

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 30025
Docket No. 49906
20-1- NRAB-00001-190036**

The First Division consisted of the regular members and in addition Referee Michael D. Phillips 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 D. D. Bryant’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 January 9, 2018.”

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.

On September 8, 2017, Claimant D. D. Bryant was assigned as the Engineer on train Y-WAT9731-07 with instructions to pick up a train from Esperanza Spot Zero. The Claimant and his Foreman operated light engines to the location and the Foreman lined them into the track and removed the derail. They then moved past the switch and derail, and the Foreman reapplied the derail and relined the switch. The train was

approximately 3500 feet deep in the track, and they proceeded toward it and coupled onto it. The Foreman then walked the train and released the handbrakes. When he reached the rear of the train, the Foreman told the Claimant to pull down to a good access point to pick him up and the Foreman rode in a van toward the switch and derail location.

The Claimant began to pull forward, eventually reaching a speed of 15 MPH before making a brake pipe reduction. He also applied dynamic brakes and finally placed the train in emergency, but the locomotive hit the derail at eight MPH and came to a stop 52 feet beyond the derail with two locomotive axles derailed.

By letter dated September 14, 2017, the Claimant was notified to attend an Investigation regarding his responsibility “in connection with your alleged failure to stop your train short of a derail.” The notice stated that the Investigation would “determine possible violation of GCOR 6.27 Movement at Restricted Speed, GCOR 1.6 Conduct and ABTHR 103.0 Train Handling.” Following multiple postponements, the Impeachment was held January 9, 2018, after which the Claimant was found to be in violation of the cited Rules, and on February 1, 2018, he was dismissed in accordance with the Carrier’s Policy for Employee Performance and Accountability (PEPA).

The Organization appealed the Claimant’s discipline assessment pursuant to the applicable collective bargaining Agreement, but the parties were unable to resolve the matter on the property. The case now comes before us for resolution.

The Organization challenges the discipline assessment as being unwarranted and not supported by the evidence. It alleges that the Carrier has not met its burden of proving that the Claimant was guilty of violating the rules with which he was charged and that the discipline therefore must be rescinded.

First, the Organization contends that GCOR 6.27 Movement at Restricted Speed does not apply to the Claimant’s case. It states that the Claimant was operating on “other than main track” where there is no Rule which requires the train to move at restricted speed. The Organization notes that the Claimant’s representative at the Investigation objected that the appropriate rule is GCOR 6.28 Movement on Other than Main Track but that the Carrier did not make that correction in the Notice of Dismissal. It argues that assuming *arguendo* that the Claimant was guilty of violating CCOR 6.28, the Carrier cannot prevail because it did not charge the Claimant with that Rule

violation nor cite the Rule in the disciplinary letter.

Similarly, the Organization states that the Carrier could have charged the Claimant with violating GCOR 8.20 Derail Location and Position inasmuch as that Rule requires employees to know the location of derails and to stop before running over one. Again, however, the Organization posits that the Carrier's failure to charge the Claimant with the correct Rule negates the assessment of discipline.

With respect to the Rules which were cited, the Organization contends that the Claimant did not violate them either. It notes that while GCOR 1.6 Conduct was read into the transcript, there was no evidence or testimony to suggest that the Claimant violated it. With respect to ABTH Rule 103.0 Train Handling, the Organization contends that the Claimant complied with that Rule in that he properly made adjustments when he reduced the throttle as speed increased and applied the dynamic brakes before applying air brakes to the train.

The Organization does concede that the Claimant has admitted misjudging the stopping distance for his train. It notes, however, that this was the first time the Claimant had picked up a train at that location and he thought the rear end was hanging over a crest of grade, causing him to think he needed more force to begin the movement. It further states that the Claimant could not see the derail because of curvature of the track and a wall which obscured his vision.

The Organization urges that the Claimant's mistake, when considering the circumstances and his years of service, does not warrant dismissal. It contends that even if the Carrier had proven the Claimant was guilty of violating the charged Rules, the case does not rise to the level of immediate discharge. It points out that the Claimant's most recent Level S discipline was for an unrelated event which had occurred more than 36 months before the incident in question, and it argues that the Carrier unreasonably applied the PEPA retention policy to determine that dismissal was appropriate. The Organization concludes that the discipline was excessive, arbitrary and unreasonable, and it requests that the dismissal be set aside.

The Carrier, on the other hand, maintains that the evidence developed at the Investigation proves that the Claimant was in violation of the cited Rules. It states that the Claimant was aware of the derail and that he was responsible to make sure the movement stopped prior to the derail.

The Carrier notes evidence from the event recorder download which shows that the Claimant handled his train very poorly. It observes that the Claimant knew he was on a downhill grade and that there was no reason for him to wait until his speed had increased to 15 mph and he had traveled nearly 2,000 feet before taking any actions. Moreover, it points out that the Claimant stated at the Investigation that he had made a mistake and that he was “assuming complete responsibility” for it. The Carrier maintains that the Claimant’s admission coupled with the testimony and evidence produced at the hearing constitute substantial evidence to establish the Rules violations.

With respect to the level of discipline assessed, the Carrier contends that dismissal was appropriate in consideration of the seriousness of the incident and of the Claimant’s discipline history. It points to prior awards which have upheld the conclusion that a restricted speed violation or failing to stop for a misaligned switch or derail is a Serious level violation under PEPA. The Carrier also points to the Claimant’s prior Rule violations, including three prior Serious level violations since 2011. It discounts the Organization’s argument that the Claimant’s most recent incident actually occurred more than 36 months before this incident inasmuch as PEPA states that the assessment date, not the incident date, starts the review period.

It notes that the Claimant’s most recent assessment was on October 7, 2014, and that it included a 36-month review period such that the September 8, 2017 incident was within that period. The Carrier concludes that there was no excuse for the Claimant’s behavior and that the discipline should not be disturbed.

We first address the Organization’s argument regarding whether the correct rules were cited. It is true that the Claimant’s representative objected to the reference to GCOR 6.27, stating that GCOR 6.28 was applicable. We find it noteworthy, however, that at no time during the on-property handling did the Organization pursue this argument. Consequently, the Carrier did not address the matter neither in its own on-property correspondence nor in its submission before us.

We also note that GCOR 6.27 and GCOR 6.28 contain essentially identical operating instructions. Both Rules state that movement must be made at a speed that allows stopping “within half the range of vision short of: . . . Derail or switch lined improperly.” Moreover, the Notice of Investigation plainly advised the Claimant of the specific conduct at issue, namely failing to stop the train short of the derail. While we do not take issue with the awards cited by the Organization pertaining to proper Rule

citation in discipline cases, in consideration of the circumstances here, we do not find that the Claimant was prejudiced by the procedures and we will not disturb the discipline on that basis. Moreover, we find that the evidence of record, including the Claimant's own acceptance of responsibility constitute substantial evidence to support the charges, thus satisfying the Carrier's burden of proof in this matter.

Turning to the level of discipline imposed, PEPA does provide that the review period for prior discipline assessments begins on the date of assessment rather than the date of the infraction. It also provides that a second Level S violation within an applicable review period may result in dismissal. Nevertheless, we do not believe permanent dismissal is warranted in this case. While the Claimant does have certain discipline events on his record, most are not for operating Rule infractions and the most recent one occurred over three years prior to the incident in question. In consideration of the Claimant's 23 years of service and his overall record, we find that the dismissal should be modified to an unpaid suspension and that the Claimant should be returned to service without back pay and with a retention period commensurate with PEPA.

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 29th day of January 2020.