

In the Matter of the Arbitration Between:

BNSF RAILWAY COMPANY

and

NMB Case No. 111

Claim of M. L. Forest
Level S 30-Day Record
Running

UNITED TRANSPORTATION UNION (COAST LINES)

STATEMENT OF CLAIM: Request on behalf of Trainman M. L. Forest requesting removal of the 30 day record suspension and pay for any time lost.

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 is employed as a Trainman. He has 38 years of service with the Carrier, 33 years of which has been as a promoted Conductor. Prior to the incident at issue in this proceeding, he had no discipline since 2001.

On February 4, 2010, Claimant was assigned to a light engine move. Trainmaster Roberto Davila to be running while performing duties. A videotape from the locomotive on which Claimant was assigned showed him dismounting from the cab, hurrying over to remove a derail and hurrying back.

Running in the performance of duties is prohibited by Safety rule S.1.5.3. Running while performing duties is also one of the Carrier's Eight Deadly Decisions.

Trainmaster Davila interviewed Claimant, who denied running. Davilla stated that Claimant acknowledged that he had "trotted", a statement which Claimant denied making. In the course of the interview with Carrier Officers, Claimant became angry, confrontational and disruptive and, as a result, was held out of service at that time.

The Carrier notified Claimant to attend an investigation in connection with the charge that he had been running during the performance of his duties. The investigation was held on February 19, 2010. The Carrier also notified Claimant to attend a second investigation in connection with his disruptive behavior in dealing with the Carrier Officers who interviewed him about the running incident. The results of that investigation are not at issue in this proceeding.

As a result of the investigation concerning the charge that he had been running in the performance of his duties, Claimant was issued a Level S 30 day record suspension and was placed on three years probation. The outcome of the other investigation (as indicated, not before the Board as part of the instant case) was that Claimant was dismissed from service. However, the Carrier offered Claimant conditional reinstatement on a leniency basis, which Claimant accepted. He was reinstated to service on July 15, 2010.

The Organization protested Claimant's suspension for running and also protested the Carrier's action withholding him from service, pending investigation. The Carrier denied the claim, which the Organization appealed on the property in the usual manner, up to and including the Carrier's highest designated official, but without resolution. The Claim was presented in due course to the Board. This proceeding followed.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burden to prove that Claimant was running in the performance of his duties. It points as proof to the testimony of Trainmaster Davila and to the cab video. It points out that running while on duty is a violation of both the safety rule cited and of the Eight Deadly Decisions. It maintains that Claimant's conduct was intentional and reckless, with potentially serious consequences to him.

The Carrier asserts that this case involves only the discipline issued to Claimant for running. It maintains that he was not held out of service as a result of running, but for his disruptive behavior during the initial interview with Carrier Officers, which was the subject of a separate investigation and produced a separate penalty of dismissal, resolved through a leniency reinstatement.

As to the merits of the running case, the Carrier asserts that the testimony of Kevin McReynolds that he recognized Claimant by his gait and mannerisms was credible and sufficient. It points out that there were only two crew members assigned to the job and that the Engineer testified, without rebuttal, that he remained in the

cab, necessarily meaning that the second person seen running was Claimant. BNSF argues that Claimant's denial that he ran is not sufficient to negate the credible testimony of the other witnesses. The Carrier argues that the testimony of the Trainmaster that he observed Claimant run is not negated by the Organization's efforts to demonstrate that he could not have seen Claimant from his vantage point; it maintains that he could see what he described.

The Carrier argues that the evidence was sufficient to meet its burden. It urges that the claim be denied.

The Organization argues, as an initial matter, that the Carrier violated Article 13 (a) of the governing Agreement when it withheld/suspended Claimant from service in advance of conducting a fair and impartial hearing. It asserts that such withholding is only allowed under the rule in "aggravated cases", which it contends Claimant's alleged running was not, since it presented no danger to his life or risk of damage to Carrier equipment or to others.

The Organization argues that Claimant was not in violation of Southwest Division General Notice 34, which prohibits running while switching. It asserts that Claimant's alleged running was not in the course of performing switching duties and that he was not, therefore, in violation of one of the Eight Deadly Decisions. It maintains, therefore, that pulling him out of service was not consistent with Article 13 (a).

