

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 30033
Docket No. 49914
20-1-NRAB-00001-190044**

The First Division consisted of the regular members and in addition Referee Michael D. Phillips when award was rendered.

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

STATEMENT OF CLAIM:

“It is hereby requested that Engineer A. T. Armstrong’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 November 8, 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.

Claimant A. T. Armstrong was employed by the Carrier as a Locomotive Engineer in Galveston, Texas. On January 17, 2017, the Claimant was reinstated to service pursuant to First Division Award 28479, subject to him taking and passing a medical examination to ensure his fitness for duty. After receiving medical clearance, the Claimant met with Road Foreman of Engines (RFE) Matthews on

September 13, 2017 to review certification requirements necessary for the Claimant's return to service. A schedule was established which required Claimant to attend instructor-led training on September 14, 2017, but he did not attend the training session. On September 19, 2017, RFE Matthews contacted the Claimant to explain if he did not complete the required training, he would be considered AWOL.

After the Claimant completed the Rules training, he met with the Galveston Terminal Manager who provided the Claimant a Galveston Familiarization Requirement Worksheet. The worksheet instructed the Claimant to make qualifying trips on Galveston territory, it informed him that his familiarization should not exceed 18 days, and that if he needed time off work for a day or more, he was required to contact RFE Matthews. On October 1, 2017, the Claimant was given a temporary Engineers Certificate, and RFE Matthews informed him the 18-day period to complete familiarization began at that time. The Claimant did not complete the familiarization requirements with that time frame; and he did not contact Carrier management about needing time off work.

By letter dated October 27, 2017, the Claimant was notified to attend an Investigation regarding his alleged indifference to duty in connection with his alleged failure to follow his Managers' instructions regarding the return to work process and familiarization plan. After one postponement, the Investigation was held November 8, 2017. Following the Investigation, the Claimant was found to be in violation of GCOR 1.6 Conduct and GCOR 1.13 Reporting and Complying with Instructions, and by letter dated November 17, 2017, 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 maintains that the Carrier failed to carry its burden of proof that the Claimant violated the Rules with which he was charged. It first focuses on the time it took for the Carrier to return the Claimant to service following the issuance of the award which reinstated him. The Organization notes that the medical clearance process to ensure fitness for duty took approximately six

months, and it alleges the Carrier took excessive time to complete the process. It then states that once the Claimant was medically cleared, he did not receive timely communications from the Carrier regarding the next steps in the return to work process and that when he finally met with the RFE and discussed attendance at the Instructor Lead Training class, the Claimant's car broke down and he was unable to appear for the class.

The Organization states that after the RFE contacted the Claimant again and told the Claimant he would be considered AWOL if he did not get his testing completed in a timely fashion, the Claimant did complete the testing requirements and then had to wait again to begin familiarization until the Carrier issued him a temporary certificate over a week later. The Organization posits that based on the foregoing timeline; the Carrier was not in a hurry to return Claimant to service.

With respect to the Galveston Familiarization Policy which required the Claimant to make five round trips over various routes, the Organization notes that the form produced at the Investigation was only a sample and was not the one actually provided to the Claimant. It contends that the portion of the form which states "total time for familiarization should not exceed 18 days" was not an instruction but merely a guideline and it points to the Claimant's testimony that he never had a conversation with a Manager regarding a time frame for completing his trips.

With respect to the reason the Claimant did not complete the familiarization within 18 days, the Organization points out that after Claimant completed two round trips, he was notified that his mother had been found lying in her driveway and had been taken to the emergency room. She was diagnosed with stomach cancer and the Claimant stated he spent the next few days assisting his mother.

In light of the foregoing, the Organization contends that the record does not support the conclusion that the Claimant violated the charged Rules. It maintains that to support such charges, the instructions in question must be clear and understandable and that the employee's actions must demonstrate defiance or an attempt to deceive. The Organization states that the record does not indicate that the Claimant received a clear directive or that the Claimant's actions were improper in the circumstances. It points to the documentation regarding the

Claimant's mother's health, which it argues constitute mitigating circumstances which the Carrier should have considered. Finally, the Organization urges that even if a Rule violation could be considered established, the discipline assessed here was arbitrary and excessive given the nature of the offense. It requests that the Claimant be returned to service and paid for his lost time.

The Carrier, on the other hand, maintains that the record unquestionably demonstrates that the Claimant failed to follow his Managers' instructions on several occasions. It states that the Claimant was clearly and unambiguously instructed to attend Instructor Led Training on September 14, 2017, but that he failed to attend. It notes that the Claimant then was instructed to complete his territory familiarization within the 18-day period which began October 1, 2017, and that he again failed to follow those instructions. The Carrier further states that the Claimant took off 29 days between his three qualifying trips without once contacting RFE Matthews, in direct contravention of the written instructions that if for any reason he must be off work for a day or more, he must contact RFE Matthews.

