

PUBLIC LAW BOARD NO. 6721

In the Matter of the Arbitration Between:

BURLINGTON NORTHERN SANTA FE

RAILWAY COMPANY

and

NMB Case No. 29

Claim of C. Gore

Dismissal: Failure to
Protect Shove, Line Switch

UNITED TRANSPORTATION UNION

STATEMENT OF CLAIM: Claim on behalf of Yardman/Trainman Gore 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 August 9, 2004 and continuing until returned to service and no deductions for outside earnings and the removal of his alleged violations on account Carrier did not meet their 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 first employed by the Carrier in March of 2004. He had no prior railroad industry experience. Claimant successfully passed his initial training and qualified as a ground man. He passed his probation period. He then entered the RCO training program in Barstow, CA. It appears that he was directed to do so by the Carrier. Claimant completed the three week course and received some additional training, but continued to voice concerns that he was not ready to perform the duties for which he was being trained.

On August 9, 2004, during Claimant's Certification Ride at the Barstow Yard under the observation of Management officials, he was unable to place the battery into the OCU box, failed to properly link up to the RCO box, failed to properly observe the alignment of a switch and failed to protect a shove. Management witnesses testified that Claimant was unable to perform these basic duties, even after being coached by the crew. Mr. French, the RCO qualifier, stopped the movement which, had it proceeded, could have caused a collision. Carrier witnesses testified that, if Claimant had not been stopped, damage or injury might have resulted. The Carrier then withheld Claimant from service. Claimant denied that he had misaligned a switch, pointing out that he did not align any

switches, asserted that he had a clear view of the end of the cut from his location and stated that he stopped the move in time once he realized he was on the wrong track.

The Carrier convened an investigation on September 7, 2004 to determine whether Claimant violated General Code of Operating Rules 1.1, (April 2, 2000 Edition) Safety, 1.1.1, Maintain the Safe Course, 6.5, Handling Cars Ahead of the Engine, and 8.2, Position of Switches, at which the evidence described herein was adduced.

During the hearing, the tape recorder being used to create the record of the proceeding malfunctioned, resulting in the loss of approximately 45 minutes of testimony. The Parties did their best to recreate the missing testimony. The Organization protested the malfunction.

Claimant had previously been issued a record 10 day suspension for failure to appear in the Terminal Superintendent's office as instructed, a Level S (serious) violation. He did not receive Alternative Handling. The Carrier's Policy for Employee Performance Accountability (PEPA), "Dismissible Violations" states, in part, that two serious rule violations within 36 months may result in an employee's dismissal.

Claimant was found guilty of the charges brought against him. He was dismissed from service on October 4, 2004.

The instant claim for Claimant's reinstatement and payment for all time lost, 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 the record contains substantial credible evidence that Claimant violated at least three serious rules during his Certification Ride and thus failed to qualify as an RCO. It asserts that Claimant's demonstrated poor performance constituted a safety hazard to himself and others and clearly indicates his unsuitability to perform the type of work assigned.

The Carrier argues that Claimant had been placed with crew members who possessed excellent skills and training ability and that he had been provided with additional hours to train on the RCO equipment, as well as coaching during the certification test. The Carrier asserts that the standard training period is three weeks and that following a request by the RCO Review Committee, Claimant had been given an additional two weeks to become familiar with the

Barstow Yard. It contends that, notwithstanding this assistance, he failed the most basic parts of his certification test.

The Carrier points out that Claimant's first task required him to place the battery into the OCU box and then to link up. It maintains that the evidence establishes that Claimant was unable to place the battery into the OCU and, after receiving assistance from the crew, was uncertain what to do to complete the link up. The Carrier also argues that, in performing the work assigned as part of the test, Claimant failed to properly align the switch and failed to protect the shove. Again it asserts Claimant failed to demonstrate competence to perform these basic duties.

The Carrier argues that the evidence proves the rule violations and urges that the dismissal be upheld and the claim be denied.

The Organization argues that the Carrier failed to prove the charges against Claimant and argues further that it failed to provide the Claimant with a fair and impartial investigation, evident when it issued the harsh and excessive discipline of dismissal to the Claimant.

