

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 29709
Docket No. 49496
19-1-NRAB-00001-180240**

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 S.A. Navarro’s discipline be reversed with seniority unimpaired, requesting pay for all lost time with no deduction 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 investigation held on January 24, 2017.

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 Carrier hired the Claimant in 2004 as a Mechanical Apprentice, and he was subsequently promoted to Engineer. On November 14, 2016, the Claimant was called for duty as the Engineer on train X-KAHCCD9-16A along with his Conductor. At approximately 10:27 hours around MP 119 on the Pikes Peak Subdivision, a locomotive data video recorder (LDVR) captured the Claimant placing the visor on his locomotive

in front of the LDVR that records the inside of the cab of the BNSF 8116. This blocked all view of the Claimant and disabled a safety device that was part of the locomotive.

The Carrier issued a Notice of Investigation letter dated November 29, 2016, which stated as follows:

“..for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged carelessness of the safety of yourself and others and willful disregard of the interest of the company and its employees by defeating a safety device at approximately 1027 hours on November 14, 2016 at approximately MP 119 on the Pikes Peak subdivision, while assigned as crew on train X KAHCCD9 16A on duty at Denver, Colorado at 0030 hours on November 14, 2016. The date BNSF received first knowledge of this alleged violation is November 18, 2016...”

After some postponement, the Investigation was held on January 24, 2017. Following the Investigation, the Claimant received a Discipline Notice dated February 7, 2017, finding a violation ABTHR 101.10 Locomotive Safety Devices and GCOR 1.6 Conduct. The Claimant was dismissed. The Organization appealed the Carrier’s decision and the Carrier denied the same. The Organization advanced the claim to the Highest Designated Officer by letter dated March 31, 2017, and the same was denied on June 14, 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 was afforded a fair and impartial Investigation. The Carrier also contends that the evidence established that the Claimant intentionally defeated a safety device by blocking the inward-facing LDVR. The Carrier contends that the fact that the Claimant was captured looking in at the LDVR in the pictures before the camera was blocked is proof that the Claimant's intent was to defeat the device. The Carrier argues that the Claimant was not wearing sunglasses and should have been doing so if the sun was an issue for him. The Carrier further contends that even if the Claimant did move the visor to block the sun, he was without authority to do so because System General Notice 121 restrains an employee from defeating or compromising the recording system. Moreover, the Carrier contends that the Claimant clearly obstructed the LDVR; whether it was his intent or not, the rules were still violated. The Carrier contends that, as an enumerated S Level offense, tampering with a safety device warrants dismissal if the action takes place during the active review period of a previous Serious violation, as is the case here. For these reasons, 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 asserts that the Hearing Officer had prejudged the Claimant and was biased against him. Specifically, the Organization points out that, at pages 15 and 16 of the Investigation transcripts, the Hearing Officer declared that the picture being shown was a clear violation of the Rules. Moreover, the Organization contends that the Carrier failed to carry its burden of proof in this case. The Organization contends that there is ample evidence in the record to support the Claimant's assertion that he repositioned the sun visor to block the sun and not to block the inward-facing camera: at the Pueblo Junction, the train was turning east into the sun; the Conductor was wearing sunglasses at the time; the sun was shown to be brightly shining in all of the pictures, and the sun appeared to be shining on the lower portion of the visor. The Organization also challenges the Carrier's classification of the IFC as a safety device and argues instead that it is an accident reconstruction device. Finally, the Organization argues that the application of the Carrier's discipline policy is arbitrary as applied to similarly-situated individuals. It is the position of the Organization that the claim should be sustained.

The Board has reviewed the record and finds no material procedural error in this case. The Carrier charged the Claimant with violation of Air Brake and Train Handling Rule (ABTHR) 101.10 which reads:

“Locomotive Safety Devices

To the extent possible, make sure these locomotives safety devices are cut in and operating at all times:

- **Alerters (consider defective device fails to provide visual and audible warnings)**
- **Automatic cab signals**
- **Automatic train stop equipment**
- **Automatic train control equipment**
- **Event recorder Equipment**
- **Locomotive Camera System**

...Do not cut out, tamper with, or defeat a safety device without proper authorization.”

The Board does not find that the Carrier has demonstrated by substantial evidence that the Claimant willfully defeated a safety device by blocking the inward-facing LDVR in his lead locomotive. The Carrier supports its position regarding the Claimant’s intent with the facts that (1) the Claimant knew about the camera, (2) the Claimant was captured looking in the direction of the camera before he adjusted the visor, and (3) the Claimant was not wearing sunglasses even though the Conductor was. The Board is not persuaded that this evidence constitutes substantial proof that the Claimant intended to defeat the device. The Claimant testified that he did not know that, by moving the sun visor into that position, he would be blocking the inward-facing camera. The record does not reflect that the Claimant was given instructions regarding the use of his visor in conjunction to the camera, so the Board considers the following possibility to be plausible— that the Claimant looked at the camera before adjusting his visor to assure himself that he could make an adjustment without blocking the camera. The un rebutted facts—that the train was turning into the sun at that time, that the sun was shining into the cabin, and that the Conductor wore glasses to offset the glare—strengthen the Claimant’s position that his intent was to block the sun and not to block the camera. The visor is a fixed object in the cab to be used by the Engineer in the execution of his normal duties in safe train handling.

System General Notice 121 reads:

“Crews must not attempt to defeat or compromise the recording systems in any way. Knowingly placing objects in view of the camera to cause an obstruction is just one example of defeating the recording system.”

Based upon this language and example provided by the Rule reads “ knowingly place objects”, the Board is not persuaded by the Carrier’s argument that even if the Claimant’s intent was to block the sun, he was without authority to adjust the sun visor. “Knowingly” is generally defined as consciously or with knowledge or complete understanding of the facts or circumstances. This is not a strict liability provision; it requires intent. The record contains more evidence to support that the Claimant’s intent was to block the sun than evidence to support that the Claimant’s intent was to block the camera. Here, the Engineer has been travelling extensively and encounters the sun, which is glaring in his eyes, and could affect the safe operation of the train. The Claimant put up the visor in order that his view ahead would not be impaired.

The Carrier charged Claimant with violation of Rule 1.6 which reads:

“Conduct

Employees must not be:

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

or

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 finds that the Carrier has not met its burden of demonstrating by substantial evidence that Claimant was culpable of the charged misconduct or of dereliction of duty. The Board does not find that the Carrier has demonstrated by substantial evidence that Claimant violated Rule 1.6. The language of this provision does

not impose strict liability; it requires carelessness, willfulness, or negligence, and the evidence does not demonstrate that the Claimant displayed any of these mental states when he adjusted the visor.

After careful review of the transcript, exhibits, on-property handling, and submission, the Board finds that the Carrier failed to meet its burden of proof that the Claimant violated the cited rules. Any back pay is subject to deduction of outside earnings.

AWARD

Claim sustained.

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.