The Carrier contends that such conduct constitutes a clear violation of GCOR 1.13 Reporting and Complying with Instructions, which states:

“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.”

The Carrier further posits that the evidence establishes that the Claimant willfully disregarded instructions that were issued in an effort to return him to service, thus demonstrating insubordination and indifference to duty in violation of GCOR 1.6, which provides in part:

Employees must not be:

“Insubordinate

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 Carrier points out that there is no dispute that not only did the Claimant fail to attend the training class as instructed by RFE Matthews, but that the Claimant also made no effort to contact the RFE to explain his absence. It also emphasizes that the Claimant admitted he made no effort to contact the RFE when he was absent for more than one day during the familiarization period.

With respect to the Organization’s characterization of the familiarization worksheet as merely guidelines rather than instructions, the Carrier maintains that the worksheet provided clear and unambiguous instructions. It states that the timeframe was plain and that the requirement to contact the RFE regarding any time away from work was unmistakable. The Carrier points to testimony from both the RFE and from the Claimant as demonstrating there was no misunderstanding and that the instructions were clear.

The Carrier also disputes the Organization’s position regarding the length of the return to work process. It states that such timing has no relevance to the Claimant’s violation of the cited Rules and that any “feeling” Claimant may have had that the Carrier was in no hurry to return him to service had no bearing on his responsibility to comply with clear and unambiguous instructions from his supervisors. It points out that the Claimant himself extended the process by failing to attend the training class as instructed.

The Carrier further contends that the mitigating factors cited by the Organization are not compelling. It states that if the Claimant truly did have car trouble that prevented him from attending training, the proper course of action would have been to inform his supervisor rather than wait five days for his supervisor to contact him and warn him of a potential AWOL violation. With respect to the possibility that the Claimant’s mother’s health condition prevented the Claimant from making the qualifying trips, the Carrier points to Claimant’s testimony in which he seemed to minimize his need to be absent since his mother was able to attend to some appointments over the phone rather than actually talking to a doctor face to face. The Carrier notes that in any event, Claimant never notified a supervisor of any circumstances which would impact his availability.

In light of the above, the Carrier asserts that the decision to dismiss the Claimant was not arbitrary. It points out that under PEPA, indifference to duty and insubordination are stand-alone dismissible violations. The Carrier also notes that upon the Claimant's reinstatement, the review periods for his prior Serious level violations were reactivated such that the Claimant was within the review period of two such violations, further justifying his dismissal. It concludes that the Claimant was well aware of what was expected of him, that he failed to comply with those expectations, and that the discipline assessed to him was warranted in the circumstances.

The Board has thoroughly reviewed the record in this matter and considered all of the parties' arguments. Based on that review, we find that the record contains substantial evidence to support the Carrier's finding that the cited Rules were violated, the standard we employ in these matters. It has been said in prior awards that an unreasonable delay in carrying out instructions or noncompliance without an outright refusal to comply may constitute insubordination. In our view, the Carrier gave the Claimant specific instructions regarding his return to work requirements but he did not comply with them. He neither completed the familiarization requirements within the 18-day period as instructed nor did he contact the RFE regarding his absences from work of more than one day.

With respect to the contention that mitigating factors prevented the Claimant from complying with his obligations, we do not find sufficient evidence in the record to support that position. While we are not unsympathetic to the Claimant's mother's health condition, we note that the Claimant's own testimony was such that it does not appear that her condition prevented the Claimant from making the required familiarization trips in a timely manner. Moreover, her condition certainly did not impact the Claimant's ability to contact the RFE if he did need time off, but he made no effort to do so.

We also note the Claimant's testimony that he did not complete the familiarization trips timely because he wanted to take those trips with only a few select engineers. The Claimant conceded that the other engineers were certified and qualified, so we find no basis for him to delay his familiarization by picking and choosing only a few engineers with whom to ride simply because the other engineers

had less seniority than he did. Any such delay in completing the familiarization on that basis was solely of the Claimant's own volition.

Having found that the Rule violations were established; the Board turns to the level of discipline imposed. As previously mentioned, the Organization urges the Board to overturn the discipline as being harsh and excessive. To overturn the Carrier's assessment, however, would require the Board to find that the Carrier acted arbitrarily or capriciously. The Rule violations in this case are quite serious, and in light of all the circumstances, we cannot find that the Carrier's judgment was arbitrary or capricious. Therefore, we will not substitute our judgment for the Carrier's.

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 29th day of January 2020.