

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

NMB Case No. 25

Claim of K. L. Jenkins

and

Passing a Signal

Dismissal: Displaying Stop

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Request on behalf of Southern California Division Brakeman K. L. Jenkins for reinstatement to service on the BNSF Railway Company with seniority and all other rights unimpaired with pay for all time lost including payment of Health and Welfare Benefits beginning November 6, 2004 and continuing until returned to service and no deductions for outside earnings and the removal of his alleged violations of Rules 1.1, 1.6, 1.47, 6.4, 6.5, 9.5 and 9.1.15 of the General Code of Operating Rules, Fourth edition, effective April 2, 2000 as supplemented or amended.

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 employed by the Carrier as a Brakeman commencing on February 1, 1999. At the time of his discharge, he had approximately five and three quarters years of service. Claimant had previously accepted responsibility under Alternate Handling for a Class I Rules violation.

On November 4, 2004, Claimant was assigned as Brakeman 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. The crew suspected a broken knuckle. The Conductor, equipped with a radio and cell phone, left the Engineer and Claimant 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. The Conductor walked by the signal which the front of the train had previously passed.

Pursuant to instructions from the Conductor, Claimant placed a knuckle from the head end on the ground next to the engine. The Engineer then pulled the train ahead to the point where the last car (with the broken coupler on the rear) was adjacent to the knuckle. Claimant then replaced the broken knuckle and, when the coupler was repaired, the Engineer shoved the train backward to make the joint with the other half of the train. The Engineer did not obtain clearance from the Dispatcher before doing so.

Claimant rode the point as the train shoved back, and while he was on the point, the train passed the red signal. Claimant testified that he did not see the signal in the dark and, apparently, because ^{ATTENTIVE} he was focused elsewhere. Thus, because he did not see the red signal, he did not report passing the signal to the other crew members. 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 crew discussed 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, the Conductor refused to do so, stating that if the Engineer had violated the rule, it was the Engineer's obligation to report it. Claimant had the opportunity to report the red signal violation upon arrival at the end of the run, but did not do so; neither did anyone else on the crew. The violation 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, 6.4, 6.5, 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 6.5 states in part:

When cars or engines are shoved and conditions require, a crew member must take an easily seen position on the leading car or engine or be ahead of the movement, to provide protection.

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. The Organization requested Claimant's reinstatement to service on a leniency basis.

POSITIONS OF THE PARTIES: The Carrier argues that it established Claimant's violations of the Rules as charged by substantial evidence. It asserts that the essential facts are not disputed: Claimant and his crew passed a red signal, without authorization, while Claimant was riding the point protecting the reverse movement. It also asserts that the undisputed evidence is that Claimant failed to observe the signal and, after the violation occurred and Claimant became aware of it, he failed to report the violation.

As to the Organization's assertion that Claimant should have been referred for Alternative Handling, the Carrier argues that

Claimant does not qualify for non-disciplinary handling because he did not accept responsibility for his actions, as evidenced by his failure to report the violation during the two days he had the opportunity to do so. It also argues that Claimant was not eligible for Alternative Handling because he was still on probation from another violation which had been processed without discipline. Finally, the Carrier points out that the Organization did not utilize the Alternative Handling local dispute resolution mechanism; and it asserts, therefore, that the Organization has waived any argument as to Claimant's entitlement to the procedure.

The Carrier points out that the Organization seeks Claimant's reinstatement on a leniency basis. It maintains that dismissal was appropriate and consistent with its Policy for Employee Performance Accountability ("PEPA"), in light of the nature and seriousness of Claimant's offense and his probationary status at the time which resulted from a previous Level S violation. The Carrier contends that it utilizes dismissal only in instances of very serious violations, but it contends that the instant violations represent a situation where dismissal is appropriate.

The Carrier, citing authorities, asserts that it has sole discretion in granting leniency reinstatements; and it maintains that it did not abuse its discretion when it declined to grant such reinstatement in this situation. The Carrier urges that the claim be denied.

