

PUBLIC LAW BOARD 6721

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

and

UNITED TRANSPORTATION UNION

NMB Case No. 41

Claim of R. Rodriguez

Dismissal: Going Between or
Working on End of Equipment,
Riding in or on Equipment

STATEMENT OF CLAIM: Request on behalf of California Division Brakeman R. Rodriguez [for reinstatement] to service on the BNSF Railway Company and that he be compensated for all time lost without the deduction of outside earnings including the time lost while attending the investigation, also including all Health and Welfare Benefits unimpaired and that his personal record be expunged for any mention of his alleged violation of Rules S-13.1.1, S 13.1.5, and 1.6 (1&2) of the General Code of Operating Rules in effect April 3, 2005.

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 June 14, 2007, at Kansas City, Missouri. 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 March 27, 1995. At the time of his discharge, he had approximately 11 years of service.

On August 4, 2005, Claimant was working as a Brakeman at Kings Park, California in road switcher service on Train R-CAL0316-041. His crew was switching a cut of cars. Two Carrier officers were observing and videotaping operations at the facility. They observed Claimant walk to the rear of a cut of cars, pull the uncoupling lever on a car, open the knuckles by hand and walk to the opposite side of the cut.

The Carrier officers approached Claimant. As they did so, they observed him riding on the side of a car as the cut was being shoved downgrade by the engine. Before the officers contacted Claimant, they observed him move to the end platform of the car and then back to the side. He was not observed to have signaled that he was going behind the cars and did not receive a signal of set and centered, which would have confirmed that the equipment would not move while he crossed behind the cars. The officers approached and questioned Claimant about his movement to the end of the car; he advised them that he had done so to tie a handbrake.

Claimant's observed conduct was in violation of two Carrier-specified safety violations within the "seven deadly sins" constituting grounds for dismissal.

By a notice dated August 4, 2005, Claimant was issued a notice to attend an investigation to determine whether he had violated Rules S-13.1.1, S 13.1.5, which prohibit him from going between or working on the end of equipment and/or from riding in or on equipment and/or of Rule 1.6, which specifies that employees must not be careless of the safety of themselves or others or negligent, of the General Code of Operating Rules ("GCOR"). The investigation was twice postponed and was finally convened on September 7, 2005. It continued and concluded on September 13, 2005. Based on the evidence adduced therein, as described above, the Carrier found Claimant guilty of having violated the Rules cited.

The Carrier represented that Claimant's personal record was then reviewed. This was Claimant's second level S suspension in less than three months, the previous violation having been "making threatening statements to Company officials", a violation for which Claimant received a 30 day suspension and three years probation.

Under the Carrier's Policy for Employee Performance Accountability ("PEPA"), two Level S violations within in a three year period constitute grounds for dismissal. Based on the provisions of PEPA, Claimant was dismissed from all service, based on the violations and because the violations constituted his second Level S rules violation within three months.

The Organization filed a timely protest of the Carrier's action, which the Carrier denied. The denial was appealed and the claim 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 presented substantial evidence, on the record as a whole, that Claimant violated the Rules as charged. It maintains that it likewise proved that dismissal was the appropriate penalty and was not arbitrary or excessive. The Carrier points out that the videotape shows Claimant riding the rear of the train, in violation of the Rule cited, that Claimant admitted having crossed from one side of the cut to the other during the shove and that Claimant also acknowledged that he did not know the parameters of the Rules, but acknowledged his noncompliance with Rule S-13.1.5.

The Carrier maintains that the evidence establishes Claimant's blatant violation of the safety requirements with which he was obligated to comply. It points out that the Organization acknowledged Claimant's violations, but quarreled with the failure of the officers to stop the movement, rather than wait and permit the second violation to take place. Indeed, argues the Carrier, had Claimant not violated the Rules in the first incident, there would be no question as to the handling of the second.

As to the Organization's contention that the investigation was procedurally deficient because the original notice was not received by any participant and was unilaterally postponed by the Carrier, the Carrier responds, in the first instance, that the objection was not raised until after the Organization's appeal, rendering it untimely. The Carrier argues, in any event, that it proceeded in good faith and that the UPS error which resulted in non-receipt of the notice was beyond its control. It points out that the investigation was rescheduled and then postponed at the request of the Organization; and after it convened, the investigation was postponed again, also at the request of the Organization. The Carrier argues that the investigation was not improperly scheduled and asserts, in any event, that all persons involved received notice of the hearing and attended when it was held.

The Carrier argues that both the seriousness of Claimant's violations and his previous violations support the penalty of dismissal which was imposed. It points out that this was Claimant's second level S suspension in less than three months, the previous violation having been "making threatening statements to Company officials", a Level S violation for which Claimant received, as indicated, a 30 day suspension and three years probation. It points out that, under PEPA, two Level S violations within in a three year period grounds for dismissal. Certainly, it contends, two such violations within three months is sufficient to sustain such a penalty.

The Carrier urges, for these reasons, that the claim be denied. In the event that the claim were to be sustained, the Carrier urges that any lost wages be offset by the amount of any outside earnings during the period of time Claimant was dismissed.

