

PUBLIC LAW BOARD No. 6721

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

and

UNITED TRANSPORTATION UNION

NMB Case No. 172

Claim of S. L. Murphy
Dismissal - Failure to
Provide Protection
During Shove

STATEMENT OF CLAIM: Claim on behalf of Trainman S. L. Murphy requesting reinstatement to service, restoration of seniority and fringe benefits and pay for all 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 October 10, 2014, in Washington, D.C. Claimant was not present at the hearing.

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. The Board makes the following additional findings.

Claimant was hired on February 12, 2001 as a Laborer and transferred to a Conductor position in 2003. On January 27, 2014, he was working as a Brakeman on train G-FUNKIN9-22A at Fresno, California. Among his duties was to spot the grain train in tracks 7608 and 7609 at Integrated Grain & Milling in Kings Park. As the train arrived at the facility, Fresno Terminal Manager Darrel Kitchen, who was observing the movement together with Trainmaster Mia Blanchard, warned the crew in advance that there were cars already on track 7609, and they would need to be moved east of Jackson Avenue in order to accommodate their train. The Conductor cut off 65 cars from the train and shoved to a joint against the cars in track 7609. Mr. Kitchen told Claimant, who was standing at Jackson Avenue, to take over the shove move, east to the "dead track," i.e., track 7611 east of Jackson Avenue. Claimant instructed the Engineer to shove 40 car lengths but, after approximately 10 car lengths, he told the Engineer to stop. Claimant had failed to remove the derail on the east end of track 7609 prior to initiating the movement and four cars derailed.

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant to have been in violation of GCOR Rules 6.28 (Movement on Other than Main Track), 6.5 (Shoving Movements), 8.2 (Position of

Switches) and 8.20 (Derail Location and Position) and dismissed him from service.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property up to and including the highest designated official, but without resolution. The Organization invoked arbitration, and the dispute was presented to this Board for resolution.

POSITIONS OF THE PARTIES: The Carrier argues that it met its burdens to prove Claimant's violations of the Rules and the appropriateness of the penalty. BNSF contends that, pursuant to GCOR 6.5, which is one of the Eight Deadly Decisions, Claimant was required to provide visual point protection when shoving the cars in track 7609 and that, since the shove was initiated on other than main track, movement was required to be able to stop within half the range of vision short of the east derail in track 7609. It asserts that Claimant admitted that he was in charge of the shoving movement; as such, Claimant, in order to comply with Rules 6.5 and 6.28, should have told his Engineer to stop prior to running over the derail. The Carrier maintains that, even if Claimant were confused as to which track was being shoved, he did not provide appropriate visual protection for the equipment being shoved. It contends that the four-car derailment clearly proves that Claimant radioed his Engineer to make a back-up move without providing the required visual protection.

As to the Organization's arguments that the Carrier, because Trainmaster Blanchard was not at the hearing, did not provide a fair and impartial investigation and that Claimant complied with the spirit of the rule and that the Carrier made changes to the facility without a job briefing, BNSF asserts that they are without merit. As to the former, it maintains, citing the record, that Ms. Blanchard was busy with meetings and then getting rest but that, in any case, Mr. Kitchen testified about the same events that both observed and there were no additional facts that Ms. Blanchard could have provided. It contends, as well, that Claimant admitted failing to protect the shove and to confusing the tracks, even though he had worked the facility previously, and that, therefore, his own testimony established the violation. As for the latter, the Carrier asserts that the "spirit" of the rule exists to prevent derailments and to keep employees and the public safe and that Claimant shoved over a derail while protecting a shove. It maintains that the Organization is trying to downplay a violation - one of the Eight Deadly Decisions - with potentially devastating consequences. It points out that the changes to the facility occurred two years prior to the incident and that Claimant acknowledged that he had worked there from time to time and was familiar with the area.

As to the penalty, the Carrier contends that Claimant, at the time of the incident, had an active Serious violation on his record and that, in accordance to the PEPA, his dismissal was appropriate. It asserts that numerous referees have upheld dismissals under PEPA for improperly protecting a shove in instances of such serious rules violations.

The Carrier urges that the Claim be denied as without merit.

The Organization argues that the Carrier failed to meet its burden to prove Claimant's guilt by substantial evidence. It contends that Ms. Blanchard could have played a critical role in explaining what happened on the day in question and that, without her attendance and testimony at hearing, the facts were not established and the hearing was flawed and violated Article 13.

As to the merits, the Organization argues that Claimant was ahead of the move and that there was some confusion as to the track onto which the crew was making their shove. It asserts that Claimant complied with the spirit of the rule and was protecting the shove, noting that he testified that he lined the train onto the track that he thought they were shoving the train onto but that the shove move was made onto a track that he was not expecting the movement to come from. The Organization maintains that the Carrier recently made some changes at the location where the move took place and that the changes were accomplished without briefing the crews to the point that they were sure as to the track numbers at the facility.

The Organization points out that Claimant is a hard working and dependable employee, with more than eight years of service. It contends that dismissal should be reserved for the worst offenses and that the instant situation is not one of them.

The Organization urges that the Claim be sustained, that Claimant be reinstated and restored with his seniority intact and that he receive all fringe benefits and payment for any time lost.

DISCUSSION AND ANALYSIS: The Board is persuaded that the Carrier met its burden of proving Claimant to have violated the rules and that the penalty imposed was not arbitrary nor unreasonable. Claimant was in charge of the shoving movement but, despite his apparent effort to abide by the rules, failed to provide the protection necessary to stop short and to avoid running over the derail.

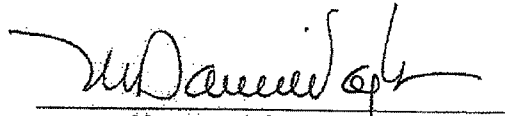
The Board has carefully considered, but is not persuaded by, the Organization's challenges to the discipline imposed. Claimant's alleged confusion with respect to the tracks is not excusable: Any

changes to the facility occurred some two years before and Claimant conceded that he had been to that area from time to time since then and that he was familiar with the area. The Board finds that Ms. Blanchard's testimony was not unique but would have been likely to duplicate Mr. Kitchen's testimony. In any case, if the Organization believed her testimony was absolutely necessary, it could have requested a postponement. It did not. Finally, the Board is persuaded that, whatever may have been Claimant's record, this incident was his second serious violation and is one of the Carrier's so-called Eight Deadly Decisions. Dismissal was a penalty specified by PEPA.

Given the nature and circumstances of his violations, the Board concludes that the penalty of termination was within the range of reasonableness. The Award so reflects.

AWARD: The Carrier met its burdens to prove Claimant guilty of the charges and to prove his termination to have been an appropriate penalty. The claim is denied.

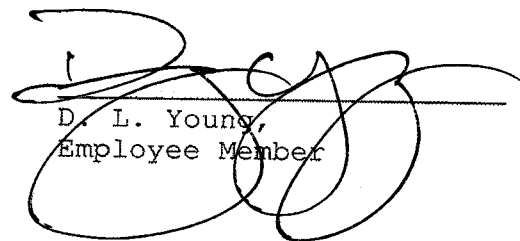
Dated this 5th day of November, 2014



M. David Vaughn,
Neutral Member



Jason Ringstad,
Carrier Member



D. L. Young,
Employee Member