The Organization argues that the Carrier failed to prove the charges against Claimant. It asserts that Claimant followed the Conductor's instructions and, after doing so, participated in discussions with the other crew members as to the possibility that the train had passed a stop signal. However, maintains the Organization, Claimant reasonably believed that it was the responsibility of the Engineer and/or Conductor to report the violation and that he learned only later that they had not, in response to which he accepted responsibility and punishment. The Organization denies any dishonesty on Claimant's part.

The Organization argues that the Carrier improperly failed to refer Claimant for processing under the Alternative Handling Agreement and, in keeping with that procedure, that the claim be sustained in part and that he be returned to service on a leniency basis.

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 proper. 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.

The Board finds the essential and undisputed facts to establish that Claimant and his crew passed a red signal, without authorization, while Claimant was riding the point protecting the reverse movement. Claimant failed to observe the signal and, after the violation occurred and Claimant became aware of it, and even after discussion whether either of the other crew members were going to report the apparent violation, he failed to report the violation.

It is well established that passing a red signal is among the most serious of safety violations. A train which passes a red signal and enters a block 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. Claimant, who was riding the point of the reverse move, was responsible to protect the move, including observing and reporting the red signal. The evidence persuades the Board that Claimant failed to carry out his responsibilities in this regard and thereby violated the Rules cited.

Claimant was in the cab when the train passed the signal in the first instance and is charged to have been aware of the signal. When the cause of the emergency was ascertained, Claimant knew, or should have known that backing the train back through the signal to recouple would be necessary if the train had parted. Even if he had not recalled passing the signal, he was riding the point and in a position to observe the signal as the train approached it in reverse. He had the obligation to be alert to the signal and to communicate the approaching signal to the other two crew members at that time.

Claimant's responsibility for the rules violation is not eliminated just because the Conductor was in charge of the train or because the Engineer was actually operating the train during the move. Claimant was riding the point and also should have seen the signal and reported it. He failed to carry out his responsibilities. Moreover, the members of a crew are jointly and severally responsible to ensure compliance with safety rules.

The evidence establishes that when Claimant returned to the cab, the crew discussed the situation. The remaining crew members, who were both responsible to report the violation, acknowledged the possibility that the train might have passed a red signal without permission, but indicated that they would not report it. However, Claimant knew, or should have known upon reflection, that a red signal violation had taken place during the reverse move and that no permission was obtained. Moreover, Claimant was riding the point and, as the preceding discussion makes clear, was directly 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 by his failure to report the violation, 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.

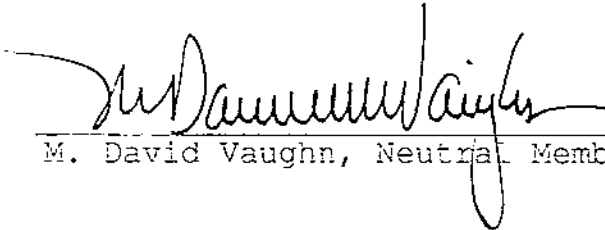
Any instance of passing a stop signal without permission is a serious rules violation. The Board notes that the train backed through the signal only to couple up to its second half, which already occupied the block. The Board also notes that it was the Claimant's direct and primary obligation to report to the cab that the train was passing a signal and that the Engineer's obligation to contact the Dispatcher from the cab to obtain permission to do so. To be sure, it was the primary obligation of the Engineer, who had been operating the train at the time of the violation, and the Conductor, who was in charge of the train, to report the violation. 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 on the point and was responsible to observe and report signals.

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 was in violation of the Rules cited. Claimant's failures to observe and report the signal resulted in the violation and 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 Carrier did not violate the Alternative Handling Agreement when it failed to afford him access to Alternative Handling. The penalty of Dismissal is not unreasonable, harsh or excessive. The claim is denied.

Dated this 20 day of June, 2006.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


R. L. Marceau, Employee Member