The Organization argues, as an initial matter, that Claimant was denied a fair hearing because the evidence is that he did not receive the notice any time prior to five minutes before the hearing. It points out that Claimant properly protested the failure at the time and asserts that the Carrier's actions precluded Claimant and the Organization from properly defending against the charges.

The Organization protests that the Carrier officials involved in the observations failed to intervene after having observed the first alleged violation and, instead, permitted Claimant to continue to work - and to commit another alleged violation - until after the switching was complete, when they pulled him over to talk. It contends that their slow intervention reflects either that Claimant had not deliberately and flagrantly violated the rules or that they were more concerned with production - and discipline - than safety. It maintains that the handling of the incident by officers points toward a need to retrain Claimant, rather than to fire him.

The Organization argues that Mr. Herndon's testimony that he had to confirm with his fellow officer what he had seen either thought that the violations were incidental or that the testimony lacks credibility and asserts that the officers were simply trying to trap Claimant into additional violations, rather than to ensure safety.

The Organization also argues that the DVD evidence submitted by the Carrier in support of the officers' observations was insufficient to prove either what happened or who engaged in the conduct. It asserts that the tape fails for failure to establish its authenticity. UTU points out that Claimant described his clothing differently than on the tape, denied he was the person on the tape and denied recognizing the voice, testimony which the Organization asserts the Carrier never disputed.

Citing authorities, the Organization urges that the claim be sustained, Claimant's dismissal rescinded and that he be reinstated to service and made whole for all time lost, without deduction of outside earnings, including the time he spent attending the investigation and including health and welfare benefits and that his records be expunged of any reference to his alleged violations.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to establish Claimant's violations of the rules by substantial credible evidence on the record as a whole and also 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 but is not convinced that the penalty of dismissal was warranted.

In the first instance, it is clear that the Carrier attempted to proceed with the investigation on September 7, 2005, without having furnished Claimant and the Organization a copy of the charges until five minutes prior to the convening of the investigation. That was a violation of the Carrier's obligation to provide due process and a fair hearing - which clearly includes a right to reasonable notice and opportunity to review the charges and prepare a defense. The Carrier effectively cured the procedural defect by recessing the hearing prior to taking evidence and allowing the Organization and Claimant a week to prepare for the hearing.

The Carrier's eagerness to proceed with the investigation in the absence of having provided anything approaching a reasonable amount of time to prepare suggests something less than a fair and objective hearing process, including the possibility of prejudgment. For the reasons which follow, it is not necessary to base the outcome of the dispute on a conclusion which might follow from that suggestion.

The Board finds the essential and undisputed facts to establish that Claimant passed between cars without having complied with the safety requirements governing such actions. He admitted the violation and further admitted that he was not fully aware of the rules, despite his obligation to be familiar with and to comply with safety rules. Claimant's conduct warranted discipline, as it was his obligation to be aware of the safety rules and to comply with them.

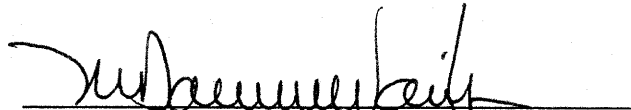
The Carrier's identification of particular types of safety violations as "deadly sins" is a reasonable exercise of its right to operate the railroad. However, while any violation of safety rules is potentially serious, there are obviously degrees of seriousness and willfulness in any violation. The Carrier's experienced officers who observed such conduct by Claimant were in a good position to evaluate the seriousness of particular conduct and must be held to have taken into account the nature and seriousness of violations in the manner in which they respond to the conduct they observe.


officers observed the conduct which formed the basis of the charges against Claimant and allowed the conduct to continue for a period of time, despite their ability to interrupt the conduct through radio transmissions or personal intervention. They failed to do so. It follows that the observers could not have believed Claimant's conduct to constitute an immediate threat to safety. If it were otherwise, the officers' conduct could only be justified on the basis that they allowing serious violations to occur in order to set employees up for discipline. The Board declines to assume that motivation on the part of the Carrier's officers.


The seriousness with which the Carrier viewed Claimant's conduct must be reflected in the penalty to be assessed. Where the Carrier allowed the conduct to continue, rather than to intervene to interrupt the conduct, a conclusion must be drawn that the conduct represented less than an imminent threat to safety. If the officers had intervened during the course of Claimant's first violation, the second violation would not have occurred. The Board's conclusion as to the seriousness of Claimant's conduct and the penalty appropriate is reflected in the Award.

AWARD: The claim is sustained in part and denied in part. The Carrier proved by substantial evidence Claimant's violations of the rules cited. Discipline was appropriate. However, for the reasons cited in the Opinion and based on Claimant's 11 years of service, the penalty of dismissal was arbitrary and excessive. Claimant's dismissal shall be rescinded, and he shall be returned to service and made whole for wages and benefits lost, less an unpaid disciplinary suspension of 60 calendar days. Claimant's entitlement to be made whole for wages and benefits, less the period of his suspension, shall not be subject to offset for interim earnings. Claimant's records shall be amended so to reflect.

Dated this 21 day of January, 2008.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


D. L. Young, Employee Member