

In the Matter of the Arbitration Between:
BURLINGTON NORTHERN SANTA FE

and

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES DIVISION -IBT**

Case No. 13

Claim of R. A. Armstrong
Level S Combined Suspension
- Failure to Follow
Movement of Car
Instructions

STATEMENT OF CLAIM: Claim on behalf of Truck Driver R. A. Armstrong requesting removal of the Level S Combined Suspension - 21 days actual suspension and nine days record suspension - and one-year review period from his record with seniority, vacation and all other rights unimpaired, and that he be made whole 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.

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 Maintenance of Way craft. The Board makes the following additional findings.

Claimant has worked for the Carrier since March 16, 1996. On October 7, 2011, according to Roadmaster William Honeycutt's testimony, he instructed Claimant to pull no more than five cars behind his Brandt Road Railer while he was in the 19th Street Yard. Mr. Honeycutt testified that, although his instruction was very specific, Claimant pulled seven cars on October 11, 2011.

The Carrier convened an investigation at which the above evidence was adduced. Based on the record, the Carrier found Claimant in violation of MWORs 1.13 (Reporting and Complying with Instructions) and 1.6 (Conduct) and assessed him a 21-day actual suspension and 9-day record suspension.

The Organization protested the discipline, which the Carrier denied on appeal. The Claim was progressed on the property on an expedited basis, 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. It asserts that the evidence presented at the investigation make it clear that, despite Mr. Honeycutt's very specific instruction to pull no more than five cars, Claimant had seven cars on October 11, 2011. BNSF maintains that Claimant was insubordinate, failed to comply with instructions and, thereby, violated the Rules.

BNSF acknowledges that Claimant denies that Mr. Honeycutt instructed him to grab only five cars but contends that the record is unclear as to whether Claimant was denying that Mr. Honeycutt ever gave him instruction to pull no more than five cars or whether he was only denying receiving such instructions on October 11, 2011. In any case, BNSF asserts that, when there is conflicting testimony, as in this case, it is the Conducting Officer who makes determinations concerning credibility. It asserts that the Conducting Officer found the testimony of Mr. Honeycutt to be credible and Claimant's testimony not to be so.

With respect to the penalty, BNSF asserts that the discipline imposed is appropriate and that leniency is not in the Board's jurisdiction. It asserts that Claimant was properly assessed a Level S combined suspension.

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

The Organization argues that the Carrier failed to prove the violations and failed to establish the appropriateness of the penalty. In particular, it contends that, in violation of Rule 13(a), Claimant was pre-judged prior to any testimony at the investigation. The Organization asserts that the Carrier removed Claimant from service without benefit of an investigation and that, if the Carrier had heard the testimony that was provided by the witnesses at the investigation, it never would have considered removal from service as an issue.

The Organization maintains, as well, that the Conducting Officer never made a ruling on its objection to Carrier Witness Honeycutt bringing in testimony outside of the date, time and location listed in the Notice of Investigation ("NOI"), that is, October 11, 2011. It contends that Mr. Honeycutt acknowledged that he did not instruct Claimant on October 11, 2011, to carry no more than five cars and did not witness how many cars Claimant handled on October 11. The Organization asserts, in addition, that the only other eyewitness to the events on the date, time and location listed on the NOI, other than Claimant, was Helper Jim Walker, who

did not hear Mr. Honeycutt give Claimant or himself instructions not to pull more than five cars.

The Organization argues that the Carrier never refuted its affirmative argument, i.e., Claimant's statement that there were only five cars being moved on the date, time and location in question. It maintains that the Carrier's inability to produce a correct and accurate record of Claimant's training - contrary to the Exhibit 5 training record, Claimant is not and has never been a B&B Welder/Helper as stated therein - lends credence to its argument that the Carrier has brought charges with no proof to substantiate the NOI issues. The Organization contends that the Carrier provided no evidence that Claimant violated the rules, Mr. Honeycutt testified to statements never heard by any other witness and the Hearing Officer's decision does not provide any explanation as to how or in what manner he concluded that Claimant had violated the rules.

The Organization urges that the Claim be sustained, that Claimant's Level S Combined Suspension, 21 days actual suspension and nine days record suspension, with a one-year review period, be removed from his record with seniority, vacation and all other rights unimpaired, and that he be made whole for all time lost.

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to establish, by substantial evidence considered on the record as a whole that Claimant violated the Rules and that the penalty assessed was appropriate. The Board concludes that the Carrier failed to meet its burdens.

The Organization's argument is that the Hearing Officer improperly allowed evidence outside the date of Claimant's violation contained in the NOI. The Board is not persuaded. The NOI states that Claimant failed to follow instructions. It does not specify the date, and it is certainly possible for an employee to be disciplined for failing to follow instructions given on one date at a time subsequent to the instruction. The Board does not find the Organization's remaining procedural challenges to be persuasive and turns to consider the merits of the dispute.

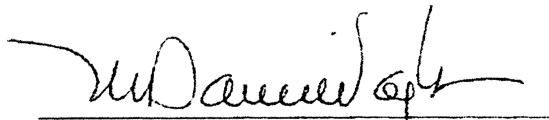
The evidence taken most favorably to the Carrier is that Mr. Honeycutt gave Claimant an instruction on October 7 to pull no more than five cars. It is unclear from the transcript whether that order was intended to constitute a standing order, applicable to each subsequent day, or if it applied only to that date. It is not clear whether Claimant understood any such order to be a standing order covering dates going forward.

The evidence is insufficient to establish that Mr. Honeycutt gave Claimant any order on October 11 with respect to the maximum number of cars to be pulled. Claimant denied having received such an order; the Helper denied hearing such an order. Mr. Honeycutt never contradicted that testimony. The Hearing Officer's right to make credibility determinations is triggered where there is conflicting testimony. Claimant's guilt does not hinge on any such conflict. Instead, the question is whether the October 7th order (the issuance of which Claimant does not directly deny) was reasonably stated and understood to cover subsequent dates. The Board is not persuaded that there is sufficient evidence to establish that to be the case. The Hearing Officer's rationale for concluding that the October 7th order covered the October 11th incident, or indeed for concluding that there was conflict in the evidence requiring credibility determinations is not a part of the record. The discipline is not sustained. The Award so reflects.


Given the nature and circumstances of Claimant's violation, the Board concludes that the Carrier failed to meet its burden to prove Claimant guilty of the charge. The Award so reflects.

AWARD: The Carrier failed to meet its burdens to prove Claimant guilty of the charges. The claim is sustained. The Carrier shall rescind the suspension and make Claimant whole for wages and benefits lost.


Dated this 9th day of May, 2014.



M. David Vaughn,
Neutral Member



Carrier Member
Ms. Samantha Rogers



Employee Member
Mr. David Tanner