

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 28516
Docket No. 48265
16-1-NRAB-00001-140295

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. T Dawson'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 4, 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 January 3, 1995. He began as a Trainman. He became an Engineer in September 1996 and was employed in such service at the time of the incident at issue herein.

On August 9, 2013, the Claimant and his Conductor were operating Train Z-WSPLAC7-08, operating west out of Kansas City on the Emporia Subdivision. At approximately 4:49 A.M., the Dispatcher contacted the crew and verbally advised them about an upcoming track restriction. The restriction, referred to as a Form A, required the crew to operate at 10 mph between Mile Post 107.0 and 107.2 on Main 1, as a result of a frog on a switch that was out of alignment. The crew misjudged the location of the slow order until they were on top of it, at which time they were going 35 MPH rather than the required 10 MPH. Although the speed created a risk of derailment, the train did not derail, and no damage resulted.

The Carrier scheduled an Investigation at which the foregoing evidence was adduced and, based thereon, dismissed the Claimant from service for violating Rules 6.31 (Maximum Authorized speed), 1.6 (Conduct) and 1.47 (Duties of Crew Members). 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 misjudged the location of the Form A and was not prepared to enter its limits at 10 MPH. It maintains, citing prior awards, that, since the Claimant acknowledged responsibility for doing so, it satisfied its burden of proof. The Carrier contends that the Organization's argument that the Carrier prejudged the Claimant is without merit. It concedes that the Conductor signed a waiver for a serious rules violation as a result of the same incident. It asserts, however, that the Conductor did not have a previous serious violation on his record and, therefore, was eligible to sign such a waiver and avoid dismissal, but that the Claimant had a previous Serious violation on his record and, therefore, was eligible for dismissal.

Finally, with respect to the penalty, the Carrier maintains that the Claimant's violations were Serious under the Carrier's Policy and points out that this was the Claimant's second serious discipline event within a five-month period. It contends that the Organization is, in essence, asking the Board to grant the Claimant a measure of leniency but argues that leniency is a management prerogative and that it did not exceed its discretion by dismissing him.

The Carrier urges that the Claim be denied and the Claimant's dismissal upheld. It asserts that, if the Claimant's Claim is sustained, the request for back pay should be denied, as he admitted to violating the Rules, and that any back pay owed him should be offset by any outside earnings.

The Organization argues that the Carrier violated the Claimant's due process rights when it failed to afford him his right to Alternative Handling (AH) in the previous case and that, had it done so, he would have waived his right to a hearing and the matter would not have been before the Board. It contends, in addition, that the Claimant's dismissal was not commensurate with the alleged offense, especially considering his years of service, and was arbitrary and excessive.

As to the merits, the Organization argues that dismissal is only appropriate when the employee's actions are egregious or when the employee has a history of rule violations of the same or similar type but that, in the instant matter, the Claimant simply misjudged the location and entered the restricted area too quickly. It points out that, although the Claimant entered the restriction traveling 35 MPH, he was able to safely reduce the speed to 10 MPH in just 47 seconds. The Organization asserts that the Carrier applied the Policy mechanically and that the Policy is not a substitute for just cause. It points out that this is the first time in his 18-year career that he had been cited for a speeding violation. It also points out that the incident resulted in the Claimant's Certificate being revoked for a 30-day period and contends that, if FRA believes that is an adequate penalty, the Carrier's dismissal of him is harsh and excessive. Finally, the Organization argues that the Claimant was open and honest in admitting his mistake. The Organization maintains that the two violations for which the Claimant has been found guilty do not provide a sufficient basis to dismiss him, pointing out that the Claimant has devoted half of his life to the Carrier.

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.

The Claimant is an 18-year employee. His speeding violation was serious and resulted in a 30-day FRA revocation. It followed a previous serious violation. However, in light of the Claimant's length of service and no prior speeding violation, the penalty of dismissal was excessive and does not satisfy the Carrier's requirement to prove just cause.

The Claimant's dismissal shall be rescinded and he shall be reinstated to service, but the period he was out of service shall be a time served disciplinary suspension, and his reinstatement shall be without backpay or benefits.

The Award so reflects.

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.