

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 29705
Docket No. 49491
19-1- NRAB-00001-180235

The First Division consisted of the regular members and in addition Referee Meeta A. Bass when award was rendered.

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

STATEMENT OF CLAIM:

“It is hereby requested that Helper P.C. Garcia’s discipline be reversed with seniority unimpaired, requesting pay for all lost time with no deduction 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 investigation held on June 9, 2017.”

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 Carrier hired the Claimant on January 17, 2005. On May 15, 2017, the Claimant was called to work as the Helper on yard job Y-ABQ102-15. The crew was tasked with kicking several cars in Albuquerque yard. Prior to the end of the work day, the Claimant and his crew went on break. During the break, the Claimant received a

phone call from his wife informing him that his youngest son may have cancer. After receiving the news, the Claimant chose to return to work in that he had only one cut of cars to go. The Claimant stepped over the rail and grabbed hold of the pin lifter with both hands, placing some or all of his body between the two cars. At the time, he had not communicated via radio or hand signals that he was going in between and he had not requested “set and centered” protection. This action was observed by an operations testing team, which consisted of two Superintendents positioned approximately 70 to 100 yards away in an unmarked car. The operations testing team stopped the crew’s movement as soon as they observed the incident.

The Carrier issued a Notice of Investigation letter dated May 23, 2017, which stated as follows:

“... for the purpose of ascertaining the fact and determining your responsibility, if any, in connection to your alleged failure to obtain protection before going in between cars attached to an engine while working as the helper on the Y ABQ102 15 at approximately 1530 hours on 15 May 2017...”

After some postponement, the Investigation was held on June 9, 2017. Following the Investigation, the Claimant received a Discipline Notice dated June 9, 2017, finding a violation of GCOR 1.1 Safety, GCOR 1.3.1 Rules, Regulations, and Instructions, and TSR 13.1.1 Going Between Cars or Locomotives. The Organization appealed the Carrier’s decision by letter dated July 18, 2017, and the Carrier denied the same on September 5, 2017. The Organization advanced the claim to the Highest Designated Officer by letter dated October 27, 2017, and the same was denied on December 23, 2017. A formal conference was held with no change in the position of the Carrier. This matter is before this Board for a final resolution of the claim.

The Board has reviewed the record developed by the parties during their handling of the claim on the property and considered evidence related to the following to make its determination of this claim:

- 1) Did the Claimant receive a full and fair investigation with due notice of charges, opportunity to defend, and representation?
- 2) If so, did the Carrier establish by substantial evidence that the

Claimant was culpable of the charged misconduct or dereliction of duty?

- 3) **If so, was the penalty imposed arbitrary, capricious, discriminatory, or unreasonably harsh in the facts and circumstances of the case?**

The Carrier contends that the Claimant was afforded a fair and impartial Investigation. The multiple roles of the Carrier officer in conducting the Investigation and rendering the discipline did not prejudice the interests of the Claimant. The Carrier also contends that substantial evidence established that the Claimant went in between equipment without proper protection. Based thereon, the Carrier contends that the discipline issued was appropriate. Moreover, the Carrier contends that a review of the Claimant's record indicates a history of operational violations. At the time of the incident, the Claimant had a serious Rule violation for passing a stop signal just six months earlier. The Carrier maintains that the Claimant's actions are not excused by the concerns of his personal life, and the Claimant should have taken the safe course of going home or taking a break to collect his thoughts when he learned his son had cancer. Lastly, the Carrier asserts that this particular Rule violation is known as one of the deadly sins; violation of the same could result in dangerous consequences to the Claimant, coworkers and the public. It is the position of the Carrier that the claim should be denied.

The Organization contends that the Carrier failed to provide a fair and impartial Investigation. The Organization also contends that the Carrier failed to meet its burden of proof. Further, the Organization contends that even though the Claimant may have violated a rule, it was not an intentional or premeditated action. It was the result of distraction based on an external traumatic event; it is not the kind of thing that could be corrected by progressive discipline. The Organization contends that the principles of just cause require the Claimant, as a troubled employee, to be offered adequate opportunity for rehabilitation prior to discharge. The Claimant had just heard that his son might have cancer, and the Claimant holds a relatively clean disciplinary record. The Organization contends that, in this case, in light of the existing mitigating circumstances, permanent dismissal is wholly inappropriate. It is the position of the Organization that the claim should be sustained.

The Board has reviewed the record and finds no material procedural error in this case. The Carrier charged the Claimant with violation of GCOR 1.1 Safety, GCOR 1.3.1 Rules, Regulations, and instructions, and TSR 13.1.1 Going Between Cars or Locomotives, all of which are incorporated herein as fully rewritten. Specifically, Rule TSR-13.1.1 reads:

“Going Between Cars and Locomotives

Going between or working on the end of rail equipment means an employee has based all or part of their body where it could be struck by rail equipment if the equipment were to move.

If the locomotive is coupled to the rail equipment:

- **After ensuring movement has stopped and slack has adjusted, the crew member must either announce by radio, “Going between,” or give the prescribed hand signal.**
- **The crew member at the controls of the locomotive must fully apply the independent breaks, center the reverser, and then acknowledge the radio transmission or the hand signal:**
- **If using a radio response, acknowledge, “Set and centered.”**
- **If using hand signals, sound one long whistle signal.”**

The Board finds that the testimony presented at the Investigation establishes that the Claimant violated this rule. While the Claimant did not initially remember reaching in to adjust the equipment with his hand, multiple witnesses saw him do so. With the violation established, the question remains as to the appropriateness of the discipline.

The Board finds that the penalty was administered in accordance with PEPA policy of progression. However, the penalty still needs to be within the range of reasonableness under the just cause standard. In this case, because this second serious violation was committed within the applicable review period, dismissal is a possible penalty. However, the question is whether consideration of mitigating factors would warrant a lesser discipline. The Claimant has approximately 12 years of service with the Carrier. With regard to the Claimant’s disciplinary record, the Carrier argues that this violation is simply the latest of several operating offenses over the course of his tenure. The Board has reviewed the Claimant’s record; the record indicates that prior to this incident, the Claimant has a prior offense in the past six months, followed with an earlier formal reprimand on August 17, 2011, and so forth. Also, of importance is the fact that

the Claimant was understandably distraught and distracted about the news he had just received that his son might have cancer.

After careful review of the transcript, exhibits, on-property handling, and submission, the Board finds that the penalty imposed is not commensurate with the offense in consideration of the facts and circumstances of this case, the Claimant's discipline record, and the applicable mitigating circumstances, the Claimant's judgment being hindered by news of his son's potential cancer diagnosis. The Board finds that the situation is unlikely to reoccur. The Board finds that the appropriate remedy is a time-served suspension.

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 17th day of June 2019.