

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 28515
Docket No. 48264
16-1-NRAB-00001-140294**

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 D. N. Newton'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 September 13, 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 September 26, 1994. He began as a Trainman. He became an Engineer in January 1997 and was employed in such service at the time of the incident at issue herein.

On July 28, 2013, beginning at 11:45 P.M., the Claimant and his Conductor were assigned to Yard Transfer Job &-1671-1 28A. Early in the morning on July 29, the crew was instructed to transfer Train V-LPCBLU1-29A from Logistics Park to the Indiana Harbor Belt Blue Island Yard. On the way to Blue Island Yard, the Claimant was required to pass through two Form B restrictions, which advises train crews of workers and equipment on or near the track: One for an IHB Foreman with limits of Mile Post 15.4 and BI Junction Mile Post 15.2 and a second for a CSXT Foreman with limits between Mile Post 15.1 and 14.9. At 6:40 A.M., the crew was stopped at Mile Post 15.4 and Claimant went to the restroom. After returning from the restroom, the Claimant asked his Conductor if she had permission from all track gangs to enter their limits and the Conductor stated that she had secured permission. Apparently, she had not. The crew departed Mile Post 15.4 at 8:51 A.M. and passed a red stop board at that location. As the train proceeded past a red stop board at Mile Post 15.1, the CSXT Foreman contacted the crew and had them stop the train, as they had entered his limits without authority. The crew stopped and a Manager was dispatched to the scene.

The Carrier scheduled an Investigation at which the foregoing evidence was adduced and, based thereon, the Claimant was dismissed for violating Rules 1.1.2 (Alert and Attentive), 1.6 (Conduct), 1.47 (Duties of Crew Members) and 15.2.1 (Protection for On-Track Equipment). 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 record demonstrates that the Claimant had both restrictions in his possession, should have been aware of them and was bound to comply with them. It maintains that the Claimant admitted at Investigation that he violated each of the cited rules and contends, citing prior awards, that it has therefore satisfied its burden of proof.

As to the Organization's argument shifting responsibility to the Conductor and alleging that the penalty was harsh and excessive the Carrier asserts that they are without merit. It concedes that the Conductor signed a waiver for Serious rules violations as a result of this incident but maintains that does not mitigate the Claimant's responsibility. It contends that prior Awards have repeatedly held that an employee cannot shift responsibility for rules compliance to another. The

Carrier asserts that the Claimant was responsible for ensuring that both Maintenance of Way Foremen were contacted and gave permission before proceeding past Mile Post 15.4 that he did not do so and, therefore, the Claimant cannot escape his share of responsibility. It maintains, citing prior Awards, that, essentially, the Organization is asking the Board to grant the Claimant leniency, but contends that leniency is a management prerogative, not for the Board.

Finally, with respect 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 contends that Form B's are designed to protect workers and equipment and that the Claimant's failure to receive authority prior to entering a Form B restriction is a Serious violation. BNSF points out that the Claimant has been disciplined nine times in his career, that this is his fourth serious event, the third serious violation since 2008, and the second within approximately 24 months.

The Carrier urges that the Claim be denied and the Claimant's dismissal upheld. It asserts, however, that, if the Board determines otherwise, the Organization's request for backpay should be denied and that any award for lost wages should be offset with outside earnings and job insurance payments.

The Organization argues that the discipline assessed in the instant matter was excessive. It contends that the Claimant received information from his Conductor that the crew had permission to pass through the limits of both Form B limits and that he was entitled to rely on his Conductor to properly perform her duties. It asserts, in addition, that, under the circumstances, it is unreasonable for the Carrier to dismiss the Claimant for a second serious rule violation within a three-year period simply because its policy states that it may do so. It maintains that the Carrier failed to consider the mitigating circumstances and that it applied its policy mechanically.

The Organization further argues that the Claimant's written statement makes clear that he believed that he had been cleared through both limits and contends that he was entitled to rely on the information he received from his Conductor. As for the penalty, the Organization asserts that, given the Claimant's tenure and disciplinary record, the Carrier lacked just cause to terminate him. It points out that this is only the second time in the Claimant's 19-year career that he has been cited for an authority violation and the instant violation only resulted in an FRA Certificate revocation of 30 days. It maintains that, if the FRA believes 30

days is an adequate suspension, the Carrier's permanent dismissal of the Claimant should be reduced.

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 establish the appropriateness of the penalty of dismissal. For the reasons which follow, the Board concludes that the Carrier proved the violations but that the evidence falls short of establishing the appropriateness of the penalty.

Form B restrictions protect track workers and equipment from trains traveling through work areas except with notice and permission. The potential consequences are catastrophic, and a violation of such restrictions is serious.

The Claimant shared responsibility with his Conductor to ensure compliance with the restrictions. The evidence clearly establishes that he did not ensure that the notice and permission requirements had been met. That having been said, and his Conductor having acknowledged that she incorrectly advised the Claimant that she had received permission when she had not, the Board is not persuaded that he should be held equally responsible or that, based on his prior record, he should have been dismissed.

The Claimant was guilty of having violated the Rules cited but the penalty of dismissal was excessive. The Claimant's dismissal shall be rescinded and he shall be returned to service, but without backpay or benefits, with the period of his absence constituting a time-served suspension. Indeed, the Claimant's practical options were limited, unless he physically repeated the contacts which the Conductor purported to have made.

AWARD

Claim sustained in accordance with the Findings.

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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.