

In the Matter of the Arbitration Between:

BNSF RAILWAY COMPANY

NMB Case No. 113

Claim of M. L. Dehekker

and

Level S 30 Day Record

UNITED TRANSPORTATION UNION (COAST LINES)

Suspension

STATEMENT OF CLAIM: Request on behalf of Switchman M. L. Dehekker requesting the removal of the Level S 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 has been employed at all relevant times as a Trainman. He has been in the Carrier's employ since 2001. On January 25, 2010, Claimant was assigned as an Engine Foreman on a job at Richmond Yard, Richmond, California.

The crew to which Claimant was assigned was instructed as part of its duties to shove a bad order car onto Track 30. Helper Castro was in charge of the move and was to ride the point. Claimant had gone ahead of the crew.

The switch directing the cars onto Track 30 was not properly lined for the move, and when the engine shoved, the bad order car was directed onto Track 19. Helper Castro called out 20 cars visibility, but the car struck a standing cut of cars on Track 19. Castro jumped from the car he was riding to avoid the collision and was injured.

An inquiry was conducted into the accident in which both the Engineer and Helper stated that Claimant had made a radio transmission indicating that he had lined the switch for 30 track and that the move was clear. Claimant denied that he had made such a transmission and pointed out that Castro, not he, was in charge of the move and that Castro, not he, was riding the point of the shove.

The Carrier convened an investigation at which the above evidence was adduced. Based thereon, BNSF issued Claimant a Level S 30 day record suspension for violation of Rules 1.6 (Conduct - carelessness/ negligence), 5.3.7 (Radio Response), 6.28 (Movement Other than Main Track) and 8.2 (Position of Switches).

The Organization protested the claim, which the Carrier denied and the Organization appealed 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 referred to this Board.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burden to prove Claimant's violation of the cited Rules. It points to the statements of Helper Castro and the Engineer, which describe Claimant making radio transmissions that the switch was lined for Track 30, and to Claimant's admission that he was responsible to line the track and that he relayed to the crew that it was so lined. BNSF argues that the evidence clearly established that the track was not so lined and that the reason it was not was as a result of Claimant's negligence. It maintains that Claimant violated the cited Rules, even though he was not in charge of the move and was not riding the point.

As to the Organization's argument that Claimant was denied a fair and impartial hearing because the first Hearing Officer demonstrated prejudgment and, after that Officer excused himself, a second Hearing Officer exhibited the same prejudgment, the Carrier denies evidence of prejudgment and points out that the Organization waited until page 68 of the Transcript to object and then continued its objection when a new Hearing Officer was substituted. It maintains that the Organization simply filled the hearing with baseless and distracting objections, statements and interference with questioning, in violation of the Organization's shared responsibility to ensure a fair and impartial hearing.

The Carrier urges that the claim be denied.

The Organization argues that the Carrier breached its obligation to provide a fair and impartial hearing by using Hearing Officers who demonstrated evident prejudgment of the Claimant's guilt.

As to the merits of the dispute, the Organization argues that it was Helper Castro, not Claimant, who was in charge of the move and who was on its point. It points out that Claimant was ahead of the move and that the Helper, who was in charge of the move and rode the point, was not disciplined. It asserts, for that reason,

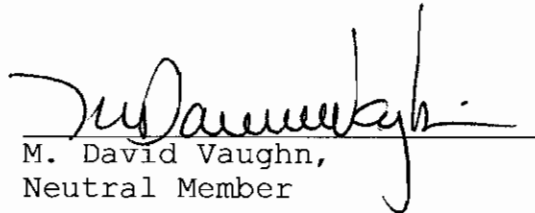
that Claimant should not be held responsible for the collision or violations which led to it. UTU maintains that the record establishes nothing more than that the Carrier disciplined the wrong person. It urges that the claim be sustained as written.


DISCUSSION AND ANALYSIS: It was the Carrier's burden to prove Claimant's violation of the cited Rules. The Board is not persuaded that the Carrier met its burden.


The evidence is persuasive that the Helper was in charge of the move and was to line the switch and ride the point. In keeping with those responsibilities, the Helper should have seen the shove go on to the wrong track and should have seen the cut of cars on Track 19 in time to stop short. His failure to carry out his responsibilities caused the collision. The Board is not persuaded by the offered evidence that Claimant lined the switch or informed the crew that it was properly aligned. A sustaining Award is required for failure to meet the Carrier's burden of proof.

AWARD: The Claim is sustained. The Level S 30-day record suspension assessed against Claimant shall be rescinded and his personnel records amended to expunge reference to the discipline. Claimant shall be made whole for any time lost. The Carrier shall implement the Award within 30 calendar days.

Dated this 4th day of November, 2010.


M. David Vaughn,
Neutral Member


Gene L. Shire,
Carrier Member


D. L. Young,
Employee Member