

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE**

**RAILWAY COMPANY**

and

**UNITED TRANSPORTATION UNION**

NMB Case No. 24

**Claim of A. Zaborov**

Passed a Signal

displaying Stop

**STATEMENT OF CLAIM:** Claim for reinstatement on behalf of Conductor A. Zaborov to service with seniority and all other rights unimpaired with pay for all time lost including payment of Health and Welfare Benefits beginning November 6, 2005 and continuing until returned to service and no deductions for outside earnings, account Carrier did not meet their burden of proof.

**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 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 employed by the Carrier as a Trainman commencing on March 31, 1997. At the time of his discharge, he had approximately seven years of service. Claimant had previously accepted responsibility under Alternate Handling for a Class I Rules violation for his involvement in a sideswipe shoving accident, for which he had received a 30 day suspension.

On November 4, 2004, Claimant was assigned as regular Conductor on service between San Diego, CA and Barstow, CA. His train was in CTC territory and had just passed a signal, for which a proceed indication or Dispatcher authorization was required, when it experienced an undesired emergency. The crew reported the emergency to the Dispatcher. Claimant suspected a broken knuckle. He equipped with a radio and cell phone, left the Engineer and Brakeman in the cab, walked the train and discovered that a knuckle had broken, which had separated the train, thereby braking it to a stop in two sections. As Claimant walked the train, he walked by the signal which the front of the train had previously passed.

Claimant instructed the Brakeman to place a knuckle from the head end on the ground next to the engine and then have the

Engineer pull the train ahead to the point where the last car (with the broken coupler on the rear) was adjacent to the knuckle. The Brakeman then replaced the broken knuckle and, when the coupler was repaired, shoved the train backward to make the joint with the other half of the train. He did not remind the Engineer to obtain clearance from the Dispatcher before doing so. While that process was taking place, Claimant continued to walk the train to the end to ascertain whether there existed any additional equipment failures.

The Brakeman and Engineer complied with Claimant's instructions, pulled forward, replaced the knuckle and shoved back to make the joint. Claimant gave his crew no instruction with respect to the signal, either before or after he passed it as he walked the train. As the train moved in reverse to couple up to the other section, with the Brakeman riding the point, and while Claimant was still at the rear of the train, the train passed the red signal, but the Engineer did not obtain permission from the Dispatcher to do so or inform the Dispatcher that they were doing so. The Board notes that the second half of the train never passed the signal the first time and that part of the train was still in the block into which the forward part of the train entered in reverse.

When Claimant returned to the cab after the knuckle had been replaced and the train recoupled, the Engineer advised him that the train "may" have passed the red signal as it backed to make the joint. The Engineer indicated that he would not report the violation and, after discussion, Claimant refused to do so, stating that if the Engineer had violated the rule, it was the Engineer's obligation to report it. Thus, none of the crew reported the violation; and it was not discovered until two days or so later.

Claimant was issued a notice to attend an investigation to determine whether he had violated Rules 1.1, 1.6, 1.47, 6.27, 9.5 and 9.1.15 of the General Code of Operating Rules, Fourth edition, effective April 2, 2000, as supplemented or amended.

General Code of Operating Rules ("GCOR") (effective April 2, 2000) Rule 1.1 states,

Safety is the most important element in performing duties. Obeying the rules is essential to job safety and continues employment.

GCOR 1.6 (Conduct) reads, in part:

Employees must not be: 1. Careless of the safety of themselves or others. 2. Negligent.

GCOR 1.47 (Duties of Trainmen and Engineers) states in part:

The conductor supervises the operation and administration of the train.

GCOR 6.27 (Restricted Speed) states in part:

When required to move at restricted speed, movement must be made at the speed that allows stopping with half range of vision short of: Stop signal.

GCOR 9.5 (Where Stop Must be Made) states in part:

If a train overruns any block signal that requires it to stop, the crew must: Warn other trains at once by radio. Stop the train immediately. Report it to the train dispatcher.

GCOR 9.1.15, (Signal Aspect and Indications) gives examples of each signal indication, including a red signal meaning stop.

The Carrier convened an investigation on November 22, 2004 at which the above evidence was adduced.

Claimant was found guilty of the rule violations. Claimant's personal record was then reviewed. Based on the Carrier's PEPA (Policy for Employee Performance Accountability), Claimant was dismissed by letter dated December 8, 2004, based on the violations and because the violations constituted his second Level S rules violation while still on probation from the previous such violation.

The claim was appealed and progressed in the usual manner, but without resolution; it was submitted to this Board for adjudication.

