

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

and

NMB Case No. 26
Claim of D. D. Winslow
Alleged failure to
Control Movement of
Locomotive

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of Conductor D. D. Winslow for reinstatement to service with seniority and all other rights unimpaired with pay for all time lost including payment of Health and Welfare Benefits beginning December 12, 2004 and continuing until returned to service and no deductions for outside earnings, account Carrier did not meet its burden of proof.

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 March 10, 2006, at Washington, D.C. Claimant was 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 as a Conductor by the Carrier in 1998 and had continuous service until his dismissal on January 21, 2005. On December 12, 2004, Claimant and his crew were instructed to pick up a consist of four locomotives and connect to their train which was located on track 1. Claimant was on the lead unit, facing the direction of movement; the Engineer was on the trailing unit operating the consist. The standard procedures include having the crew member on the point call out car lengths to contact, having the recipient acknowledge all radio communications by voice and stop the movement in half of the number of car lengths called out if no further transmission is received.

The four engines under the control of the Engineer approached the cut of cars at excessive speed, failed to slow to an appropriate speed and collided with the standing cut of cars at a speed of 16 mph, resulting in significant damage to track and equipment. During the approach, Claimant called out car lengths on a radio, which he believed the Engineer to acknowledge by keying his radio. According to the tapes, Claimant's last call was at 12 cars. His next transmission was "stop, stop, stop", just before impact.

Claimant asserted that he had continued to call out car lengths as the engines closed on the cars, that he thought the Engineer was receiving his call when he heard clicks and thought he felt the Engine slow. When it became apparent that the engines would impact the cut of cars, Claimant braced himself but did not pull the lever which was located in the cab to set the brakes in emergency.

The Carrier convened an investigation to determine whether Claimant violated Rules 1.1, 1.6, 1.47, 2.6, 2.13, 2.17, 5.3.7, 6.22, 6.27 and 6.5 of the General Code of Operating Rules, April 2, 2000 edition, at which the evidence described herein was adduced.

General Code of Operating Rules (effective April 2, 2000 2.6 states:

An employer who does not understand a radio communication or who receives a communication that is incomplete must not act upon the communication and must treat it as if it was not sent.

Exception: An Employee who receives information that may affect the safety of employees or the public or cause damage to property must take the safe course. When necessary, stop movement until the communication is understood.

When radio communication is used to make movements, crew members must respond to specific instructions given for each movement. In addition:

Radio communications for backing and shoving movements must specify the direction and a distance and must be acknowledged when distance specified is more than four cars.

Carrier GCOR Rule 6.22, Maintaining Control of Train or Engine, states:

Crew members must consider train or engine speed, grade conditions, and air gauge indications to determine that the train or engine is being handled safely and is under control. If necessary, take immediate action to bring the train or engine under control.

The Carrier's Policy for Employee Performance Accountability (PEPA) establishes guidelines for the progression of discipline.

The PEPA Policy section titled "Dismissable Violations" states in part:

The ultimate sanction of dismissal may be imposed in response to a single aggravated offense, as listed in Appendix C. Dismissal also may be imposed in response to a series of rule violations, coupled with no sign of significant improvement in the employee's behavior. There are essentially four events or combinations of events that may result in dismissal:

- Two serious rule violations (see Appendix B) within 36 months (or within 12 months, if the employee's record review period was reduced to recognize five years of injury and discipline-free service)
- Five violations of any kind in a 12-month period (which may include a combination of non-serious, serious and attendance violations).
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Claimant was found guilty of the charges brought against him; and in accordance with the PEPA guidelines, he was dismissed from service effective immediately.

The instant claim was presented in due course and 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 Claimant's blatant disregard for the Carrier's rules substantially contributed to the collision resulting in substantial damage to tracks and Company property. It also argues that the evidence established that Claimant was in the engine cab of the 4th locomotive, facing the movement of the engine and was using the BNSF 5092 engine radio, as opposed to the packset radio, to provide car counts as the train was moved.

Claimant testified that he was communicating with his Engineer informing him counting off in car lengths the progression of the train, and relying on radio clicks to confirm the Engineer's receipt of the messages. The Carrier asserts that by not requiring the proper confirmation that the Engineer had received his communications, Claimant violated safety Rule 2.6.

