

PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

NMB Case No. 48
Claim of S. T. Peoples
Dismissal:

and

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Request on behalf of California Division Foreman, S. T. Peoples for reinstatement to service with pay for time lost without the deduction of outside earnings, with all rights, seniority and all Health and Welfare Benefits restored unimpaired and removal of the alleged violation of rule 1.1.2, and 6.5 of the General Code of Operating Rules, Fifth Edition effective April 3, 2005 as supplemented or amended from his personal record.

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 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. The Board makes the following additional findings.

Prior to the dismissal at issue in this proceeding, Claimant was employed by the Carrier as a Trainman. He had approximately four and one-half years of service, having begun employment in 2002. In October of 2005, Claimant had received Level S discipline under the Carrier's Policy for Employee Performance Accountability ("PEPA") for failure to report a derailment and for re-railing the cars without assistance, resulting in damage. He waived a claim, accepted a 30 day suspension and was placed on three years probation.

On December 14, 2005, Claimant was assigned as a Foreman at Watson Yard. Claimant was kicking cars on the lead. His was the only crew working the Yard at the time. Claimant's crew aligned switches, picked up power and performed switching in other parts of the yard. On their return to that part of the Yard, they released a car intended for track 1233, on which other cars had been spotted, Claimant and his Engineer testified that they had previously aligned the switch for track 1233, before performing switching in other parts of the Yard. Claimant released the car without first checking the alignment of the switch, which Claimant

believed was still set for track 1233. The switch was, in fact, set for track 1234 and when the car was kicked, it rolled down that track, which was clear, to the far end of the yard and over a derail, causing damage and requiring rerailling. At relevant times, Claimant's helper was not in a position to observe the alignment of the switch. The crew discovered the derailment only after kicking a second car down the same track and having to chase it down.

Both Claimant and his Engineer testified that they had lined the switch properly for the move and were at a loss to explain how it might have been set for the wrong track.

The Carrier convened an investigatory hearing to ascertain Claimant's responsibility, if any, in connection with the incident. Following the hearing, the Carrier found Claimant to have violated of GCOR Rules 1.1.2 (which requires, in part, that employees to be alert and attentive in performing their duties) and 6.5 (handling cars ahead of engine, which was changed effective October 30, 2005 to require employees to protect moves by being in position to provide visual protection, which effectively means that Claimant was required to ride the point of the move).

The violation was Claimant's second Level S violation under PEPA. Under that Policy, an employee who commits two serious rules violations within a 36 month period is subject to dismissal, and the Carrier dismissed him from service based on his second Level S violation within the period.

The Organization filed a timely claim on Claimant's behalf, which was progressed on the property in the usual manner, but without resolution. The dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burden to prove, by substantial evidence considered on the record as a whole, that Claimant is guilty of the violations charged and, as they constitute his second Level S violation in little more than a ~~year~~ year, he was properly dismissed from service. It points out that Claimant admitted that he, and not the Helper, was responsible to ensure the proper alignment of switches in connection with the moves. BNSF maintains that Claimant's violation were, in fact, serious and warrants his dismissal under the Policy.

BNSF denies that it violated Article 24 (c) of the governing agreement by charging Claimant with the wrong rules. It points to the notice of hearing, which clearly describes the incident at

issue and cites possible violation of the rules which he was ultimately found to have violated. It contends that the charges were sufficiently clear to enable Claimant and the Organization to defend them, as is required by the Article.

The Carrier disputes the Organization's assertion that the charge of violation of GCOR Rule 6.5 was improper, pointing out that the Rule was changed prior to the date of the incident and asserting that Claimant was responsible for complying with the Rule. It asserts that, had Claimant been visually protecting the move, the erroneous alignment and resulting derailment would not have occurred.

The Carrier asserts that, under PEPA, dismissal is appropriate for this, Claimant's second Level S violation in little more than a month. BNSF urges that the claim be denied and Claimant's dismissal upheld. Citing authority, the Carrier urges that, in the event the claim might be sustained, or sustained in part, and reimbursement ordered for any lost wages, any amounts due should be offset by any outside earnings.

The Organization does not dispute that the accident occurred, but argues that the Carrier failed to prove Claimant's culpability. It points to the testimony of both Claimant and his Engineer that the switch was properly lined when the crew was earlier working the tracks and speculates that a trespasser might have realigned the switch, there being no other explanation.

