

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 29704
Docket No. 49490
19-1- NRAB-00001-180234

The First Division consisted of the regular members and in addition Referee Meeta A. Bass when award was rendered.

(Brotherhood of Locomotive Engineers and Trainmen
PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“It is hereby requested that Engineer R. E. Espinoza's discipline be reversed with seniority unimpaired, requesting pay for all lost time, with no offset for outside earnings, including the day(s) for investigation with restoration of full benefits and that the notation of Dismissal be removed from his personal record, resulting from the investigation held on July 27, 2016.”

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

In 1998, the Carrier hired the Claimant. During the time period in question, the Claimant was an Engineer in Pueblo, Colorado. On February 16, 2016, the Claimant was working and assigned as the Engineer on train M-DDCPUE1-16. The Claimant had been operating his train at or near maximum authorized speed for the

preponderance of the trip. The Claimant reduced his speed for a 25 MPH slow order and after clearing the restriction, he stayed at or near 25 MPH for 19.6 miles. The maximum authorized speed for that portion of the track was 55 MPH. The Boise City Subdivision Dispatcher instructed the Claimant and his Conductor that they were to perform a 17-car pick-up upon arrival at La Junta. The Claimant and his Conductor informed the Dispatcher that they believed the outbound crew should perform the pick-up instead of them. The dispatcher checked with the Chief Dispatcher and reinforced the instructions that they were to perform the work. When the Claimant's train arrived at La Junta, the Claimant had 3 hours and 20 minutes left to work. The Claimant and his Conductor secured the train and did not perform the pickup as instructed. The Conductor had a job briefing with the other crew who did the work. The Claimant and his Conductor were placed under charge. The Conductor signed a waiver.

The Carrier issued a Notice of Investigation letter dated February 19, 2016 which stated as follows:

“...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged indifference to deny when you allegedly failed to avoid unnecessary train delays when you failed to comply with dispatcher instructions when instructed to perform a pickup at La Junta yard at approximately 2150 hours, February 16, 2016 while assigned as crew members to Train M-DDCPUE 1-16, on duty at 1400 hours in Dodge City, Kansas...”

After some postponement, the Investigation was held on July 27, 2016. Following the Investigation, the Claimant received a Discipline Notice dated August 23, 2016, finding a violation of GCOR 1.6 Conduct, GCOR 1.29 Avoiding Delays, GCOR 1.3.1 Rules, Regulations, and Instructions, GCOR 1.3.3 Circulars, Instructions, and Notices and GCOR 1.13 Reporting and Complying with Instructions. The Organization appealed the Carrier's decision on August 29, 2016, and the Carrier denied the same on September 28, 2016. The Organization advanced the claim to the Vice President of Labor Relations by letter dated November 23, 2016, and the same was denied on January 12, 2017. A formal conference was held with no change in the position of the Carrier. This matter is before this Board for a final resolution of the claim.

The Board has reviewed the record developed by the parties during their handling of the claim on the property, and considered evidence related to the following to make its determination of this claim:

- 1) Did the Claimant receive a full and fair investigation with due notice of charges, opportunity to defend, and representation?
- 2) If so, did the Carrier establish by substantial evidence that the Claimant was culpable of the charged misconduct or dereliction of duty?
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh in the facts and circumstances of the case?

The Carrier contends that the Claimant intentionally caused delay to his train with the sole purpose of avoiding performing the assigned work in violation of GCOR 1.29. The Carrier contends that the Claimant subsequently ignored instructions of the Boise Subdivision Dispatcher to complete the work, in violation of GCOR 1.13.

The Carrier further contends that the Claimant showed blatant indifference to duty and unnecessary delay to the Carrier's customers freight by intentionally operating well below authorized speed and by failing to perform the required pick-up after being properly instructed, in violation of GCOR 1.6. Based thereon, the Carrier has met its burden of proof that the Claimant violated the rules. Moreover, the Carrier contends that the Investigation was properly held and that the discipline was commensurate with the nature of the offense. The Claimant violated the cited Rules and the Carrier does not need to prove that harm resulted from these violations. It is the position of the Carrier that the claim should be denied.

The Organization contends that the Claimant was denied a fair and impartial Investigation. The Organization contends that the Hearing Officer also assessed the discipline against the Claimant, thus representing the Carrier's bias and its predisposition against the Claimant. The Organization contends that the Carrier's denial to secure the attendance of the outbound crew denied the Claimant of the

opportunity to introduce exculpatory testimony in his defense on the charge of insubordination. The Organization contends that the Carrier failed to disclose Mr. Cook as a witness prior to the Investigation and thus violated its Agreement and the due process rights of the Claimant. The Organizations further contends that based on its speed calculations, the train could have been potentially delayed by less than nine minutes. The Organization further contends that the Carrier failed to establish a violation of the cited Rules. The Organization argues that the statements of the outbound crew confirm that the Claimant and his Conductor were prepared to comply with the Dispatcher's instructions but following their own job briefing, the outbound crew decided to perform the work. Moreover, the Organization contends the penalty imposed is unreasonably harsh. The Claimant is a 16 year veteran who was a Level S Discipline for an unrelated event which occurred seven months prior. Prior to that event, the Claimant had no discipline on his records for 13 years. It is the position of the Organization that the claim should be sustained.

