Rule S-

13.1.5 is clear and unambiguous and requires that, when riding in or on a moving flat car, an employee must maintain a sitting or kneeling position as near as possible to the center of the car facing the direction of movement. While it acknowledges that Claimant was facing the direction of movement, the Carrier asserts that Claimant was crouching, rather than in a kneeling or sitting position, and was at the far end of the flat car, rather than as near as possible to the center of the car. It maintains that Claimant admitted he was not properly positioned in the center of the car and was not in a kneeling or sitting position and that, although he argued that he positioned himself in the safest spot possible on the flat car, Claimant ignored the rule.

The Carrier further argues that Rule S-13.1.5 takes the guesswork away from employees and is the result of both Parties learning from their mistakes. It maintains that the Rule limits employees' discretion to decide the safest place to ride a flat car and that Claimant was allowed to ride it only if he complied with specific requirements. It contends that the Rule puts employees on notice regarding what is acceptable and Claimant simply failed to comply with the Rule.

The Carrier further argues that the Organization's numerous complaints are without merit. It argues that the car involved in the instant case was clearly a flat car and the Local Chairman's insinuations to the contrary are unsupported. It maintains that, for the case to be handled through alternative handling, Claimant needed to admit guilt and request alternative handling, neither of which did he do. The Carrier asserts that Claimant was not prejudiced as a result of being withheld from service because it considered the violation to be serious, that his retention in service pending investigation would have endangered him and that, in any case, the assessed suspension included the time he was withheld from service. It contends that Claimant was not prejudiced by the memorandum dated April 1, 2003 (Car. Ex. 1, pp. 47-48), entitled "Serious Rule Violation," because the System Operations Test Team that prepared the memorandum made no findings and assessed no discipline.

The Carrier further argues that, although the Test Team that observed Claimant's behavior considered his actions a serious rules violation, it did not immediately stop the movement because they thought a sudden braking action might place Claimant in greater danger by possibly throwing him forward. Finally, the Carrier rejects Claimant's allegation that he had ridden similar cars in the same way in the past, had been observed by Carrier officers and was never corrected. It contends that no evidence was offered to support such a contention.

As to the penalty imposed, the Carrier argues that Claimant placed himself in a very dangerous position, in direct violation of a critical safety rule and that he was on notice that such a violation would be dealt with strictly and would be considered a "serious" rules violation. The Carrier points to Claimant's personal record, including numerous suspensions and three dismissals, and maintains that the 45-day actual suspension in the instant case was warranted. It urges that the claim be denied.

The Organization argues that the Carrier failed to prove the charges against Claimant and argues further that it failed to provide the Claimant with a fair and impartial investigation, evident when it issued the harsh and excessive discipline of a 45-day actual suspension to the Claimant.

The Organization further argues that the Carrier showed prejudice and prejudgment, violating Article 13, when it pulled Claimant from service the day he allegedly violated the rules. It notes that the Carrier officers who witnessed Claimant riding the car did not stop the movement and, if what he was doing was so dangerous, they should have immediately stopped the movement when they first saw it. It maintains that the Hearing Officer also showed prejudice in the way he "badgered" Claimant concerning whether he was riding in the "center" of the car (Car. Ex. 1, pp. 31-32) and pressuring him to admit guilt.

Finally, the Organization argues that all objects have more than one center line to them and that Claimant complied with Rule S-13.1.5 when he road the car as near to the latitudinal center of the car as possible, against the bulkhead at the end of the car. 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 45-day actual suspension was the appropriate response. For the reasons which follow, the Board is persuaded that the Carrier failed to meet its burden to establish that Claimant violated Safety Rule S-13.1.5 as he was charged.

Although, at the outset of the investigative hearing, the Organization appeared to dispute whether the center beam bulkhead car involved in the instant case was a flat car as that term is used in TY&E Safety Rule S-13.1.5., it is evident that the Organization no longer disputes that fact before this Board. It is also undisputed that Safety Rule S-13.1.5 requires an employee, who wishes to ride on the deck of an empty flat car, to kneel or sit as near as possible to the center of the car or the empty space while

facing the direction of the movement. The Carrier acknowledges that Claimant was facing the direction of the movement but contends that Claimant violated the safety rule in two obvious and important respects: He *crouched* during the movement, rather than kneeling or sitting, at the *far end* of the flat car, not anywhere near the center of the car. The Board is persuaded, however, that the language of the rule is not nearly so precise and unambiguous as the Carrier would have us believe.

The deck of a typical flat car, including a center beam bulkhead flat car, has a long rectangular shape; it has one longer dimension and one shorter dimension. It is evident that, with respect to Safety Rule S-13.1.5, the Carrier *intended* that the "center" of the flat car be the center of the longer dimension. In other words, if a rectangle 50 feet long and nine feet wide is to be divided into two equal halves, the Carrier would divide it into two 40-foot by nine-foot rectangles. It would therefore expect Claimant, riding a 50-foot long rectangular flat car, to be in the "center" of the car, 25 feet away from the bulkheads and the accompanying cars at either end of the flat car. Consequently, on Exhibit 9 (Car. Ex. 1, p. 53), the Hearing Officer understood the point identified by Claimant as position number two as the "center" of the flat car.

Carrier's assumed position of the "center" of a flat car, however, is too narrow and the language of the Rule does not require what Carrier intended. If a rectangle 50 feet long and nine feet wide is to be divided into two equal halves, it is equally plausible to divide it into two 25-foot by 4½-foot rectangles. Claimant, therefore, could be at the center sill of the flat car, while leaning against the bulkhead at its east end, but as far from the sides of the car as possible. Thus, Claimant reasonably described position number one as the "center" of the flat car. The Board is, therefore, persuaded by the Organization's contention that flat cars have more than one center line to them. Claimant complied with the precise language of Rule S-13.1.5 when he leaned against the center sill of the center beam bulkhead flat car and he complied with its spirit since the bulkhead at the east end of the flat car prevented him from falling off the end of the car and injuring himself.

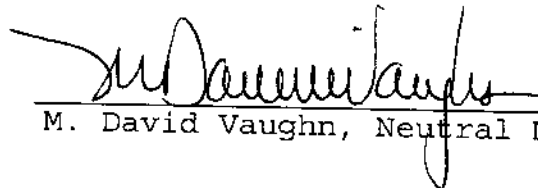
Similarly, with regard to Claimant's body position, the Rule requires that he be kneeling or sitting during the movement, but it does not define either term. The videotape of the movement conclusively shows that Claimant was not moving across the deck of the flat car; he was immobile, having positioned himself at the center sill leaning against the bulkhead and his body low to the deck. Such a position might, in fact, be safer than the position

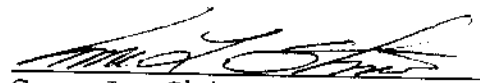
the Carrier suggests was required: kneeling (or sitting) in the open area of the car. While he may not have been precisely in a kneeling or sitting position, Claimant's body position was close enough to kneeling and the language of the rule is sufficiently imprecise to allow for a slight variation. It certainly would not justify imposing a suspension of 45 days. The Award so reflects.

Since the case has been determined on the merits, the Organization's protests that the Carrier failed to meet its obligations to afford Claimant due process and fair hearing will not be considered at this time.

AWARD: The claim is sustained. The Carrier failed to prove that Claimant violated Safety Rule S-13.1.5. Claimant's 45-day actual suspension is rescinded and he shall be paid for all wages lost.

Dated this 2nd day of February, 2005.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


R. L. Marceau, Employee Member