The Organization concedes that the Rule, then recently changed, required Claimant to protect the move; but it asserts that Claimant's alignment of the route was sufficient to satisfy that requirement. It maintains that the lack of contrary testimony leaves un rebutted the crew's assertion that the route was properly lined. UTU argues that the Carrier's conclusion that Claimant was nevertheless responsible indicates prejudgment and requires invalidation of the action. It points out that, because there were cars on Track 1233 and that was the track onto which the switch was aligned, Claimant felt comfortable letting it go.

The Organization also argues that GCOR Rule 6.5 is inapplicable because it does not relate to shoving cars into a yard track. It asserts that, in yards where only a single crew is working, it is common practice to line switches for an intended route and later kick cars for the intended track without going back to recheck the alignment. The alternative is time-consuming and impractical, maintains UTU.

The Organization urges that the claim be sustained for lack of proof of violation of the Rules charged and that Claimant's dismissal be rescinded and that he be reinstated to service, with seniority unimpaired, and made whole for wages and benefits lost, without deduction for outside earnings. It contends that, in any event, the penalty of dismissal was excessive and, citing authority, maintains that it should be reduced.

DISCUSSION AND ANALYSIS: The Carrier's burden to prove, by substantial evidence considered on the record as a whole, that Claimant is guilty of the violations charged and, as the violation is his second Level S in little more than a month, that he was properly dismissed from service. The fact that Claimant is "subject to dismissal" under PEPA for a second Level S violation does not make his dismissal automatic; however, BNSF maintains that Claimant's violations were, in fact, serious and warrant dismissal. For reasons which follow, the Board holds that the Carrier met its burden to establish Claimant's guilt but that the penalty of dismissal is excessive.

As to the proof of Claimant's guilt, the derailment speaks for itself. If the switch had been properly lined, the car would have rolled down track 1233 and into other cars, stopping its movement. It is not disputed that the car was instead routed onto track 1234, the wrong track, and that the misrouting resulted in its derailment. The only conclusion to be drawn is that the switch was improperly lined.

Claimant's crew was the only crew operating in the Yard during the time between the crew's earlier alignment of the route and its return when it kicked the car which derailed. There is no evidence that any other employees were in the vicinity and no evidence that any trespasser was in the Yard, let alone that such individuals would have either opportunity or motive to realign that particular switch. The Board holds that the derailment is sufficient evidence of the misalignment of the switches and that there is no evidence that anyone but Claimant was responsible for the proper alignment of the route.

GCOR Rule 6.5 governs the move at issue. It requires, in part, that cars must not be shoved until the engineer knows who is protecting the movement and that visual protection must be provided. Claimant was responsible to provide visual protection for the move. That responsibility is not eliminated because the Rule was recently revised or because compliance with the Rule would be time-consuming. It is clear that, had Claimant complied with the

Rule, the derailment would have been avoided. Under such circumstances, the Carrier properly disciplined Claimant.

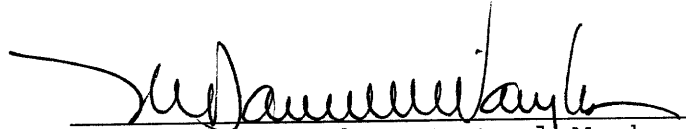
The Organization's procedural challenges to the discipline are unpersuasive. The charges against Claimant are certainly clear enough to allow his representatives and him to prepare a defense to the charges and the Rule is applicable to the situation presented. There is no showing of prejudice from the way the charges were stated.

Claimant's actions violated a basic operating rule and caused a derailment. His actions followed an earlier Level S. There are mitigating circumstances in that the Rule had recently been revised. The crew believed it had properly lined the switch; Claimant's mistake was failing to check the alignment and protect the move.

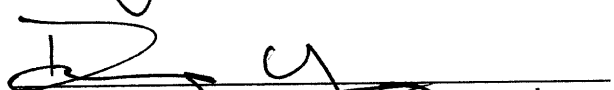
Claimant had no discipline prior to the first Level S shortly before this incident. The Board is not convinced that Claimant's actions warrant his dismissal and reduces the penalty to a suspension of time served, reinstating him, but without pay or benefits for the period of his absence. The Award so reflects.

AWARD: The Carrier sustained its burdens to prove Claimant guilty of the charges against him. The penalty of dismissal is excessive under the circumstances. Claimant's dismissal shall be rescinded and the penalty reduced to a suspension of time served. Claimant's reinstatement shall be without restoration of pay or benefits for the period of his absence. The Carrier shall implement the Award within 30 days of its execution.

Issued this 21 day of November, 2007.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


R. L. Marceau, Employee Member
