

In the Matter of the Arbitration Between:

**BURLINGTON NORTHERN SANTA FE
RAILWAY COMPANY**

and

NMB Case No. 42

Claim of T. C. Freund

50 Day Level S Suspension

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Appeal requesting the removal of the Level S, 50 day suspension, three year probation, and for the removal of the alleged rules violations from his personal record and pay for all time lost beginning the date he was withheld from service until returned and without deduction of outside earnings.

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. The Board makes the following additional findings.

Claimant is employed by the Carrier as a Brakeman. He commenced his employment with the Carrier in 2003 and at the time of the incident at issue, had two years of service.

On September 6, 2005, Claimant was assigned as Brakeman at Los Angeles working a train of approximately 120 empty container flat cars, 6,000 feet long, which were to be placed at a designated spot No. 4 on Mainline Track No. 1. The movement required the crew to make a reverse move eastward from Mainline Track No. 2 through a crossover. Claimant was positioned on the point of the shove with a radio. The Conductor and Engineer remained on the locomotive. It was very dark at the time of the move.

Claimant's job included calling out the distance from the point of the move to the standing cut of cars at Spot 3 onto which his train was to couple. He called out the distance in car lengths. Claimant testified, and his Engineer confirmed, that Claimant repeatedly called out car lengths as the shove was made. He testified that it was very dark but that he could see that the track ahead was clear because of the shine on the rails.

The train backed around a curve, over a bridge and across the golf course crossing, a landmark approximately 3,000 feet from the eventual point of impact. It is not disputed that Claimant called, and the Engineer heard the call, at 20 car lengths. Claimant testified that he gave the 20 car call when he crossed the golf course crossing. That equates to 500 feet; Claimant explained the apparent discrepancy based on the speed the train was moving, a speed of which he was unaware at the time.

The next call would be a 10 car call at 12 actual car lengths. Claimant testified that he made the call when he saw the shine of the wheels of the cut of cars in Spot 3; he testified that the Engineer did not understand the call, as the radio transmission was garbled, and that the Engineer asked him to repeat the transmission.

The Engineer in his written statement said that he heard the 10 car length call but after two car lengths, heard another, but garbled transmission, picked up the radio and told Claimant that he could not understand and was stopping the train; he reached for the independent brake valve but felt impact almost immediately and the train went into emergency.

It does not appear that the Engineer was able to stop the train in half the distance from the last clear communication, when he received the garbled transmittal, even though he was traveling at 16-18 miles per hour at the time and reasonably should have understood that he needed to stop the train immediately.

Claimant called three car lengths on the radio, twice yelled to the Engineer to "plug it" (place the train in emergency) and jumped from the train, injuring his knee.

The transcript of radio transmissions confirms Claimant's call-out of another 20 cars, followed by a 15 car transmittal (to which none of the witnesses testified) to which the Engineer responds that Claimant broke up and requests that the transmission be repeated, followed by a 10 car call-out and then - inexplicably in light of all the other testimony from all involved - a transmission "20 more", followed by a statement (apparently from the Engineer to Claimant) saying "go ahead", as if he had not heard the message, followed by "you need to plug it right now" and another message from the Engineer that "I can't really tell what you're saying". It is not clear that the Engineer understood anything after the initially-quoted 20 car call-out.

The train struck the standing cut of cars, which were tied down, at 16-18 miles per hour, according to the locomotive event recorders. The resulting force caused the empty cars to derail and

jackknife at two locations, spreading cars over the landscape and fouling both mains. This was a serious collision.

Insofar as the record indicates, Claimant handled his post-collision responsibilities as he was required by the Rules to do. The crew was subjected to post-accident drug and alcohol testing. Insofar as the record indicates, the test results were negative.

The Carrier convened an investigation to ascertain his responsibility in connection with possible violations of GCOR Rules 1.1, 1.1.1., 1.1.3, 1.6, 1.47, 2.6, 2.13, 5.3.7, 6.27 and 103 and 103(a). The hearing was attended by Claimant, the Engineer and their respective representatives. At the hearing, the above facts were adduced.

Following the hearing, the Carrier determined Claimant to have been in violation of the cited rules and assessed him a Level S 50 day suspension.

The instant claim protesting Claimant's suspension and seeking its removal and compensation for his losses 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 based on the record, that Claimant violated the rules with which he was charged and that the penalty of a Level S 50 day suspension was an appropriate penalty.

The Carrier argues, as an initial matter, that the evidence establishes that Claimant was lost. Since he testified that the cut of cars at Spot 3 came into view as his train approached and that he crossed the golf course crossing 20 car lengths from the end of the cut onto which he was to couple. It points to evidence that the golf course crossing is 3,000 feet, or approximately 60 car lengths, from the point of impact with the cars at Spot 3.

