

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
FIRST DIVISION**

**Award No. 28583  
Docket No. 48435  
17-1-NRAB-00001-150231**

The First Division consisted of the regular members and in addition Referee Peter R. Meyers 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 M. B. Kundracik’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 October 31, 2014.”

**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.

By notice dated October 14, 2014, the Claimant was directed to attend a formal Hearing on charges that the Claimant allegedly had violated Carrier Rules during an October 3, 2014, incident in which the Claimant allegedly failed to safely couple cars and failed to properly protect a movement. The Investigation was conducted, after a postponement, on October 31, 2014. By letter dated November 19, 2014, the Claimant

was notified that as a result of the Hearing, he had been found guilty as charged and was being dismissed from the Carrier's service. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to discipline him. The Carrier denied the claim.

The Carrier contends that the instant claim should be denied in its entirety because the Claimant was not prejudiced when he was found guilty of violating two rules that were not explicitly included in the Investigation Notice but that the Claimant knew were at issue during the Investigation, because substantial evidence conclusively establishes that the Claimant is guilty as charged, and because the discipline assessed was appropriate in that the Claimant committed a second Level-S violation while in an active review period. The Carrier also asserts that any award of backpay should be offset by any outside earnings while the Claimant was dismissed. The Organization contends that the instant claim should be sustained in its entirety, without any offset of outside earnings, because the Carrier failed to afford the Claimant a fair and impartial Investigation when it improperly added two alleged rule violations for the first time at the Hearing, because the Carrier failed to establish substantial evidence of wrongdoing by the Claimant, and because the discipline imposed was inappropriate.

The Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit. We find that the Claimant was not prejudiced by the fact that he was found guilty of two rules that were not explicitly included in the investigation notice. The record reveals that the Claimant was informed that the Investigation would include his alleged failure to safely couple cars and failure to properly protect movement while working on an engine in the Alliance Yard on October 3, 2014. That language made it clear to the Claimant what was going to be involved in the Investigation. The Claimant admitted that he was prepared to proceed with the Investigation and his Organization representative presented a number of defenses to the case. There is no requirement that each specific rule be listed in the Notice of Investigation. Therefore, there is no basis to set this discipline aside based on the procedural argument.

The Board has reviewed the evidence and testimony in this case, and we find that there is sufficient evidence in the record to support the finding that the Claimant violated a number of Carrier rules when he performed a shove movement while he was unable to observe the shove. Consequently, he failed to protect the shove movement because he was not in a position to provide any visual protection. The Claimant's failure to follow the rules subsequently led to a serious incident involving the derailing

of five railroad cars. The Claimant's actions in violation of the rules directly led to the incident.

Once the Board has determined that there is sufficient evidence in the record to support the guilty finding, we next turn our attention to the type of discipline imposed. The Board will not set aside a Carrier's imposition of discipline unless we find its actions to have been unreasonable, arbitrary, or capricious.

The Claimant in this case received a previous Level S discipline within the previous 36 months. That Level S in October of 2012 was for failing to perform a required air brake test and failure to transfer control of locomotives and air to the lead locomotive. Under the Carrier's rules a second serious violation committed within the applicable 36 month review period may result in dismissal. In addition, the Claimant had received three active Attendance Guidelines violations. Given the seriousness of this offense, coupled with the previous disciplinary background of this Claimant, this Board cannot find that the Carrier acted unreasonably, arbitrarily, or capriciously when it terminated the Claimant's employment. Therefore, the claim must be denied.

**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 25th day of October 2017.