

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

NMB Case No. 33
Claim of Dean Gilbert
Level S 30 Day Record
Suspension & Probation

and

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of Southern California Foreman D. A. Gilbert for removal of the Level S three Years Probation for his allegedly throwing rocks at a train in violation of GCOR Rules 1.1, 1.6, 1.19 and S-1.2.3 and S-1.2.9 of the Train and Engine Safety Supplement and with restoration of seniority and all other rights unimpaired and pay for 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 17, 2006, at 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 which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Trainman and Yardman crafts.

At times relevant to the claim, Claimant was assigned to a job as a Foreman at the Carrier's Los Angeles Yard. He had been hired by the Carrier in 1996 as a Trainman.

On January 24, 2004, the Carrier's Senior Special Agent was on patrol in the Yard and, at approximately 0950 that date, Stevens witnessed Claimant, standing near the tracks observing a passing train, throw three objects in the direction of the train, using hard throwing motions and causing Stevens to believe that he was throwing rocks. Stevens approached Claimant and advised him that such conduct is violative of provisions of criminal and that he had arrested violators for such conduct. Stevens saw nothing on the ground in the vicinity that might have been thrown other than rocks. According to Stevens, Claimant did not deny throwing rocks, although he was not specifically asked, responded with a glib remark the words of which Stevens did not recall, and turned away from Stevens, at which point Stevens took Claimant's identification and work information and reported the incident to Claimant's supervisor.

The Carrier scheduled an investigation concerning the incident at which the above evidence was adduced. In response to the charges, Claimant denied throwing rocks at the train. He testified that he was standing near the mainline, eating marshmallows out of a bag, but that three fell to the ground, becoming dirty, and he tossed them in the direction of the passing train. He testified that Stevens was 300-500 feet away when he threw the marshmallows and that the disconnect between what he was doing and what Stevens warned him about caused him to respond flippantly that Stevens was being a bit over-zealous. G.S.
AZM

Based on the evidence adduced at the hearing, the Carrier found Claimant guilty of violations of GCOR Rules 1.1 (Safety), 1.6 (Conduct), 1.19 (Care of Property), 6.29 (Inspecting Trains) and S-1.2.3 (Alert and Attentive), S-1.2.5 (Safety Rules, Training Practices, Policies) and S-1.2.9 (Horseplay) of the Train and Engine Safety Supplement and placed him on a Level S three years probation. G.S.
AZM

The Organization filed the instant claim seeking removal of the discipline which was progressed on the property in the usual manner, but without resolution; and it was submitted to this Board for disposition.

POSITIONS OF THE PARTIES: The Carrier argues that it proved Claimant's violations of the rules by substantial credible evidence and that the penalty imposed was appropriate to the offense. It maintains that Claimant's conduct was unsafe and in violation of law.

The Carrier points to the testimony of Carrier Officer Stevens as firmly establishing Claimant's conduct. BNSF asserts that Claimant did not deny throwing objects at the train either at the time Stevens approached him or at the hearing; the only question is what he threw. However, points out the Carrier, Claimant did not tell Stevens at the time that he was throwing only marshmallows, and Stevens described the throwing motion as hard, a motion not necessary to simply toss marshmallows away.

The Carrier argues that Stevens' testimony was consistent and Claimant's testimony incredible. It asserts that, in any event, the determination of the relative credibility of the two versions of the incident attested to by Stevens and Claimant has universally been held to be a right of the hearing officer. In this instance, the Carrier credited the testimony of Stevens over that of Claimant; and BNSF asserts that determination should not be overturned by the Board.

The Carrier urges that the claim be denied.

The Organization argues that Carrier failed to provide the Claimant with a fair and impartial hearing and failed to meet its burden of proof.

The Organization argues that the Carrier denied Claimant a fair hearing when it failed to call Mr. Garcia, who was on the ground on the same side of the train as Claimant and could have validated or denied the respective versions of the incident, in violation of Article 24 (c) of the governing Agreement. By contrast, maintains UTU, the witness called by the Carrier was facing away from the incident and saw nothing. It asserts that Stevens' statement that he saw nothing else on the ground that could have been thrown other than rocks demonstrates that he made no attempt to verify what was thrown and performed no investigation.

The Organization argues that Stevens' testimony was uncertain - that he "thought" he saw Claimant throw something - and is insufficient to prove any violation of the rules. It asserts that Claimant's explanation of throwing marshmallows was both innocent and credible.

The Organization urges that the claim be sustained, the record suspension and probation rescinded and Claimant made whole for wages and benefits lost, including his time to attend the hearing.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to introduce substantial credible evidence on the record as a whole of Claimant's guilt and to establish that the penalty of a Level S record suspension and probation was the appropriate response. It was also the Carrier's burden, when challenged, to demonstrate that it afforded Claimant a fair and impartial hearing. The Board is persuaded that the Carrier met its burdens.

First, as to the conduct of the hearing, there is no indication that the Organization requested Garcia's presence or protested his absence at the hearing. Clearly, the Organization could have called Garcia as its witness, but it did not. There is not, in any event, any indication that Garcia saw Claimant throwing anything or saw that what he was throwing were marshmallows. Under such circumstances, the Board is not persuaded that the Carrier violated Claimant's right to a fair hearing by not calling him.

Second, as to the Carrier's proof of the charges against Claimant, the testimony of Stevens and Claimant are similar on many points: it is not disputed that Claimant threw objects in the direction of the train; Claimant concedes that he did so. The only question is what he threw.

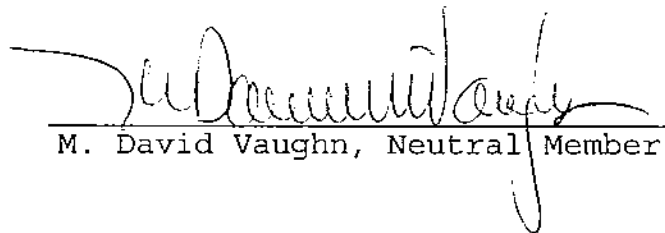
There is no work-related reason for Claimant to have been throwing marshmallows at the train, but the Board acknowledges that, had Claimant been throwing marshmallows, rather than rocks, neither his intent nor the possible result would have been so negative. However, Stevens testified that Claimant was making hard throwing motions, not simply tossing something light or for a short distance. Moreover, when approached by Stevens, Claimant gave no innocent explanation for his conduct, even after Stevens obtained his identification and work assignment; and Stevens observed nothing on the ground or on Claimant's person such as marshmallows or a bag that might support Claimant's version of events.

Under such circumstances, the Board concludes that the Carrier was within the bounds of its discretion to determine that Stevens' testimony was more credible than Claimant's and to base its determination as to Claimant's guilt on that assessment.

Throwing rocks at trains is no innocent pastime. Damage or injury are possible results of such petty vandalism. As a railroad employee, Claimant is responsible to protect, and not damage, the Carrier's property. The Board concludes that the Carrier submitted substantial evidence to support the conclusion that Claimant threw rocks at the train and was, therefore, in violation of his obligations to the Carrier and was guilty of several of the charges against him sufficient to support the penalty imposed. The Award so reflects.

AWARD: The Carrier proved, by substantial credible evidence, that Claimant is guilty of the charges against him and that the penalty imposed is appropriate. The claim is denied.

Dated this 16th day of January, 2007.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


R. L. Marceau, Employee Member