BNSF argues that Claimant's testimony that he then started to count down at the point he passed the golf course crossing from 20 cars to 10 and then to three cannot be correct. It asserts that Claimant's testimony that he called 10 car lengths cannot be correct because the Engineer did not even have time to apply the brakes prior to impact. The Carrier asserts that the distance at the time Claimant called 10 cars must have been considerably shorter than the actual length for that to have happened. It maintains that Claimant's failure to properly and timely call out the car lengths violated the rules with which he was charged and

that, but for Claimant's failures, the collision would not have occurred.

The Carrier rejects the Organization's argument that Article 16 (a) precludes discipline because radio failure caused the accident. It concedes that the radio transmissions may have been garbled, but maintains that the garble was likely the result of how Claimant used the radio, pointing out that the transmission occurred just prior to his jumping from the train. The Carrier points out that GCOR Rule 2.6, read together with Rules 5.3.7 and 6.22, requires employees receiving an garbled message to treat it as if not sent and, when necessary for safety, to stop the movement until the communication is understood.

The Carrier likewise rejects the Organization's argument that the garbled communication was the result of radio failure based on the Carrier's subsequent installation of additional equipment to improve radio reception. It maintains that the changes do not overcome the improper car counts which Claimant gave.

The Carrier denies that the statement of the hearing officer that the purpose of the hearing was determine "when and how and by who may have violated a rule" constituted prejudgement inconsistent with the requirement that the Carrier afford Claimant a fair hearing.

The Carrier argues that its new disciplinary program is proper and restrained and should receive deference from the Board.

Finally, the Carrier argues that, in the event the discipline were to be overturned, any back wages be offset by outside earnings.

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

The Organization argues that the Carrier failed to prove Claimant's guilt of the charges against him and that it also failed to provide Claimant with due process and a fair hearing.

The Organization argues, in the first instance, that the movement was properly and safely performed, with Claimant timely and properly giving car counts using the rule of "half plus one", until the Engineer was unable to hear Claimant's radio transmission. It asserts that the garbled communication was the result of radio failure and that the collision was the direct result of that failure. UTU points out that Article 16 (a) of the Trainmen's Schedule provides that employees will not be held responsible for accidents caused by failures in the functioning of radio equipment.

The Organization argues that the failure of radio communications which Claimant experienced in making the reverse was so common that the Carrier subsequently added more equipment to improve reception.

UTU argues that the investigation was illegal, since Claimant clearly carried out his responsibilities. It asserts that Hearing Officer McReynolds exhibited prejudgment in making a statement which assumed that rules had been violated.

The Organization urges that the claim be sustained, that Claimant's suspension be ordered rescinded and that he be made whole for wages and benefits lost.

DISCUSSION AND ANALYSIS: It was the Carrier's burden to prove, by substantial credible evidence on the record as a whole, Claimant's guilt of the violations charged and to establish that the penalty of a 50 day suspension was not arbitrary or excessive. The Board concludes that the Carrier failed to meet its burdens.

It was also the Carrier's burden to establish, when presented with argument and evidence to the contrary, that it provided Claimant with due process and a fair hearing. The Board has reviewed the Hearing Officer's statement which is complained of by the Organization and concludes that the statements are not sufficient to constitute prejudgment.

The evidence persuades the Board that Claimant followed proper procedure up until the time he communicated that 10 car lengths remained and, at that point, his radio transmission was garbled. The Carrier asserts that this must have been the result of Claimant's improper use as he was about to jump. This is mere speculation, for which there is no evidentiary support. Indeed, at the time Claimant called 10 car lengths, there is no indication that he anticipated a collision.

The subsequent action of the Carrier installing additional equipment to improve radio reception cannot, itself, be used to establish what happened during the incident; but the evidence does indicate that this had been a problem area for radio reception. The Carrier's conclusory denial that the failure of the radio to function properly caused the garble and communication failure and that the failure caused the accident is not convincing. To the contrary, Claimant testified that he called car lengths down to and including 10 cars at the proper time; and the Engineer testified that the communication from Claimant after he had called out 20 cars was garbled.

The transcript of radio transmissions generally confirms Claimant's testimony and supports the Organization's arguments, in that he calls out another 20 cars and then a 15 car transmittal to which the Engineer responds that Claimant broke up and requests that the transmission be repeated. Indeed, it is not clear from the transcript whether the Engineer comprehended any message after the initial 20 car transmittal. It is clear that Claimant kept transmitting car lengths thereafter - his job - but the Engineer appears to have continued to shove the 6,000 foot train at 16-18 miles per hour toward the coupling point, without applying any brakes, even though he knew that he was less than 20 car lengths away and heard only garbled transmissions after the last 20-car call-out.

