

In the Matter of the Arbitration Between:

BNSF RAILWAY COMPANY

NMB Case No. 105

Claim of F. L. Woolfork
Dismissal - Improperly
Riding Car

and

UNITED TRANSPORTATION UNION (COAST LINES)

STATEMENT OF CLAIM: Request on behalf of Switchman F. L. Woolfork asking for reinstatement to service; the restoration of seniority and all benefits and the removal of any mention of this incident 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 August 19, 2010 in 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 (the "Agreement") which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts including Claimant. The Board makes the following additional findings.

Claimant was employed by the Carrier as a Trainman in 2003. He had a previous Level S violation for stepping on to moving equipment for which he received a record suspension and probation. On April 17, 2009, the date of the incident at issue, Claimant was assigned as a Switchman, working in Los Angeles. On that date, Carrier Officers observed Claimant for a period of approximately 60 seconds riding a stack car with his left foot on the crossover platform and the right foot on the car's stirrup step. They concluded that his action was in violation of the Carrier's Life-Critical/Safety Critical Rules, which prohibit such practices. In connection with riding equipment, TYE Safety Rule S-13.1.5 (B) prohibits employees from riding on the crossover platform or end ladder of any freight car. Claimant later acknowledged that he was aware of these Rules.

The Officers confronted Claimant and asked if he had been riding the stack car; he demonstrated that he had been riding the car with his right foot in the stirrup, which was different than the Officers had observed and which they took to mean that he knew the proper way to ride a stack car. Claimant asserted that he had been riding the car with his left foot on the crossover platform because it was "comfortable" and was, in his view, "safe".

The Carrier scheduled an investigation into Claimant's conduct, which was held on September 3, 2009. At that investigation, the above facts were adduced. The Officers described their observations of Claimant. Claimant did not deny that he had ridden the car in the manner described, but asserted, as indicated, that the position was the most comfortable and, he believed, was safe. He denied that he had violated the Rule.

Based on the evidence adduced at hearing, by a letter dated June 10, 2009, the Carrier found Claimant to have violated the Rule cited and dismissed him from service. The dismissal followed previous Level S discipline for which a three-year period of probation had been issued. He was four months in to that probationary period when the incident at issue took place.

The Organization protested the discipline as being without evidentiary support, asserting that Claimant had complied with the intent of the Rule and that his position was based on common sense. The Carrier denied the claim, which the Organization appealed on the property in the usual manner up to the Carrier's highest designated official, but without resolution. The Organization then invoked arbitration, and the claim was referred to this Board.

POSITIONS OF THE PARTIES: **The Carrier** argues that it met its burden to prove Claimant guilty of having violated the cited Rule, by substantial evidence based on the record as a whole, by improperly placing his foot on the crossover platform of a car while riding it. The Carrier argues that the cited Rule is designed to protect employees from injury in making Life-Critical/Safety Critical decisions. It points out that Claimant acknowledged being aware of the Rules and of engaging in the conduct described. In light of the potentially serious safety consequences of the violation of the Rule and Claimant's previous Level S record suspension and probation, the Carrier asserts that the penalty of dismissal is appropriate and should not be overturned. It urges that the claim be denied.

The Organization argues that the Carrier failed to meet its burden of proof. It protests, as an initial matter, that the Hearing Officer badgered Claimant into admitting a violation by repeatedly asking the same questions. UTU contends that Claimant was engaging in the safest course of action under the circumstances to stabilize his body and protect himself in the event of slack action. It maintains that Claimant was never trained in the correct application of the Rule, which it contends is vague and has several times been modified. The Organization argues that even the poster illustrating the Rule is confusing because it has the employee riding a tank car with one foot on the hand hold and the other on the crossover platform, a position similar to what

Claimant used on the date at issue. It maintains that, in such circumstances, precedent exists for finding proof of a violation to be lacking or for allowing claimants a certain leeway when they have made a good faith effort to remain safe. The Organization urges that the claim be sustained.

DISCUSSION AND ANALYSIS: The Carrier had the burden to prove Claimant's guilt of the violation charged by substantial evidence, considered on the record as a whole and to establish the appropriateness of the penalty of dismissal. For the reasons which follow, the Board determines that the Carrier proved Claimant's violation by substantial evidence, considered on the record as a whole, that Claimant violated the Rule with which he was charged. Indeed, Claimant admitted as much.

As to the penalty of dismissal, the Board finds Claimant to be guilty of a second Level S violation while only four months into a probationary period for a previous such violation. PEPA provides that employees in that position are "subject to" dismissal, although such a penalty is not mandated. As an employer-promulgated set of Rules, PEPA is not a substitute for the contractual standard of just cause, but PEPA clearly places employees on notice of the Employer's expectations, which are enforced with training and the application of progressive discipline. Indeed, PEPA and the deadly decisions are intended to encourage employees to act safely and thereby reduce injuries to them.

Where the Board has found in such situations that the employee has violated a Rule, it has sometimes sustained dismissal and sometimes mitigated the penalty and returned the employee to work, generally without back pay and in some type of probationary status. In the instant case, Claimant is a relatively short-service employee. Other than some minor discipline for attendance, his only previous violation was for a safety rule similar to that for which he was dismissed. However, Claimant's second violation is clear.

The Organization's assertions that Claimant's position on the car was safe and should be accorded deference because he was comfortable and believed he was safe are unconvincing. The Carrier gets to define what it requires by way of safe practices; it has prohibited employees from riding cars in the position in which Claimant was riding and made such conduct subject to discipline under PEPA. Management has a basic right to promulgate and enforce such rules.

The Organization's argument that the Rule is vague and has been modified several times, thereby relieving Claimant of the obligation to follow the Rule or, at the least, mitigating his violation, is likewise unavailing. The Board does not find the

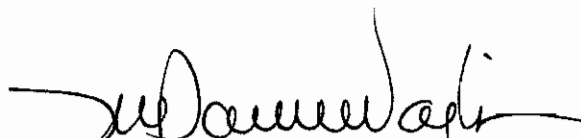
Rule to be vague and is not persuaded that Claimant found the Rule to be so.

The Rule against riding on crossover platforms is one of several prohibitions designed to reduce employee injury and death from bad safety decisions. The pace of railroad work makes shortcuts and non-compliance with Safety Rules tempting. The Carrier has a right to prohibit such violations. Positive efforts, such as counseling and retraining, are alternatives to the "two strikes" practice. However, discipline for violations is also contemplated by the Rule and PEPA. Just cause must always be proven.

The Board is persuaded that the Rule and PEPA make dismissal an allowed penalty, but not a required penalty, for a second such violation. In light of Claimant's record and the circumstances of his violation, the Board is persuaded that dismissal is an excessive penalty. The Award will reflect the Board's disposition of the claim.

AWARD: The Claim is sustained in part and denied in part. The Carrier proved Claimant guilty of violating the Safety Rule with which he was charged. The penalty of dismissal was excessive and shall be reduced to a suspension of time served. Claimant shall be reinstated to service and the references to this dismissal expunged from his record. Claimant's seniority shall be restored, but he shall not be paid wages or benefits for the time he was out of service. The Carrier shall make the Award effective within 30 calendar days from the date of execution.

Dated this 4th day of November 2010.



M. David Vaughn,
Neutral Member



Gene L. Shire,
Carrier Member



D. L. Young,
Employee Member