

PUBLIC LAW BOARD NO. 6721

In the Matter of the Arbitration Between:

BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY

NMB Case No. 39
Claim of D. A. Rector
Dismissal: Running

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Request on behalf of Southern California Foreman D. A. Rector for reinstatement to service with pay for all time lost without deduction of outside earnings, with all seniority rights unimpaired, and ~~with~~ all fringe benefits intact.

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.

Claimant was employed by the Carrier as a Conductor; his service with the Carrier began on February 2, 2004. In October 2004, the Carrier suspended Claimant based on a Level S violation for conduct unbecoming an employee. The Carrier subsequently reinstated Claimant.

The Carrier has in effect a Policy for Employer Performance Accountability ("PEPA"). It is described in Award 1 of PLB 6532 (Vaughn) as follows:

. . . There is no indication that PEPA was the product of collective bargaining. PEPA has been in effect since July 1, 2000 and was revised effective March 8, 2001 (the only revision is as to subject area not here at issue). Under PEPA, certain infractions as are defined as "Serious Rule Violations" or "Level S" violations. Level S infractions carry with them prescribed record suspensions, possible actual suspensions, and probationary periods. PEPA provides that "a second serious incident within a 36-month review period will subject the employee to dismissal."

Pursuant to a Switching Operations Fatality Analysis ("SOFA") conducted by the Federal Railway Administration ("FRA"), the Carrier established a list of "Seven Deadly Sins", which are incorporated into its Rules. One of the "Seven Deadly Sins" is running. Specifically, Rule S-1.5.3 provides, in relevant part, "Except in emergency, running is not permitted in the performance of duty."

On January 24, 2005, Claimant was working in San Diego as a switchman's helper on Y-SDG231-2-24A. Two Carrier officers were performing "operations testing" during which they observed Claimant allegedly running while switching.

By letter dated February 14, 2005, the Carrier notified Claimant to attend an investigation to ascertain facts surrounding his alleged running while on duty. Following postponements, the hearing was held on March 18, 2005. At the hearing, the following additional evidence was adduced. Both Carrier officers asserted that they had seen Claimant running across a track in connection with a switch associated with a train movement. Manager of Safety Brad Welte, one of the Carrier officers who observed Claimant, testified that when questioned about it, Claimant acknowledged his violation. Mr. Welte testified further, however, that Claimant did not actually believe that he was running. Superintendent of Operations Richard Mills testified that Claimant acknowledged his violation of the Rules and that he explained that he was running in order to "clear up the crossing".

Both Mr. Welte and Mr. Mills acknowledged that there was nothing in the Carrier's documents or rules that defines "running". The Carrier asserted that any movement other than walking constitutes running and thereby violates its rule.

Claimant testified that there came a point in his work where he "high stepped" over a spot in the track where he believed he was likely to trip if he did not execute such a step. Claimant testified further that he "tend[s] to walk very fast". He denied having been running.

Following the hearing, the Carrier found Claimant guilty of the charges and dismissed him, based on the nature of the offense and the fact that the offense was Claimant's second violation within the previous four months.

The instant claim for Claimant's reinstatement was presented in due course, 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, by substantial evidence, that Claimant was running across the tracks and that such movement violated its Rule which prohibits running. The Carrier cites a dictionary definition of "running" - "to go faster than a walk; to go steadily by springing steps so that both feet leave the ground for an instant in each step. . . . to go rapidly or hurriedly". It contends that Claimant's actions constituted running. The Carrier asserts that in situations such as this, where there is conflicting testimony, the Hearing Officer is in the best position to evaluate such testimony. It contends that the Board should accept that evaluation, and maintains that its disciplinary determination was based on substantial evidence.

The Carrier rejects the Organization's request for classroom or field training for Claimant. It points out his previous Level S violation (which occurred three months before the conduct at issue) and that Claimant is a relatively new employee. The Carrier contends that dismissal is appropriate and in keeping with various cited arbitral precedents. It further contends that it cannot simply tolerate such disregard for the safety of its employees.

The Carrier urges that the claim be denied and Claimant's dismissal be upheld. It also requests that if discipline is modified, that any lost wages paid to Claimant be offset by any outside earnings.

