

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 28512
Docket No. 48261
16-1-NRAB-00001-140291**

The First Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

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

STATEMENT OF CLAIM:

“It is hereby requested that Engineer R. H Winter'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 August 15, 2013.”

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.

The Claimant was first employed by the Carrier on May 15, 2006. He began as a Trainman and he was working as a Conductor at the time of the incident at issue herein.

On May 23, 2013, the Claimant was working as the Conductor on Train Z-ALTSBD7-22, operating from Needles to San Bernardino, California. Around midnight, the train arrived at the intermodal ramp in San Bernardino and the crew, including Claimant, was instructed to pull through track 13/223 – a continuous track although the facility is divided – and to double the head portion of their train into track 222. After pulling 65 feet past the 222/223 switch, the Claimant placed fuses and secured the cars in track 223. Shortly thereafter, the Claimant entered a van, which was facing opposite the movement and instructed his Engineer to shove back 20 car lengths. Since the train was clear of track 223, a Contractor had begun his blue flag process in order to inspect the cars. The Engineer acknowledged the car count and began his shove but, because the Claimant failed to properly line and verify that he was lined for track 222, the shove took the cars down the wrong track, that is, track 223. Before the Claimant instructed his Engineer to stop, the train was shoved 287 feet into track 223, striking a stop sign, running over a derail (derailing three sets of trucks) and fatally injuring the Contractor.

The Carrier scheduled an Investigation at which the foregoing evidence was adduced and, based thereon, dismissed the Claimant for violating Rules 6.5 (Shoving Movements), 6.28 (Movement on Other than Main Track), 8.2 (Position of Switches) and 8.20 (Derail Location and Position). The Organization protested the discipline, which the Carrier denied. The Organization appealed the discipline in the usual manner, up through and including the Carrier's highest designated official, but without resolution. The dispute was referred to the Board for adjudication.

The Carrier argues that it met its burden to prove the Claimant's violations of the Rules and the appropriateness of the penalty. It asserts that the record demonstrates that the Claimant admitted that he was in charge of the shove and that the shove onto the improperly-lined track ended in a derailment and loss of life. It maintains that the Claimant was obligated to have been able to stop within half the range of vision of the switch improperly lined, the stop sign and the derail protecting track 223 but, instead, the Claimant shoved into the wrong track, ran through a gate and over a derail, resulting in the fatality of a worker. The Carrier contends that the

Claimant was responsible for ensuring that his route was properly lined after pulling out of track 223 but that, although he testified that he threw the switch for the intended route, it is obvious that he did not do so. Finally, it asserts that the Claimant not only shoved his train over a derail but that he shoved it through a gate that preceded the derail and continued to shove the movement until an employee was killed.

The Carrier argues that the Organization's arguments are without merit. It maintains that it cannot force someone who is not an employee – such as the two contract employees – to testify and that the Trainmaster, although he was available for previous dates of the Investigation, had a conflict with the date the Investigation was held. It points out, however, that the Trainmaster, if needed, was available via phone conference. It maintains that, more relevant, the evidence irrefutability shows that the Claimant failed to protect the shove properly. In addition, the Carrier contends that, because the Organization merely argues that it stands behind arguments made at the hearing and subsequent correspondence but does not identify the specific contentions, it finds it impossible to address them. However, the Carrier reaffirms all the points it made in the local decline and urges that anything not addressed is without merit.

Finally, as to the assessed discipline, the Carrier argues that one of the Stand Alone Dismissible violations under the Carrier's Policy is a Rule violation that could result in serious collision and/or derailment, serious injury or extensive damage to property. It asserts that the Claimant violated the applicable Rules and that his actions resulted in damage and death. It points out, in addition, that the Claimant stood for dismissal for multiple Serious violations in addition to violating a Rule which resulted in loss of life.

The Carrier urges that the Claim be denied and the Claimant's dismissal upheld.

The Organization argues that the Carrier violated the Claimant's due process rights when it failed to provide the Claimant with a fair and impartial Investigation. It contends, in addition, that the Carrier failed to carry its burden of proof that the Claimant was guilty of the offenses with which he was charged.

As to procedure, the Organization asserts that there were several people who were in a position to corroborate the Claimant's story – including the Trainmaster who watched the crew using a yard camera, a driver who assisted the Claimant and could have testified about the position of the switch, as well as two other employees who were at or near the clearance point in track 23 and may have had information about the position of the 23 switch – but that the Carrier failed to produce them as witnesses. It maintains that the Carrier had a right and responsibility to produce these witnesses and that the only reasonable conclusion is that their testimony would adversely affected its case.

The Organization argues, as well, that the Claimant asserted that he lined the 23 switch for the lead and that he then got into the van and that he placed fuses on two road crossing they were to shove over. It points out that the Trainmaster, in a written statement he wrote shortly after the incident occurred, stated that, while watching the crew on the yard camera system, the crew lined the switch. The Organization contends that, although both the Claimant and the Trainmaster stated that the switch was lined, the Terminal Manager concluded that there is “no physical evidence to show” that the switch was lined.

The Organization asserts that the Carrier failed to prove just cause for its action and urges that the Claim be sustained as written. It asserts that, if the Board believes that some discipline is appropriate, the assessed discipline was not commensurate with the alleged offense, especially considering the Claimant's exemplary record of service, with only a single mark of discipline for a minor attendance infraction.

It was the Carrier's burden to prove the Claimant's guilt by substantial evidence considered on the record as a whole, to prove the appropriateness of the penalty and, when challenged to prove that it provided the Claimant with due process and a fair Investigation. For the reasons which follow, the Board holds that the Carrier met its burden and denies the Claim.

As to the conduct of the Investigation, the Board is not persuaded that the Carrier's failure to produce identified witnesses constitutes reversible error. The Claimant's conduct and the consequences thereof speak for themselves. The cars could not have wound up on the wrong track unless the Claimant failed to properly

line the switch. And the cars would not have gone through the stop signal gate, over the derail if he had been properly protecting the point of the move, at least in the absence of communications or equipment failures which are not alleged.

The evidence with respect to the merits is substantial and essentially incontrovertible based on the result: the Claimant was in charge of the move, including lining the switch, the cars were on the wrong track and, unprotected, shoved through the derail, causing damage and a fatality. Nothing from any witness could negate that evidence. The Carrier met its burden to prove the rules violation.

As to the penalty, the Claimant's multiple failures and the tragic consequences of those failures are also self-evident, notwithstanding the Claimant's good record. The penalty of dismissal is not arbitrary or excessive. Any reduction of the penalty would, under the circumstances, constitute leniency, a determination which is the prerogative of the Carrier.

AWARD

Claim denied.

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 First Division**

Dated at Chicago, Illinois, this 12th day of January 2017.