As to the merits of the case, the Organization argues that Trainmaster Davila could not have seen what he reported, as he was too far away and, due to the difference in elevation and the presence of automobiles in the parking lot and engines on the tracks between Davila's location and where Claimant allegedly ran, essentially negating the Carrier's proof. The Organization also points out that Mr. McReynolds conceded he could not see the face of the person allegedly running, a limitation which it contends also negates the Carrier's proof. The Organization points out that Claimant consistently denied that he was running in the performance of his duties and that the Engineer also denied having seen Claimant run.

The Organization argues that the Carrier violated the Agreement by holding Claimant out of service and failed to meet its burden of proof with respect to the merits. It urges that the claim be sustained and the 30 day record suspension and probation assessed against Claimant removed from his record. The Organization is not seeking pay for the time Claimant was held out of service, but asserts that the circumstances of Claimant running

are not aggravated and maintains, therefore, that the Carrier had no cause to remove him from service.

DISCUSSION AND ANALYSIS: The claim at issue is the 30 day record suspension and probation imposed on Claimant for running, in violation of the cited Rules. Not at issue in this proceeding is Claimant's dismissal, which was the subject of a separate investigation and which was resolved by Claimant's acceptance of a leniency reinstatement. The reinstatement terms do not speak to the period Claimant was held out of service, but the Organization has conceded that it is not seeking pay for that time. Moreover, the Board is persuaded that Claimant was held out of service based on his confrontation with Carrier Officers when they interviewed him after he was observed to be running. That action is not included in the claim before the Board.

The Organization's several challenges to the discipline based on failure of proof are not persuasive. The Board is not convinced that the Trainmaster could not see Claimant from his location or that the distance was too far away to confirm his actions. The Board notes that the Trainmaster could not have known of the existence of the corroborating cab video of the time he saw Claimant. We also conclude that Claimant was sufficiently identified as the person seen by the Trainmaster and in the video.

The Board is in doubt whether Claimant was observed to be "running" within the meaning of the Rules cited. In drafting Rules, the Carrier is assumed to be using language in its usual sense. The dictionary defines running as "to go faster than a walk; specifically to go steadily so that both feet leave the ground for an instant in each step." By contrast, trot is defined as "a jogging gait of a man that falls between a walk and a run." It is not disputed that Claimant moved rapidly to and from the derail. Indeed, the Carrier encourages - and its work assignments frequently require - the rapid, but safe, accomplishment of assigned work. However, neither the Trainmaster who observed Claimant nor the Officer who viewed the video described his gait as having both feet off the ground at the same time.

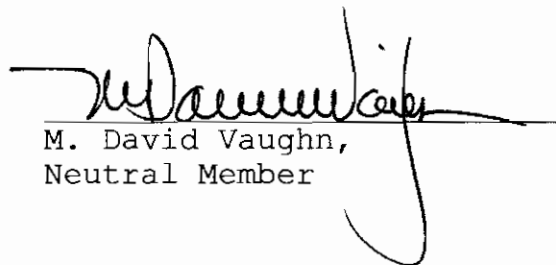
Claimant did not dispute that he was moving quickly. As indicated, the Trainmaster testified that he said he was "trotting", which is, as indicated, a gait slower than running and less dangerous. More to the point, it does not appear that engaging in a trot or jog or other gait less than running is prohibited by the Rules against running. Engaging in trotting or jogging, separately or in combination with other conduct, may violate other Rules, but not the specific Rules with which he was

charged. In light of the special circumstances of this case, the discipline must be set aside on that basis. The Award so reflects.


Nothing herein minimizes the importance of safe work practices and the right of the Carrier to promulgate and enforce through the disciplinary process rules against unsafe conduct. However, the seriousness with which the Carrier views unsafe conduct does not serve to relax the Carrier's burden of proof of specific charges.

AWARD: The claim is sustained. For the reasons stated in the Opinion, the Carrier failed to prove Claimant's violation of the Rules. The penalty of a 30 day record suspension and probation shall be rescinded. Claimant's records shall be expunged from reference to the penalty. The Carrier shall make the Award effective within 30 days of its issuance.

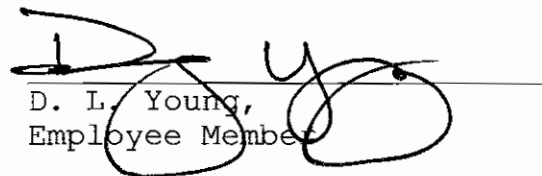
Dated this 4th day of Nov, 2010.



M. David Vaughn,
Neutral Member



Gene L. Shire,
Carrier Member



D. L. Young,
Employee Member