

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 28480
Docket No. 48256
16-1-NRAB-00001-140286**

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 hired as a Trainman. He has been employed by the Carrier since 2000; and on the date of June 3, 2013, was working as an Engineer, assigned to the Guaranteed Road Extra Board at Bakersfield, California.

During the overnight of June 3, 2013, the Claimant was at an away from home terminal (“AFHT”) in Barstow, California. He was registered at a Carrier-provided hotel, and Crew Support had both the Claimant’s cell phone and the hotel telephone number and his room number as his contact numbers. At 2:45 A.M. on June 3, Crew Support began trying to contact him for a deadhead assignment, with an on duty time of 4:04 A.M. Crew Support made four attempts to contact him, using both numbers, between the times of 2:45 A.M. and 2:52 A.M. Two calls were made to the hotel front desk, but it was busy; two calls were made to the Claimant’s cell, but no one answered the rings and the calls went to voice mail.

The Claimant testified that he was in bed and asleep at the hotel at the time Crew Support tried to reach him. According to evidence offered by the Organization, the hotel switchboard was not working and was known not to be working, although room to room calling was working. The Claimant received a call from another employee, who advised him that he had missed a call. He called the crew office but was advised that the miss could not be corrected. He testified that Crew Support stated that the hotel had indicated that a hotel employee had gone to the Claimant’s room to knock on the door, but received no response. The Claimant testified that he checked with hotel management, who advised that they had not sent anyone.

General Code of Operating Rules (GCOR) Rule 1.15 requires employees to report for duty at designated times and places. 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 Carrier convened an Investigation at which the above evidence was adduced. Based thereon, BNSF dismissed the Claimant from service. The Organization protested the Carrier’s action, which the Carrier denied. The Organization appealed the Carrier’s action. The appeal proceeded in the usual

manner, up to the Carrier's highest designated official, but without resolution. The unresolved dispute was referred to the 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 Claimant failed to respond to the calls, as he was obligated to do. It points out that the Organization does not challenge the fact that the Claimant missed the call.

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. The Carrier also rejects the Organization's assertion that the Carrier witness describing the number of call attempts as "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 asserts that, because the hotel switchboard was not working, the Claimant had no way to receive calls, but the Carrier points out that the Claimant had his cell phone but did not answer it.

The Carrier denies a practice, or any evidence in support of a practice, that employees in hotels shut off their cell phones and rely on the hotel phones for duty calls. It denies any obligation to have management knock on the Claimant's door. The Carrier contends that the Claimant was obligated to answer his phone when subject to call, but failed to do so.

The Carrier also rejects any challenge to conducting two missed call investigations on the same day. It points out that the Claimant had two missed calls within a week and that scheduling both investigations the same day was logical and not prohibited. Neither does the Carrier's scheduling indicate prejudgment.

The Carrier rejects the Organization's assertion that the penalty was excessive. It points out that the Claimant has been disciplined 17 times since 2004, including five

prior missed calls, a pattern rendering the Claimant subject to dismissal, for which neither leniency, or a mitigated penalty, are appropriate.

The Carrier urges that the Claim be denied.

The Organization argues that the discipline must be rescinded because the Carrier failed to prove the Claimant to have been at fault or in violation of the Rules charged. It points out that the Carrier admitted that the telephones at the hotel were inoperative and that the Carrier was aware of the malfunction. The Organization asserts that the Carrier's argument that the Claimant failed to answer his cell phone fails because employees are not required to have cell phones to respond to calls at away from home terminals, but that the Carrier is responsible for providing the hotel and for calling crews and that it is common practice, known to the Carrier, for employees to turn off their cell phones at AFHT's.

The Organization asserts that the Claimant lacked a charger for his cell phone and the battery was dead, a condition which did not concern him because he believed the Carrier to be responsible to contact him through or at the hotel. It contends that the Claimant had no idea the hotel telephone system was not functioning. It contends, therefore, that it was the fault of the Carrier and the hotel management not knocking on the door when they knew their system was down.

As to the Claimant's acknowledgement at the Investigation that he violated both GCOR Rules 1.15 and 1.16, the Organization argues that he did not intend the answers he gave, but was merely giving the Carrier the answers he felt the Carrier wanted to hear.

The Organization argues, in any event, that the Claimant's call was to deadhead home and that he did not delay any train or fail to perform any service. It asserts that the Carrier's invocation of discipline based on the alleged missed call is ridiculous. It urges that the stacking of charges and Investigations merely confirms the unreasonableness of the Carrier's position.

As to the Carrier's argument that dismissal was due to this having been the Claimant's sixth event within 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 and after allowing for the possibility of dismissal. It asserts that the Carrier's invocation of dismissal for the sixth 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 Board finds the Carrier met its burden to show Claimant's violation of the Rule. The Claimant was required to provide contact numbers. One of the numbers the Claimant provided was his cell phone. The Organization's assertions that he was not obligated to answer his cell phone at AFHTs because of a practice and that it was the burden of the Carrier and the hotel it provided to ensure that the Claimant was called by knocking on his room door are not supported by the record.

The Board notes, as it did in First Division Award 28388, 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 he was obligated to answer calls on the contact numbers he provided. The Claimant's record of five previous missed calls and a total of 17 instances of discipline since 2004 indicate that the Claimant is unable or unwilling to accept his responsibility in that regard. Failure to do so 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.

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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 20th day of December 2016.