The Carrier charged the Claimant with violation of GCOR 1.6 Conduct, GCOR 1.29 Avoiding Delays, GCOR 1.3.1 Rules, Regulations, and Instructions, GCOR 1.3.3 Circulars, Instructions, and Notices and GCOR 1.13 Reporting and Complying with Instructions which read:

“GCOR 1.29 Avoiding Delays

Crew members must operate trains and engines safely and efficiently. All employees must avoid unnecessary delays.

GCOR 1.13 Reporting and Complying with Instructions

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.

GCOR 1.3.1. Rules, Regulations and Instructions

Safety Rules. Employees must have a copy of, be familiar with and comply with all safety rules issued in a separate book or in another form.

General Code of Operating Rules. Employees governed by these rules must have a current copy they can refer to while on duty.

Hazardous Materials. Employees who in any way handle hazardous materials must have a copy of the instructions or regulations for handling these materials. Employees must be familiar with and comply with these instructions or regulations.

Air Brakes. Employees whose duties are affected by air brake operation must have a copy of the rules and instructions for operating air brakes and train handling. Employees must know and obey these rules and instructions.

Timetable and Special Instructions. Employees whose duties are affected by the timetable and special instructions must have a current copy they can refer to while on duty.

GCOR 1.6 Conduct

Employees must not be:

1. Careless of the safety of themselves or others.
2. Negligent.
3. Insubordinate.
4. Dishonest.
5. Immoral.
6. Quarrelsome
7. Discourteous.

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty or to the performance of duty will not be tolerated.”

The Board has reviewed the record and will discuss the appearance of impropriety of the proceeding in the context of this discussion. It is the role of the Hearing Officer to gather the facts surrounding the events which gave rise to this discipline. As a Hearing Officer, it is also his responsibility to safeguard the integrity of the process and the parties’ Agreement, and to create a record that is composed of competent, relative and probative evidence. The Board takes exception to the Carrier calling Mr. Cook, who was not disclosed on the witness list, to give hearsay testimony

of his conversation with the Conductor, a prior witness in this matter, to establish the fact the Claimant failed to achieve maximum speed to avoid the work. The Conductor accepted his responsibility for his portion of the violation and executed a waiver. When called by the Carrier, the Conductor was not questioned regarding the conversation with Mr. Cook in his original testimony, nor was he recalled after Mr. Cook's testimony to address Mr. Cook's assertion. The transcript reflects that the Conductor was told to remain in the building subject to recall. There was also no need for the local representative to secure an affidavit from the Conductor post-proceedings. The Carrier could have recalled the Conductor. The Carrier had to have known the content of Mr. Cook's testimony prior to conversation because he would not have called "Mr. Cook." Therefore, his name should have been disclosed on the Notice of Investigation. It is the opinion of the Board that the failure to question the proponent of the statement attacks the validity of the same. This irregularity in the proceeding can be cured by giving the testimony of the Conductor no weight as opposed to sustaining the claim on procedural grounds as well as disregarding the Affidavit of the Conductor as after acquired evidence.

As related to the merits, the Board is troubled by the time differential between 15 and 18 minutes and the implication that the Claimant knew or would have known that the other crew would have arrived within that time frame. The Carrier argues that the Claimant was traveling at or near maximum speeds on other portions of his route but failed to increase his speed to the maximum rate coming out of the first slow order after receiving the instructions from the dispatcher. The Carrier witness testified that "the train appeared to be operated at a much slower pace to arrive at La Junta later than it was before they received that message." On the other hand, the Claimant defends his action on the basis of the upcoming 25 mile per hour restriction, the need to brief the Conductor on these new instructions within safe train operations, and in compliance with the fuel conservation policy of the Carrier that is coupled with a financial incentive. Neither the Claimant nor his Conductor was asked whether or not they deliberately delayed the train for purpose of avoiding the instruction. The Conductor testified that there was more than three hours remaining in their shift to complete the task assigned. It is not disputed that the Claimant and the conductor did not actually complete the assigned task. The Claimant was given clear instructions to do the work and did not. The Claimant did not report back to the dispatcher to make her aware of the job briefing with the other crew.

The Board finds there was insufficient evidence to prove a violation of GCOR 1.29 Avoiding Delays, and substantial evidence that the Claimant violated the remaining rules. The Board finds that level of culpability for the charge of insubordination does not warrant a penalty of dismissal. The Board finds that the penalty is unreasonably harsh given the totality of the circumstances, the proven charges, and his discipline record. The Board recognizes that the Carrier's policy provides a grid, and the company representatives are most likely going to rely on the grid to avoid claims of disparate treatment. Under the principles of just cause, the test is whether the penalty fits within the range of reasonableness. Given all the relevant considerations, adherence to progressive discipline does not require automatic acceleration to the next level of discipline, unless the parties have so agreed. The Board modifies the penalty to a second Level S infraction. Any back pay is subject to deduction of outside earnings.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 17th day of June 2019.