

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 28386
Docket No. 48252
16-1-NRAB-00001-140282**

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

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

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Locomotive Engineers and Trainmen on the BNSF Railway Company:

It is hereby requested that Engineer D. T. Dawson's discipline be reversed with seniority unimpaired, requesting pay for al/ lost time, with no offset for outside earnings, including the day(s) for investigation with restoration of full benefits and that the notation of Level S 30-Day Record Suspension be removed from his personal record, resulting from the investigation held on May 9, 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 in engine service by the Carrier on January 3, 1995. He became an Engineer in September of 1996 and was employed in such service at the time of the incident at issue herein.

On March 20, 2013, the Claimant and his Conductor were working Train MAMSKCK1 19 and were making a pick up at Wellington, Kansas. The Conductor advised the Claimant that he was going between cars, to which the Claimant responded that he was “set and centered,” meaning that the reverser is in a neutral position so that the engine would not move.

The Carrier subsequently reviewed the event recorder for the Claimant’s engine and noticed that the locomotive was in power while stopped and that the reverser was not, in fact, set and centered, but that the throttle was, instead, in the forward, position. The Carrier reviewed the audio download from the period and heard the Claimant’s response to his Conductor’s request for protection that protection was in place, with the reverser set and centered, as is required.

The Carrier scheduled an investigation at which the foregoing evidence was adduced and, based thereon, issued the Claimant a 30-day record suspension. It denied the Organization’s request for alternative handling. 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 hearing and decision. This proceeding followed.

The Carrier argues that it met its burden to prove the Claimant’s violation of the prohibition against allowing employees to go between cars without proper protection, which it points out, is one of the Carrier’s Eight Deadly Decisions. It asserts that the Claimant had been trained on the requirement, but notwithstanding the training, the evidence establishes that he failed to comply with the requirement, allowing his Conductor to go between cars without protection. It points out that the Carrier’s evidence is uncontroverted in the record.

The Carrier argues that the Rule violated is one of its Eight Deadly Decisions and that the consequence of the violation was potentially very serious. It contends that the penalty assessed was well within the range of reasonableness.

The Carrier rejects the Organization's procedural challenges. It asserts, in the first instance, that the Claimant was not entitled to Alternative Handling under the Safety Summit Agreement because he did not accept responsibility for his actions, as is required. It contends that the evidence does not reflect such acceptance. Indeed, it points out that the Claimant asserted that the failure was an "honest mistake" and that protection was provided because the engine brakes were set, a position inconsistent with such acceptance and inconsistent with the prerequisite for alternative handling that an employee not realize particular action to have been improper. The Carrier asserts that Claimant was not entitled to alternative handling for the additional reason that his conduct constituted gross negligence because it was "willful". The Carrier also argues that the objection to the Conducting Officer also issuing the discipline is without merit, having been raised and rejected multitudinous times.

As to the merits of the dispute, the Carrier argues that the evidence confirms the Claimant's violation of the requirement that the reverser be set and centered before a crew member goes between cars. It asserts that the Claimant's conduct was indisputably a serious violation under PEPA and warranted the record suspension and 12-month review period.

The Carrier urges that the Claim be denied.

The Organization argues, in the first instance, that the Claimant was improperly denied alternative handling, as it contends was his right under the Safety Summit Agreement, subject only to certain exceptions not applicable here. It asserts that Claimant's conduct was not gross negligence as a willful violation. It maintains that the Carrier's PEPA policy is unilateral and does not override negotiated agreements. BLET argues that the procedural defects in the case are fatal to the discipline and that the Claim must be sustained on that basis alone.

As to the merits, the Organization argues that the Claimant did, in fact, accept responsibility for the incident, although he did not recall it. It points out that this was

the Claimant's first violation ever for such a failure or for any other violations of operating safety rules. BLET points out that, although the reverser was not set and centered, the locomotive brakes were set the entire time, so the locomotive did not and would not move, eliminating any real danger.

The Organization argues that, under the circumstances of the incident, the penalty assessed – the step just short of dismissal – is arbitrary and unreasonable in light of his years of service and prior record.

The Organization urges that the Claim be sustained and the penalty revoked.

It was the burden of the Carrier to establish, by substantial evidence considered on the record as a whole, that the Claimant is guilty of the violation charged and that the penalty assessed was within the range of reasonableness. The Organization must establish that the Carrier did not provide the Claimant with due process and a fair hearing and otherwise complied with its procedural obligations. For the reasons which follow, the Division concludes that the Carrier met its burdens and that the Organization did not.

As initial matters, the Claimant and the Organization argue, in essence, that the requirement to set and center before allowing a crew member to go between cars is no big deal where, as here, the IEB was set. That hardly constitutes acceptance of responsibility for the violation, a prerequisite for alternative handling. The Division does not reach the argument whether the Claimant was not entitled to alternative Handling because his conduct constituted "gross negligence" as "willful."

As to the merits of the dispute, the locomotive downloads and audio establish that the Claimant failed to set and center his reverser prior to allowing his Conductor to go between cars, as is required. The violation is not excused or mitigated by having the engine brakes set. The Carrier proved the violation.

As to the penalty imposed, the severity of the violation warrants the penalty. That this was Claimant's first violation of this type of rule is not sufficient to render the discipline excessive, although that may be reflected in the determination to assess only a record – as opposed to an actual – suspension. The Award so reflects.

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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 4th day of October 2016.