The Organization argues that the Carrier failed to prove that Claimant violated the rule as charged and/or that if he had committed a violation, that dismissal was^{not} the appropriate discipline for such offense. It points out that neither Carrier witness could offer an exact explanation of what constitutes "running". The Organization rejects the assertion that "running" is anything that is not walking. It cites a dictionary definition of running as "to move swiftly on foot so that both feet leave the ground during each stride" and argues that the Carrier's witnesses did not describe Claimant's movements in that way. The Organization contends that Claimant should not be punished for violating a rule that the Carrier cannot define, which the Carrier did not explain to Claimant, and which the testimony of his accusers does not support.

The Organization further points out that the record shows that Claimant walks quickly and acknowledges his testimony that he "high-stepped" over a rail. It rejects the implied Carrier assertion that such actions constituted "running".

The Organization maintains that penalty of dismissal is arbitrary and excessive. It contends that the Carrier should not

impose discipline through a rule which the Carrier cannot define and which cannot be explained to an employee. The Organization asserts that the Carrier should train employees as to what sort of movement is considered to constitute "running".

The Organization urges that the claim be sustained, the dismissal rescinded and that Claimant be returned to service with all seniority rights unimpaired, with fringe benefits intact, and with pay for all time lost without deduction for outside earnings.

DISCUSSION AND ANALYSIS: The central question presented in this case is whether the Carrier proved, by substantial evidence in the record, that Claimant was "running" in violation of the Carrier's rules. The Board concludes that the Carrier met its burden to prove that Claimant conducted an unsafe movement high-stepping over the rails, but did not prove that he was running. Thus, for the reasons that follow, the Board concludes that dismissal is not appropriate.

There is no dispute as to the dangers of certain movements in a railroad yard. Moving too quickly and/or with uncertain footing is hazardous in such an environment, where trains operate and where uneven terrain, slick surface and loose stones create high potential for injuries. Similarly, there is no dispute in this record that the Carrier has the right and duty to regulate the behavior and movements of employees so as to minimize the likelihood of injuries that could stem from such dangerous human movements. Prohibiting running represents one effort to do so.

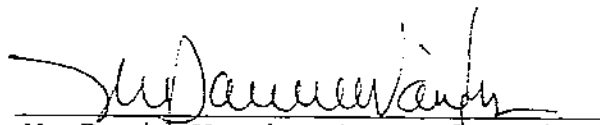
The record evidence, including Claimant's own testimony indicates that he was moving quickly through the yard and that, at one point, he executed a "high step" or hop in order to cross rails. The record does not suggest that any emergency existed, although Claimant testified that his high step was to avoid tripping. It is unclear whether he would have needed to avoid tripping if he had not been moving so quickly. Thus, Claimant's movements - swift and with uncertain footing - constituted lifting both feet, even if it was not a full-blown run, within the dictionary definition. A5


The Organization asserts that "running" has not been defined and employees have not been trained to understand what constitutes "running". The hyper-technicality of that argument ignores the fact that swift movements with uncertain footing in non-emergency situations - regardless of the precise physiological composition - constitute a hazard against which the Carrier has a right to protect its employees and for which it may impose discipline.

The record here, however, indicates that Claimant's behavior does not rise to the level of reckless. More to the point, Claimant's conduct is not proven to have constituted running; thus his conduct was not a "Deadly Sin" and modification to the penalty is warranted. The conduct is certainly not sufficient to establish Claimant as being beyond rehabilitation. Nonetheless, in keeping with the thrust of the rule and Claimant's obligation to work safely, the Board finds that a period of substantial suspension without pay is an appropriate corrective, rather than punitive, penalty. In light of Claimant's short service and previous Level S violation, such a suspension will serve the purpose of progressive discipline. The Award so reflects.

AWARD: The Carrier proved that Claimant violated his obligation to work safely but failed to prove that Claimant violated all elements of Rule S-1.5.3. Claimant's dismissal shall be rescinded and he shall be ~~be~~ reinstated to employment, but without back pay and/or benefits for the period of his absence. Claimant's record shall be amended to reflect this Award, which the Carrier shall implement within 30 days.

Dated this 15th day of November, 2006.


M. David Vaughn, Neutral Member


Gene L. Shire
Carrier Member


R. L. Marceau
Organization Member