

In the Matter of the Arbitration Between:

BNSF RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION (COAST LINES)

NMB Case No. 112

Claim of K. L. Goodie

10-Day Record Suspension

Failure to Properly

Kick Cars

STATEMENT OF CLAIM: Request on behalf of Switchman K. L. Goodie requesting the removal of the 10-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 by the Carrier as a Switchman. She has six years of seniority and, at the time of the incident at issue, was assigned to a yard job at Bakersfield, California.

On March 10, 2010, Superintendent Brad Welte was notified that Claimant had been involved in an incident which caused her to be injured. He interviewed Claimant, who advised him that she was facing east on a westward movement and reached over with her right hand to pull the pin lifter. As she turned to walk west, in the direction of the movement, she slipped and fell to her knees. Claimant confirmed that sequence of events. Mr. Welte stated that he inspected the area where Claimant slipped and found residue of a spill, but denied that the residue was oily or would cause an employee to slip

The Carrier notified Claimant to attend an investigation in connection with the incident leading to her injury. The investigation was held on April 8, 2010 at which the foregoing facts were adduced. Following the investigation and based thereon, the Carrier issued Claimant a 10 day record suspension for violating TSR 13.3.2, which requires employees when operating

uncoupling levers to face the direction of the movement and use the hand nearest the equipment to operate the lever.

Claimant notified the Trainmaster and Terminal Superintendent and filed an accident report.

Claimant acknowledged that she was facing east on a movement that was westbound when she pulled the pin lifter and so advised Mr. Welte. Superintendent Welte stated that the cars being handled by Claimant had not yet been kicked, and had not moved from the time they had initially stopped; he acknowledged that at the time the cars began to move west, Claimant was, in fact, facing the direction of the move and had not touched the cut lever until after the cars stopped moving.

The Carrier notified Claimant to attend an investigation to ascertain her responsibility in connection with the move, insertion and injury. The hearing was convened before Hearing Officer Michael Collins on April 8, 2010. In his capacity as Terminal Manager, Mr. Collins had conducted job briefings with crews telling them that the injury at issue in this proceeding was Claimant's fault. After the Organization challenged the propriety of Mr. Collins serving as a Hearing Officer in Claimant's investigation, he offered to recuse himself if requested, but both Claimant and the Organization indicated that they did not wish him to do so.

Based on the evidence adduced at the hearing, the Carrier imposed a 10 day record suspension for violation of TSR 13.3.2, which the Organization appeal. The Carrier denied the appeal, which was progressed on the property in the usual manner, up to and including the Carrier's highest designated official, but without resolution. The Organization then invoked arbitration; and the case was brought before this Board.

POSITIONS OF THE PARTIES: **The Carrier** argues that it met its burden to prove Claimant's violation of the Rule cited. It confines its analysis to the manner in which she performed her duties and disclaims any connection between Claimant's injury and the discipline imposed, although it contends that, had Claimant performed her duties consistent with the Rule, the injury might have been avoided.

The Carrier points out that Claimant acknowledged that she was facing east on a movement that was westbound when she pulled the pin lifter. It asserts that her action was in violation of SR 13.2.2, which requires employees to face the direction of the movement and to use the hand nearest the equipment to operate the

cut lever. It asserts that the evidence is that she failed to do so.

As to the Organization's assertion that the Carrier failed to accord Claimant a fair and impartial hearing because Hearing Officer Collins had conducted job briefings asserting Claimant's fault for her injury, thereby prejudging her guilt, the Carrier responds that the Hearing Officer's prior knowledge was not an issue, as indicated by the declination by Claimant and the Organization when Hearing Officer Collins offered to step aside in preference of another Hearing Officer.

As to the allegation that Claimant's injury was caused by a spill, the Carrier points to Mr. Welte's testimony that he inspected the area where Claimant fell and found residue of a spill, but not an oily spill. It maintains that there is no connection between the residue and Claimant's injury.

The Carrier argue that Claimant breached her responsibility to work safely and follow its rules. It urges that the claim be denied.

The Organization argues, as an initial matter, that the Carrier violated Claimant's entitlement to a fair and impartial hearing when it used Terminal Manager Collins as a Hearing Officer, after he had conducted job briefings announcing that Claimant's injury had been her fault. It asserts that involvement indicated his prejudgment of her guilt. UTU contends that the prejudgment invalidated the hearing from its inception and was not cured by Collins' offer to step aside.

As to the merits of the dispute, the Organization asserts that the Carrier failed to prove the violation. It points out that Claimant testified that the cars were stopped when she was standing facing west and that she was facing west - in the direction of the move - when the cars moved. It asserts that Carrier witness Welte acknowledged that she had not touched the cut lever until the cut was stopped, so there was no direction of travel. UTU argues, on that basis, that the cited Rule is inapplicable and that no violation occurred.

The Organization asserts that the Carrier is simply trying to mitigate its injury damages. It maintains that Claimant must be exonerated and that she be made whole by sustaining the claim and overturning the discipline.

DISCUSSION AND ANALYSIS: It was the obligation of the Carrier to ensure that Claimant received a fair and impartial hearing. The

Carrier may not allow a Hearing Officer to conduct such hearings if he has prejudged the employee's guilt. It appears that Hearing Officer Collins had expressed his opinion that Claimant was at fault in the incident in the course of job briefings. Under such circumstances, he should not have been designated to conduct the investigation and should not have accepted the designation when offered. That defect is not cured by Mr. Collins' offer to resign nor by the rejection of that offer. The Claim will be sustained on that basis and the 10 day record suspension removed from Claimant's records. The Award so reflects.

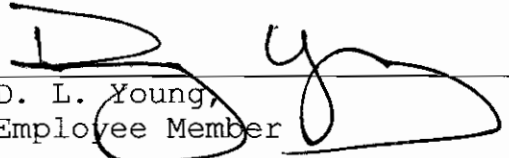
Because the claim is decided on the basis of the procedural defect, the Board does not reach the merits of the claim.

AWARD: The claim is sustained on the basis of the procedural defects described in the record. Claimant's 10 day record suspension shall be rescinded and expunged from her personnel record. The Employer shall make the Award effective within 30 days.

Dated this 4th day of November, 2010.


M. David Vaughn,
Neutral Member


Gene L. Shire,
Carrier Member


D. L. Young,
Employee Member