Further argues the Carrier, despite being in proper position to do so, Claimant did not observe the speed recorder, relying instead on a "feeling" that the train was slowing. Carrier Officer McReynolds testified that the event recorder tape indicated that

the speed of the locomotive consist stayed consistent at 16 mph right up to the point of impact.

The Carrier also argues that, at three car lengths, when Claimant realized a collision was eminent, the only action he took was to scream "stop, stop, stop" into the radio. It asserts that, even then, Claimant had sufficient time to pull the emergency brake but that the only action he took was to brace for a collision.

The Organization argues that the Carrier failed to meet its burden to prove Claimant guilty of the charges. It asserts that the Carrier tried to assign blame to Claimant instead of the Engineer. It also argues the Carrier failed to prove Claimant violated the rules as charged.

The Organization argues, in the first instance, that the evidence is that the Carrier-provided radio was defective. It points out that the Carrier failed to test the equipment and to Claimant's testimony that he continued to transmit car counts, even though the tapes do not include the transmissions. UTU points to Article 16(a) of the Governing Agreement, which states that the Carrier cannot punish an employee for the failure of its equipment. The Organization protests that the Carrier is impermissibly blaming the Claimant instead of fixing equipment.

The Organization also argues that Claimant's due process was violated. It points out that the Agreement provides, in Article 13(a), that a hearing cannot be held on day of, before or after a holiday. UTU protests that the hearing was held on December 30th, the day before the legal holiday of New Year's Day.

The Organization also argues that Claimant did not violate the Safety Rules. It asserts that the evidence is that Claimant followed all applicable rules, gave proper radio signals, and when it became apparent that there would be impact, he braced for it. That was the only safe course available. The Organization argues that the Engineer responded both on radio and by slowing down. It argues that, had the engineer followed the rules and carried out his responsibility, no collision would have occurred.

The Organization argues that the Carrier failed in its burden of proof and a sustaining award is in order. Claimant should be returned to service with seniority rights unimpaired, pay for time lost beginning the date that he was pulled from service, without reduction of outside earnings and all health and welfare benefits intact.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to prove Claimant's guilt by substantial credible evidence on the record as

a whole and to establish that dismissal was the appropriate penalty. For the reasons which follow, the Board is persuaded that the Carrier met its burden to establish that Claimant violated Rules 1.1, 1.6, 1.47, 2.6, 2.13, 2.17, 6.27 and 6.5 as he was charged and that dismissal was an appropriate penalty.

The evidences establishes Claimant's failure to require the proper form of communication between himself and his Engineer. There is insufficient evidence that Claimant continued to call out car lengths. The tapes, which are clear at the 25 cars and discernable at "stop, stop, stop" contains no intermediate calls. Furthermore, Claimant did not observe the speed recorder to verify the speed at which the train was moving, relying instead on a "feeling" that the train was slowing. Finally, Claimant failed to pull the emergency brake lever to stop the train.

As to the Organization's claim that the radio was defective, the tapes are clear that there were no transmissions between 12 cars and "stop, stop, stop". There is no indication beyond Claimant's testimony that he made the additional transmissions. That is not sufficient to establish that the radio was defective.

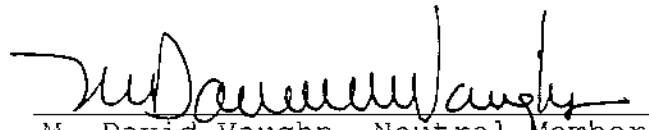
The record establishes that the hearing was convened on December 30th, a day proscribed under the Agreement. The reason that date was selected is not part of the record; however, a review of the transcript reveals no objection to the date by the Organization and no showing of prejudice to either the Organization or to Claimant. To hold the hearing on a prohibited day over the Organization's objection would violate the Agreement. In the absence of any objection and in the absence of demonstrated prejudice, the date on which the hearing was held is not a basis upon which to overturn the penalty.

Claimant's record reveals that between September 2004 and December 12, 2004 he had accumulated five instances of discipline, nearly all dealing with train control issues, as well as a Level S violation for which he was on probation at the time of the incident.

In light of Claimant's record of violations and the seriousness of the violations here decided, the penalty of dismissal was appropriate. The Award so reflects.

AWARD: The claim is denied. The Carrier proved that Claimant violated the Rules with which he was charged and proved dismissal to be the proper penalty.

Dated this 13th day of May, 2006.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


R. L. Marceau, Employee Member