

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 28514
Docket No. 48263
16-1-NRAB-00001-140293

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

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

STATEMENT OF CLAIM:

“It is hereby requested that Engineer L. R. Joiner'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 Dismissal be removed from his personal record, resulting from the investigation held on September 11, 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 by the Carrier on June 9, 2003. He began as a Trainman. He became an Engineer in October 2006 and was employed in such service at the time of the incident at issue herein.

On August 24, 2013, the Claimant was working Train B-LACLAC3-25 on the San Bernardino Subdivision. At approximately 9:49 A.M., the Claimant and his crew were between Santa Fe Springs and Coyote Creek, with the Conductor and Brakeman riding about 30 cars from the head end. They climbed off the train and the crew requested a Rule 6.6 back-up move. However, the crew did not request the Coyote Creek signal for the move, leaving them with authority only to the red signal at Coyote Creek but not past it. The Claimant then made a reverse movement of 5,364 feet, through the signal and switch not lined for his movement at Coyote Creek. When the train stopped, it had passed the signal by 715 feet.

The Carrier scheduled an Investigation at which the foregoing evidence was adduced and, based thereon, dismissed Claimant from service for violating Rules 1.6 (Conduct), 6.6 (Back Up Movements), 1.47 (Duties of Crew Members) and 9.5 (Where Stop Must Be Made). 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 adjudication.

The Carrier argues that it met its burden to prove the Claimant's violations of the Rules and the appropriateness of the penalty. It asserts that the facts and testimony presented at the Investigation make it clear, and the Claimant admitted that he only received authority for the move to Coyote Creek but that, instead, he exceeded the authority by allowing the train to pass that signal by 715 feet. It maintains that, since the shove passed the red signal at Coyote Creek, the crew was required to stop but did not and, in addition, did not warn other trains over the radio. It contends that the Claimant was careless of the safety of others and, as a Metrolink train was approaching, the Claimant narrowly avoided a catastrophe.

The Carrier asserts that the Organization's arguments that the Conductor was responsible and there was disparate treatment are without merit. It maintains, despite the Organization's contention that the Claimant was merely part of a crew that committed a violation, that it was the Conductor who was responsible for protecting the point and that he failed to do everything he could to ensure that the train did not pass the signal at Coyote Creek and, that, had the Claimant fulfilled his duties, the train would not have overrun its authority. It points out that the Claimant did not use the locomotive distance counter, which exists so Engineers can measure how far they have shoved or moved. The Carrier contends that the Claimant was not disciplined for being part of a crew but for an egregious violation

of his individual responsibilities that could have resulted in harm to himself or others.

As to the Organization's contention that the Carrier subjected the Claimant to disparate treatment because the Brakeman received alternative handling (AH), the Carrier asserts that the Conductor admitted his Serious violation, even though he was not the one moving the train or claiming to watch the point, and was eligible for AH. It maintains that the Claimant was not eligible for AH and, in any case, there is no proof that the Organization requested it locally or that it appealed the denial as required. It points out that AH was not included in the local level appeal or the investigation transcript and contends, therefore, that the Organization lost the right to make such an assertion before the Board.

Finally, as to the penalty, the Carrier argues that the discipline imposed is appropriate and the record fails to support any of the Organization's claims to the contrary. It points out that this incident represented the Claimant's third Serious violation in two years. The Carrier contends that the Claimant was shown leniency in February 2012 and declines, as is its prerogative, to do so again.

The Carrier urges that the Claim be denied and the Claimant's dismissal upheld.

The Organization argues that the Carrier failed to prove that the Claimant was guilty of violating the Rules with which he was charged. It contends that the evidence demonstrates that the Claimant relied on his Conductor to protect the point, noting that the Conductor admitted that he assumed that responsibility. It asserts that, although the Conductor was clearly responsible for the incident, the Carrier held both the Claimant and the Conductor equally responsible but assessed the Brakeman a lesser, disparate, discipline. It maintains, therefore, that the Claimant's dismissal is arbitrary, capricious and shocking to any sense of fairness.

The Organization concedes that an Engineer has responsibility to comply with all rules but contends that he is not the insurer against all incidents. It asserts, therefore, that the Claimant was entitled to rely on his Conductor to do his job properly and should not be disciplined simply because he was part of a crew. It maintains that the Claimant did everything necessary to ensure the train did not pass the signal but that he cannot be in two places at once and had to rely on his crew during the shoving move. The Organization contends that the Carrier's

suggestion that the Claimant should have used his locomotive counter is without merit, pointing out that this was raised for the first time by the Carrier's highest designated officer and, thus, was unfair because the Claimant was not given an opportunity to respond.

The Organization asserts that the Carrier failed to prove just cause for its action and urges that the Claim be sustained as written.

It was the burden of the Carrier to prove the Claimant's violation of the Rules charged by substantial evidence considered on the record as a whole and to prove that the penalty imposed was not arbitrary or excessive. For the reasons which follow, the Board holds that the Carrier met its burden to prove the Claimant to have violated the Rules as charged but that the penalty of dismissal was excessive.

The evidence clearly establishes that the crew exceeded its authority backing its train 715 feet beyond the signal and failed to warn other trains of the violation, creating the potential for a collision. The violation was serious. The Claimant and his Conductor were both responsible.

That having been said, it was the Conductor who was in charge of the train and who was riding the point, observing the signal and protecting the move. The Claimant was in the engine, at the other end of the train.

The Board is not convinced that the Claimant is entitled to AH, but is persuaded that his responsibility is not as great as the Conductor's.

The Claim is sustained in part and denied in part. The Carrier proved the Claimant's violation of the Rules cited but the discipline imposed was excessive. The Claimant's dismissal shall be rescinded and he shall be reinstated to service, but without backpay or benefits for the period of his absence, which is a time-served suspension. The Claimant's reinstatement shall be subject to taking and passing a return to work medical examination.

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 12th day of January 2017.