

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 28388
Docket No. 48255
16-1-NRAB-00001-140285**

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 R.A. Campbell'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 June 27, 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 employed as a Trainman with the Carrier since 2000; and on the date of May 28, 2013, was working as an Engineer, assigned to the Guaranteed Road Extra Board at Bakersfield, California.

At 5:58 A.M. on May 28th, the Claimant was subject to call, and was first out on the Board. Crew Support first called him for a train with an on duty time of 7:06 A.M. Between 5:58 A.M. and 6:15 A.M., Crew Support made five telephone calls to the Claimant on the two telephone numbers he had provided the Carrier for contact. None of the attempts to either of the numbers was successful. Based on its inability to reach the Claimant, the Carrier showed him as missing a call and called another employee in his place.

The Claimant testified that he was asleep during the time period the Carrier was attempting to contact him and did not hear either of the phones ringing because he had placed them in the other room. He stated that he had checked the lineup prior to going to sleep and, because he was not expecting to be called for another 19 hours, placed the phones in the other room. GCOR Rule 1.16 requires employees subject to call to indicate where they can be reached and must not be absent from their calling place. The Claimant acknowledged that he had not complied with GCOR Rule 1.15, which requires employees to report for duty at designated times and places.

The Carrier convened an Investigation at which the above evidence was adduced. Based thereon, BNSF dismissed Claimant from service. The Organization protested the Carrier's action, which the Carrier denied. The Organization appealed the Carrier's action. The appeal was processed in the usual manner, up to the Carrier's highest designated official, but without resolution. The unresolved dispute was referred to this Board for hearing and decision.

The positions of the Parties are set forth in their written submissions and at hearing. They are summarized as follows:

The Carrier argues that it met its burdens to prove by substantial evidence considered on the record as a whole that the Claimant violated the Rules charged and

that the penalty of dismissal was appropriate. It asserts that the evidence is clear that the Claimant failed to answer the calls, as he was obligated to do. It points out that he conceded that he failed to do so.

The Carrier contends that the Organization's arguments against the discipline are unpersuasive. It rejects the challenge to the conducting officer also assessing the discipline as long since decided in its favor. BNSF also rejects the Organization's assertion that the Carrier witness describing the call gave "false testimony;" it contends that the matter was a simple counting error and that the exhibit on which the testimony was based is part of the record. The Organization challenges the propriety of the Carrier's call, which was earlier than the lineup would have predicted. It asserts that, while it attempts to inform employees of their respective anticipated call times, there is no way to predict that. Moreover, it points out, the lineup did not include on duty times.

BNSF contends that the Claimant was obligated to answer the phone when subject to call but failed to do so. Finally, the Carrier rejects the Organization's assertion that the penalty was excessive. It points out that the Claimant has been disciplined 16 times since 2004, including four prior missed calls, rendering the Claimant subject to discipline. It contends that he is not entitled to leniency or a mitigated penalty.

The Carrier urges that the Claim be denied.

The Organization argues, as an initial matter, that the Carrier deprived the Claimant of a fair and impartial Hearing by allowing the conducting officer to assess the discipline. It contends, as well, that the Carrier's witness and the Hearing Officer opined falsely as to the number of times the Carrier attempted to call the Claimant – nine versus the actual five, thereby overstating the seriousness of the Claimant's failures. Moreover, contends BLET, the evidence is that the Claimant did not hear the phones because he had left them in another room, based on his check with the Carrier's lineup before going to bed, which led him to believe he would be home, not called, until the following day. Thus, the call he received was 19 hours prior to when the lineup indicated he would be called. It contends that employees must be allowed some flexibility and to be able to obtain adequate rest. The Organization maintains

that the Carrier produced no evidence to support a conclusion that the lineup changed as a result of scheduling changes.

The Organization argues that employees must be given opportunity to correct problems, which it contends the Claimant did in the instant case following the violation by putting in a land line and by setting an alarm in advance of the end time for his Federally-mandated rest. It contends that it is unreasonable for the Carrier to have dismissed the Claimant without allowing him the opportunity to correct his behavior.

As to the Carrier's argument that dismissal was appropriate because this was the Claimant's fifth disciplinary event in 12 months, the Organization asserts the instant charge would be a Standard violation, for which PEPA provides for progressive discipline through the fourth such offense, with only the fifth allowing for the possibility of dismissal. It asserts that the Carrier's invocation of dismissal for five such minor violations is out of proportion to the character of the violations, rendering the penalty arbitrary and excessive.

The Organization urges that the Claim be sustained as written.

The Carrier met its burden to show Claimant's violation of the Rule. His excuses and the Organization's assertions that he was acting reasonably in light of where he stood on the lineup, has taken steps to correct the problem that led to his missing the call and that he deserves another chance ring hollow in light of his four previous missed calls and other discipline. It points out, however, that the Claimant had approximately 13 years of service at the time of his dismissal.

The Board notes the importance of the requirement that employees who are subject to call answer the call. The Carrier operates on a schedule, and employees who are assigned to extra boards have an obligation to respond to calls. Failures to do so compromise the Carrier's ability to meet its operational commitments and place extra burdens on employees down the list.

The evidence establishes that the Claimant was a repeat offender on missed calls and had not, for whatever reason, corrected his inability or unwillingness to answer them. The Claimant had sufficient seniority that he knew, or should have

known, that call schedules do not always follow lineups and that an employee subject to call is – no surprise – subject to call. Failure to answer the calls in this instance, after having several prior missed calls, does not provide a credible excuse or reason to afford the Claimant yet another chance. The Award so reflects.

The Board has reviewed the procedural arguments advanced by the Organization, but finds none of them persuasive.

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.