

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14190
Docket No. 14073
17-2-NRAB-00002-150047**

The Second Division consisted of the regular members and in addition Referee Joseph M. Fagnani when award was rendered.

PARTIES TO DISPUTE: (**(International Brotherhood of Electrical Workers**
(BNSF Railway Company

STATEMENT OF CLAIM:

- “1. That in violation of the governing Agreement, Rule 40, in particular, the BNSF Railway Company arbitrarily, unjustly and excessively disciplined Kansas City, Kansas, Mechanical Department Electrician Terrance J. Jones as a result of an unfair investigation conducted on May 16, 2014. Electrician Terrance J. Jones was assessed the ultimate penalty of dismissal from the Carrier’s service on May 23, 2014.**

- 2. That accordingly, and as a result of the unwarranted, arbitrary, unjust and excessive discipline assessed Mechanical Department Electrician Terrance J. Jones, the BNSF Railway Company be ordered to return Electrician Terrance J. Jones to service immediately, to compensate Electrician Jones for all lost wages, rights, benefits and privileges which have been adversely affected as a result of the dismissal, and further, remove all record of this matter and the discipline assessed from Mechanical Department Electrician Terrance J. Jones’ personal record.”**

FINDINGS:

The Second 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.

The Claimant was dismissed from the Carrier's service following a formal Investigation in connection with the following:

“....your alleged violation on May 3rd, 2014 at approximately 6:00am, you allegedly were found sleeping in the cab of the BNSF 1472. When questioned about the incident, you allegedly misrepresented the facts about the incident.”

At the formal Investigation, General Foreman Barbour and Mechanical Foreman Mills testified that on the subject date, they were walking around the locomotive facility when they observed the Claimant in the cab of engine BNSF 1472 with his eyes closed and head tilted to his chest. They further stated that they closely observed the Claimant for approximately one minute through the window of the locomotive and the Claimant did not move and continued to have his eyes shut. General Foreman Barbour testified that he moved closer to the window and took two photos of the Claimant who, according to the supervisors, remained immobile with his eyes shut and his head tilted. The photographs were also entered into the investigatory record. When the supervisors entered the cab of the locomotive, the Claimant was awake and denied that he had ever been asleep. Based on the observations of Messrs. Barbour and Mills and based on the photographic evidence, the Carrier concluded that the Claimant was asleep while on duty in violation of its Rules of Conduct.

The Claimant testified at the Investigation that, while he could not recall what he was doing at the time, he denied that he was asleep at any time during his tour of duty. When questioned about the discrepancies between his statements and those of the two supervisory officials, the Claimant stated that their testimony was inaccurate.

There is obviously a conflict in testimony. This Board has held in a plethora of awards that when there is a conflict in testimony that the Carrier, as the trier of facts is in the best position to resolve such conflict, and that this Board, in its appellate capacity, should not upset such finding absent a clear showing of prejudicial conduct by the Carrier. There is no such showing in this case.

In disciplinary cases, the Carrier has the burden of proving that the charges against an employee are sustained. Unlike in criminal or civil cases, the standard of proof in a disciplinary hearing is that the Carrier must provide substantial evidence of a credible nature that a violation has occurred. Upon its review of the record, the Board finds that the Carrier has upheld its burden of proving that the Claimant was guilty of the charged offense.

Relative to the discipline assessed in this case, the Carrier notes that the Claimant's violation constituted a serious offense in accordance with its Policy for Employee Performance Accountability (PEPA), and points out that such Policy provides that an employee may be dismissed for a second serious violation within the applicable review period. The Carrier presented documentation establishing that this was the Claimant's second serious offense during the review period and also noted that during the Claimant's seven years of service, he has been disciplined on ten previous occasions. The Organization argues that the discipline assessed was arbitrary, capricious and unjust.

Based upon its review of the record, the Board finds that the discipline assessed was in accord with the Carrier's PEPA and was not excessive or arbitrary. Accordingly, the Board will not disturb the discipline of dismissal assessed in the present case.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

Dated at Chicago, Illinois, this 15th day of December 2017.