

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 28585
Docket No. 48437
17-1-NRAB-00001-150233

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 D. Z. Johnson’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 November 5, 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 15, 2014, the Claimant was directed to attend a formal Hearing on charges that the Claimant allegedly had been careless of the safety of himself and others in violation of Carrier rules on October 11, 2014, when he allegedly failed to sound the proper whistle sequence, failed to sound short whistles, and failed to sound his whistle at all while operating a train. The

Investigation was conducted, after a postponement, on November 5, 2014. By letter dated November 14, 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 substantial evidence conclusively establishes that the Claimant is guilty as charged, because the Organization's arguments are without merit, and because the discipline assessed was appropriate. 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, because the Carrier failed to establish reliable and substantial evidence of wrongdoing by the Claimant, because the Carrier should have applied a "good faith" exception to the rules governing whistle soundings due to the difficulty of precisely estimating the time of arrival, because the Claimant was a temporary transfer to the territory, because the Claimant was subjected to disparately harsh treatment, and because the discipline imposed was arbitrary and excessive.

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 was guilty of violating several Carrier Rules when he failed to properly whistle his horn on several occasions as required by the Rules. Several of his whistles were incomplete, and he failed to whistle at all at MP 91.7. The Claimant admits his wrongdoing and therefore clearly violated the Rules.

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 was unfamiliar with the territory and was admittedly not well rested, although he was rested in compliance with the Rules. He had nine consecutive starts before this trip and he was not acquainted with the Nebraska territory in which he was operating. Although those facts are not an excuse for failing to follow this incredibly important safety rule, they are facts that

should be considered when determining discipline. The Claimant was clearly remorseful for his behavior and has fourteen and one-half years of providing service for the Carrier. Given the mitigating circumstances, the Board finds that it was unreasonable, arbitrary, and capricious for the Carrier to terminate the Claimant's employment for his wrongdoing in this case. However, we do find that the Claimant was deserving of very severe discipline and, therefore, we order his reinstatement to be without back pay. The period of time that the Claimant was off work shall be considered a lengthy disciplinary suspension.

The claim is sustained in part and denied in part. The Claimant shall be reinstated to service, but without back pay. The period of time that the Claimant was off shall be considered a lengthy disciplinary suspension for his serious rule violation.

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 25th day of October 2017.