The Organization argues that at the time he was disciplined, Claimant was still a student, operating under the oversight of an instructor. It points out that he did not cause harm to himself, other BNSF employees or BNSF equipment. It asserts that the assignment which led to his dismissal was a training test to determine whether Claimant was ready to be licensed. UTU maintains that the total of 13 weeks of training which Claimant received were dangerously inadequate to prepare him, as a trainee with no prior railroad experience, for real world situations.

UTU further argues that the ability to operate a remote control unit cannot be a condition of employment. It asserts that there is no provision that states the Carrier may terminate an employee's ground seniority simply because the employee cannot operate remote control units.

The Organization urges that the claim be sustained, Claimant's dismissal rescinded and Claimant returned to service with all rights unimpaired, including seniority and health and welfare benefits, and without deduction of outside earnings, starting August 9, 2004 and until returned to service

DISCUSSION AND ANALYSIS: It was the burden of the Carrier to adduce substantial credible evidence on the record as a whole of Claimant's guilt and to establish that the penalty of dismissal was

the appropriate response. For the reasons which follow, the Board is persuaded that the Carrier established Claimant's violation of certain rules, but that the penalty of dismissal was harsh, excessive and inappropriate.

The Carrier has an obligation to ensure that employees are not placed in assignments which they cannot safely perform and has a further obligation to provide employees with training sufficient to perform assigned duties. It also has the right to make determinations as to qualifications and suitability to perform particular types of work, subject to review through the claims process.

The evidence persuades the Board that the Carrier properly deemed Claimant to have failed his RCO qualifying test. He demonstrated lack of skill and judgment necessary to perform RCO duties. Claimant acknowledged as much by stating in advance of the test that he was not comfortable performing the duties assigned and asserting that he needed additional training.

The Board is not persuaded that the Carrier provided Claimant with sufficient training. The assertion that he received two additional weeks of training beyond the basic three weeks is not supported by the record. He received, at most, several extra days of RCO training. His training was not preceded by any railroad industry experience. He appears to have successfully completed the pre-RCO training and to have passed his probationary period. Under such circumstances, it is not appropriate to place all of the consequences of the unsuccessful RCO training program on Claimant.

Moreover, it appears that Claimant was qualified as a ground man and was not obligated, under the terms of the governing Agreement, to become RCO-qualified. Neither is the Board persuaded that Claimant's performance was such that it warranted withholding him from service. Whether there were jobs for which he was qualified and for which he would have been eligible during the period is not apparent from the record. That question, and its possible economic consequences, are remanded to the Parties for review and resolution.

Claimant shall be returned to employment, a training program appropriate to his status shall be developed and, upon Claimant's completion of that program, his qualifications and suitability for employment in the Yardman, or such other craft in which employment is available, shall be evaluated and appropriate determinations made.

PLB 6721

Case No. 29, Claim of C. Gore

Page 5

Ultimately the Carrier has the right to make qualification and suitability determinations, but, in the case of employees who have passed their probationary, that right is subject to review through the claims procedure. Violations must be proven by substantial evidence and the penalty must be established to be appropriate to the offense.

The Board notes the faulty tape recording equipment and reminds the Carrier of its responsibility to provide a complete record of the hearing and to provide equipment necessary to obtain that record. Clearly, the Carrier failed its responsibility, potentially jeopardizing the fair hearing to which all claimants are entitled. That having been said, the Organization did not identify any evidence or argument favorable to Claimant which was lost as a result of the faulty tape recorder. The Board is not persuaded that failure of the tape and the recreated testimony, delay and inconvenience are sufficient to overturn the discipline.

Under the circumstances, the Board is not convinced that the Carrier properly dismissed Claimant from service. Instead, he should be reinstated to service and afforded re-training as well as any additional training warranted. If RCO continues not to be required, he should be allowed to work in non-RCO jobs for which he is qualified. If RCO qualification is required, Claimant should receive a full assessment as to his ability and suitability for the required jobs for which he was being trained.