In his statement, the Engineer stated that he was reaching for the independent brake to slow the five units in the locomotive consist. For reasons not apparent, he waited to apply the independent brake and did not attempt to apply the train brake; the train went into emergency only as a result of the impact. Clearly, Claimant had no control over the train-handling.

The evidence is that the train hit the standing cut of cars at a speed of 16-18 miles per hour. The Board notes the complete inappropriateness of that speed at 20 car lengths away from the coupling point, but clearly if the impact speed was that fast, it was that fast or faster at 20 cars and 10 cars away. Moreover, knowing the speed and approximate distance to couple, it was the responsibility of the Engineer when he heard the garbled message to take the safe course, which would have been to stop the train immediately. Indeed, a major purpose of calling car lengths is to ensure that the engineer can stop the train in half the distance from the last call. This the Engineer did not do so and was apparently unable to do. Without passing on the claims of the Engineer or the Conductor, which are not before this board, it would appear that it was not errors by Claimant which were the proximate cause of the collision.

As to the Carrier's assertion that Claimant was "lost", the Board is not convinced that his apparent failure to recognize how far away the golf course crossing was from the point of impact is determinative of claimant's guilt. If the crossing was 60 car lengths away from the end of the cut of cars at Spot 3 but he called 20 car lengths after he passed the crossing, that increases, rather than decreases, the car length warnings he gave the Engineer and renders the speed at which the train was moving, and the failure to apply brakes and lower the train's speed even more inappropriate. The Board notes that Claimant was not in a position to know the speed of the train while he was riding the point in the

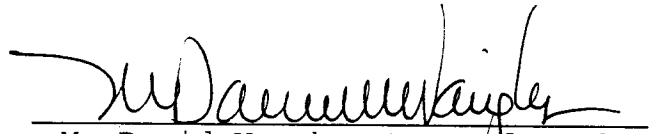
dark and that Claimant testified that the usual coupling speed he was used to was four miles per hour.

The Carrier was understandably concerned as to the crew's performance which resulted in a collision of sufficient severity to foul its mains. Mistakes were clearly made. There are lessons to be learned and improvements to be made following such an event, but neither the seriousness of the collision or the need for improvement in areas including crew performance are a substitute for the Carrier's obligation to prove the specific charges against Claimant, which the Board concludes it failed to do. The Award so reflects.

The Carrier argues that any award of back pay should be offset by interim earnings. The Board notes that the purpose of the remedy for the Carrier's violation of the governing Agreement is to make him whole, that is, to place him economically where he would have been, but for the Carrier's wrongful imposition of the suspension, and not to enrich him beyond that point. Accordingly, the Award reflects that, if Claimant had interim earnings during his suspension different than he might have had before his suspension, those earnings are to be deducted from wages paid. However, given the length of the suspension, the Board would not be prepared to assume an obligation on Claimant's part to seek another job to mitigate his losses.

AWARD: The Carrier failed to prove by substantial credible evidence that Claimant is guilty of the charges against him. The claim is sustained. Claimant's suspension shall be rescinded, his seniority for the period restored and he shall be made whole for wages and benefits lost as a result of the suspension, less interim earnings in excess of outside earnings for the period prior to his suspension. Claimant's personnel records shall be amended so to reflect. Claimant shall provide the Carrier with a statement of interim earnings, if any, or a statement that there are no such earnings. The Award shall be implemented, and payments made, within 30 calendar days from Claimant's submission of the statement with respect to interim earnings.

Dated this 20TH day of February, 2007.



M. David Vaughn, Neutral Member



Gene L. Shire, Carrier Member



R. L. Marceau, Employee Member

Public Law Board No. 6721

Award No. 42

Organization's Written Dissent

The employees respectfully dissent to the Award in part authorizing the Carrier to deduct outside earnings from the monetary amount Claimant would have received as wages during the time he was withheld from service. The Awards, rulings, customs, and practices which collectively constitute the former ATSF Coast Lines Agreement clearly demonstrate that the long standing practical application of the aforementioned Collective Bargaining Agreement has not included deductions for earnings derived from other employment during time periods when an employee was denied the opportunity to exercise seniority to an employment position governed under provisions of the former ATSF Coast Lines Agreement.

Respectfully submitted,

A handwritten signature in cursive script that reads "Rick L. Marceau".

Rick L. Marceau
Employee Member