**POSITIONS OF THE PARTIES:** The Carrier argues that it established substantial evidence to support the rule violations cited in the discipline letter. While noting conflicting testimony among the crew members, it asserts that several facts were undisputed: 1) Claimant was the conductor and in charge of the movement of the train; 2) Claimant's train experienced an undesired emergency at approximately 2140 hours on November 4, 2004; 3) Claimant instructed the brakeman to remain on the train while he inspected the train; 4) Believing the UDE was caused by a broken knuckle, Claimant instructed his brakeman to replace the knuckle if necessary; 5) Claimant walked approximately 40 cars back where he found the broken knuckle and 6) in doing so passed by the red signal between the head end of the train and the bad order car; 7)

Claimant did not inform the brakeman that he would need to obtain permission to pass the red signal on his reverse movement to put the train back together after the knuckle was replaced. Finally Claimant proceeded towards the rear of his train, leaving the brakeman to make the coupling by himself even though Claimant experienced trouble seeing due to darkness.

The Carrier argues that, by failing to clearly communicate with his crew plans for handling the replacement of the broken knuckle and the movement of the train, Claimant violated Rule 1.1. It also maintains that Claimant was completely irresponsible in failing to observe the red signal between the head end of his train and the rear of the train, thereby violating Rule 1.6, Conduct. The Carrier maintains that, by going to further inspect the rear of the train, Claimant also violated Rule 1.47, Conduct. The Carrier further asserts that Claimant's failure to observe the red signal was completely irresponsible, (Rule 1.6.2, Negligence) and that it was lucky no one was injured in the incident.

The Carrier argues a violation of Rule 1.47 occurred when Claimant failed to supervise the move and give clear instructions to his crew on how they were to proceed when they found the broken knuckle while he went to the rear of the train to inspect it for further damage.

The Carrier also claimed that the crew violated Rule 6.27, Restricted speed in that Claimant's train was going too fast to be stopped with "half range of vision short of stop signal".

The Carrier asserts the absolute necessity of reporting red signal violations. It notes that Rule 9.5 states that when a red signal violation occurs, the train is to be stopped, other trains are to be warned and the violation is to be reported to the Dispatcher. The Carrier argues that, as Conductor, Claimant was in charge of the train and it therefore became his responsibility to report the violation, an action he failed to do.

The Carrier asserts that alternative handling was denied for two reasons: first, Claimant had the same Class I offense in the previous 24 months; and second, Claimant was dishonest when he failed to immediately report the red signal violation.

Further, BNSF argues that, because the general committee did not request a conference with the line AVP or his/her designee, the Organization did not follow the steps set forth in the agreement. Thus, the Carrier argues, it cannot be charged with violating the Alternative Handling Agreement.

The Carrier urges that discipline was appropriate and that the penalty of dismissal should not be disturbed.

**The Organization** argues that the Carrier failed to prove the charges against Claimant and, further, asserts that BNSF failed to provide Claimant consideration under the Alternative Handling Agreement.

The Organization points out that, after the train went into emergency, Claimant had the Engineer properly report the emergency, then got on the ground and walked to inspect the train. Approximately 40 cars back, he found a broken knuckle and told the Brakeman to get the correct knuckle, pull the train up to him and "either replace the knuckle or load it up and come back" and he (Claimant) would help him replace it. UTU asserts that the Brakeman replaced the knuckle as instructed, then called the Engineer and told him he was ready to back up to the train.

The Organization points out that the Engineer and Claimant discussed the possibility that the train was further damaged and that Claimant proceeded to walk the rest of the train to check for other possible problems while the head end of the train was shoved back to the rear portion of the train. UTU points out that Claimant was at the rear of the train when the Brakeman, riding the point of the reverse move, allegedly passed the red signal, and could not see it. The Brakeman, by contrast, rode the point and should have seen the signal. Not until Claimant returned to the head of the train was he aware of the possible signal violation.

Pointing to evidence adduced at the hearing, (Tr. 21) the Organization points to communication made with the Dispatcher which gave no indication that the crew has passed a signal. Therefore, argues UTU, Claimant did not have any reason to think that a rule had been violated. UTU argues that because the Brakeman and Engineer violated the rule, it was their responsibility to report the alleged violation. It asserts that to expect Conductors to report alleged rule violations is absurd and that the discipline system would be bogged down as a result of reports of alleged violations.

UTU urges that the claim be sustained, that Claimant be exonerated of all charges and paid for all time lost without the deduction of any outside earnings and be returned to service with all seniority rights unimpaired and with all fringe benefits restored.

**DISCUSSION AND ANALYSIS:** It was the burden of the Carrier to establish Claimant's violation of the rules by substantial credible evidence on the record as a whole and to prove that the penalty of

dismissal was a proper response. For the reasons which follow, the Board is persuaded that the Carrier met its burden to establish that Claimant violated the Rules with which he was charged and that the penalty of dismissal was not arbitrary or excessive.

Failure to observe (obey) a red signal and failure to obtain permission prior to passing such a signal are among the most basic of safety violations rules. A train which passes a red signal without permission may collide with another train already occupying the block or may be struck by another train routed into the block by a Dispatcher who believes the block to be empty.