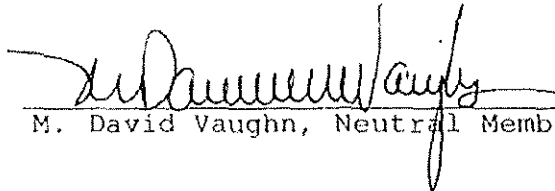
PLB 6721

Case No. 29, Claim of C. Gore

Page 6

AWARD: The claim is sustained in part and denied in part. Claimant's performance in the RCO certification test was properly deemed unsatisfactory. In his performance during the test, he violated rules included in the list with which he was charged. Claimant was not properly withheld from service as a result of his performance during the RCO certification test. His status during the period after he was withheld from service is remanded to the Parties for determination and entry of appropriate remedy. Claimant shall be returned to duty in the same status he was in at the outset of his RCO training. Whether he can be required to undergo RCO training as a condition of his employment is likewise remanded to the Parties. In light of the passage of time, Claimant shall receive refresher training and, if RCO qualification is required, a complete new RCO training course, including additional training beyond the basic course, if needed. Claimant shall be returned to employment, a training program appropriate to his status shall be developed and, upon Claimant's completion of that program and testing, his qualifications and suitability for employment in the Yardman Craft, or such other craft for which he might be eligible, shall be evaluated and appropriate determinations made. The Carrier shall implement the Award within 30 calendar days of its execution.

Executed this 13th day of July, 2006.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


R. L. Marceau, Employee Member

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INTERPRETATION: An Award previously issued by the Board sustained in part and denied in part a Claim protesting Claimant's 2004 dismissal from service for unsatisfactory performance in the RCO certification test, in violation of multiple rules cited in the Opinion.

The Board found Claimant guilty of unsatisfactory and unsafe performance of his RCO duties; however, it found his training not to be adequate. Moreover, Claimant had established ground seniority, and the Board found that he had been improperly withheld from such service as a result of his performance during the RCO certification test and should have been returned to that status, rather than being dismissed. The penalty of dismissal was arbitrary and excessive, for reasons stated in the Opinion, including inadequate training.

Claimant's status during the period after he was dismissed was remanded to the Parties for determination and appropriate remedy. On August 17, 2006, the Parties requested an Interpretation of the Board's previous Award and issuance of a more specific remedy. The Award is interpreted to read as follows:

Claimant's dismissal shall be rescinded and he shall be returned to employment in the same status he was in at the outset of his RCO training, that is, as an employee holding ground seniority and working in that capacity. In light of the passage of time, Claimant shall be fully and completely retrained and requalified as a ground employee, as if he were a new employee, before being returned to work as a ground employee.

Upon his requalification, Claimant may exercise his full ground seniority, including seniority covering the period of his dismissal, and shall be allowed to work when and as the exercise of his seniority and qualifications allow. In the event Claimant does not qualify, he shall be treated by the Carrier in the same manner as any other employee who fails to qualify.

Claimant shall be required to undergo RCO training only if all other, similarly-situated employees are required to do so or if he applies and is accepted for such training. If RCO qualification is required of him or if he is otherwise enrolled in the training,

PLB 6721

Case No. 29, Claim of C. Gore

Page 2

Claimant shall be given a complete new RCO training course, including additional training, if needed, beyond the basic course.

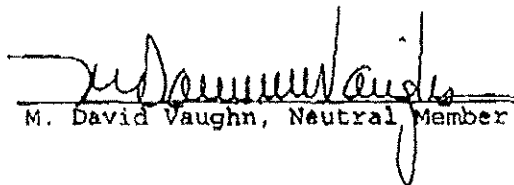
Upon Claimant's completion of all required training and testing, his qualifications and suitability for employment in the Yardman Craft, or such other craft for which he might be eligible, shall be evaluated and appropriate determinations made. In assessing Claimant, the Carrier shall not be required to relax the safety and competency requirements applicable to other employees.


If Claimant becomes RCO-qualified, he shall be allowed to exercise his seniority in such job. If he does not become RCO-qualified, Claimant shall continue in ground service as his seniority and qualifications allow.

The responsibility for Claimant's unsatisfactory and unsafe performance during his RCO qualification is shared between the Carrier and him. Elements of Claimant's employment and earnings during the period he was dismissed are speculative. In full satisfaction of the Carrier's financial obligation to Claimant during the period he was dismissed, and without precedent or prejudice, the Carrier shall compensate Claimant for 180 calendar days at the guaranteed extra board rate, less standard deductions. Claimant's entitlement to that compensation is not contingent on his requalification for service.

The Carrier shall implement the Award, as interpreted, within 30 calendar days of its execution.

Executed this 29th day of September, 2006.


M. David Vaughn, Neutral Member


Gene L. Shire, Carrier Member


R. L. Marceau, Employee Member