The evidence clearly establishes that the train operated by Claimant's crew backed through the signal into the block it had just vacated. Whether the Dispatcher was, or should have been, aware that the train had separated and that the back half had never left the previous block is unclear from the record. However, that fact does not negate the absolute responsibility of the crew not to pass a red signal without permission.

All members of a crew are jointly and severally responsible to ensure compliance with safety rules. As Conductor, Claimant was in charge of the train and bore a special responsibility to ensure that the train was operated in compliance with all safety rules. The evidence persuades the Board that Claimant failed to carry out his responsibilities in this regard.

In the first instance, Claimant knew, or should have known that his train was passing a red signal when the emergency occurred. He anticipated the cause of the emergency as a broken knuckle, as evidenced by his instruction to the Brakeman, and knew, or reasonably should have known, that backing the train back through the signal to recouple would be necessary if the train had parted. He also knew, or should have known, that permission from the Dispatcher would be required in order pass the signal in order to make that move. If Claimant forgot the signal, his walk the length of the train caused him to pass right by it. He had the ability to communicate additional instructions to the other two crew members at that time.

Claimant's responsibility for the rules violation is not eliminated just because he was walking the train at the time the signal violation took place. The facts that the Engineer, who actually operated the train during the move, failed to obtain permission to pass the signal and that the Brakeman was riding the point and also should have seen the signal and reported it mitigates, but does not excuse, the seriousness of his violations. It was Claimant's job to anticipate and prevent such a violation. He failed to carry out his responsibilities.

The scene upon Claimant's return to the cab was disorganized. The Engineer stated that he might have passed a red signal without permission, but did not report it. It was the Engineer's direct responsibility to report the violation, as he controlled the train during the move which produced it and was responsible to obtain permission for the move. However, Claimant knew, or should have known upon reflection, that a red signal violation had taken place during the reverse move if no permission was obtained. Moreover, Claimant was in charge of the train and, as the preceding discussion makes clear, was in part responsible for the violation. For both of those reasons, Claimant was also responsible to report the violation, at least if the other employees failed to do so. His failure to carry out that responsibility was also a violation of the rules.

Of the Organization's argument that Claimant's violations should have been referred for Alternate Handling, the Board is not persuaded. In order to be eligible for Alternative Handling, Claimant would have been obligated to accept responsibility for the violations, which he did not do. While there might be question when in the Alternative Handling process such responsibility must be acknowledged, the Policy for Employee Performance Accountability (the "Policy") is clear that employees who commit a second Level S violation while on probation from the first, such as Claimant was, are not eligible for such treatment. The Board concludes that the Carrier did not act improperly when it refused to refer Claimant to Alternative Handling.

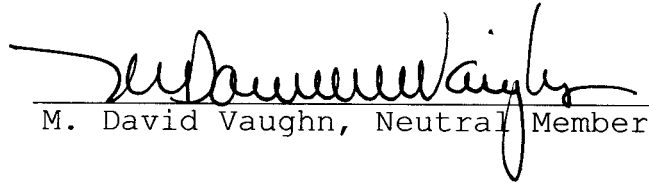
Any instance of passing a stop signal without permission is a serious rules violation. The Board notes that the train backed through the signal only to couple up to its second half, which already occupied the block. The Board also notes that it was the Brakeman's direct and primary obligation to report to the cab that the train was passing a signal and the Engineer's obligation to contact the Dispatcher from the cab to obtain permission to do so. It was also the primary obligation of the Engineer and Brakeman, who directly engaged in the violation, to report it. Those allocations of responsibility serve to mitigate somewhat the nature of Claimant's conduct, but do not excuse him, in light of the fact that he was in charge of and responsible for the safety of the train, was responsible for the crew's compliance with safety rules and was responsible to report violation.

The Policy provides, in part, that a second serious incident within a 36-month review period will subject the employee to dismissal. The Policy does not require dismissal and does not substitute for the Carrier's burden to prove that discipline was the appropriate penalty. Here, Claimant had acknowledged responsibility for a previous, serious rules violation and was on

probation at the time he committed the violations at issue in this proceeding. His conduct in connection with the incident, while well-intentioned, was in violation of a number of rules and in violation of his common-sense responsibilities as Conductor. His failures to act endangered the crew and others, in violation of Claimant's primary obligation to comply with safety rules. Under such circumstances, the penalty imposed by the Carrier cannot be held to have been unreasonable, harsh or excessive. The Award so reflects.

**AWARD:** The Carrier proved Claimant's violations of the rules cited by substantial evidence. The penalty imposed is not unreasonable, harsh or excessive. The claim is denied

Dated this 1<sup>st</sup> day of Mar, 2006.

  
M. David Vaughn, Neutral Member

  
Gene L. Shire, Carrier Member

  
R. L. Marceau, Employee Member