

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 29708
Docket No. 49494
19-1- NRAB-00001-180238

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 Engineer N. D. Gomez’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 4, 2016.”

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 July 5, 1994 as a Trainman, and he subsequently promoted to engineer in May 1997. On September 13, 2016, the Claimant was working and assigned as an engineer at the Carrier’s yard at Wichita, Kansas. The Road Foreman of Engines was performing operational tests on said date. The Claimant observed the Road Foreman in the yard and notified the crew; the Foreman knew that

Claimant provided the crew advance notification. The Road Foreman boarded the locomotive, and stated that he had observed the Claimant placed an object underneath his leg, and tossed the object out of the window. The Road Foreman saw and smelled cigarette smoke. At no time while on the locomotive did the Road Foreman confront the Claimant on his observations. The Claimant later informed the Road Foreman that they needed to move to a different locomotive, and they needed a break for lunch. The two exited the locomotive. When Claimant entered the yard office, the Road Foreman asked the Claimant to come into his office to discuss some matters. At that time, the Road Foreman discussed the alleged Rule violations inclusive of violation of radio Rules by announcing his presence to crew members. The Claimant became agitated and left the room, and was requested by the Foreman to return to his office to complete their conversation. The Claimant had raised his voice, and had used profanity. The Foreman testified that when he released the Claimant from their conversation, the Claimant carried on across the room with another one of his coworkers.

The Carrier issued a Notice of Investigation letter dated September 19, 2016, which stated as follows:

“...for the purpose of ascertaining the facts and determining your responsibility, if any in connection with your alleged smoking on a locomotive, hostile conduct towards a direct supervisor, and failure to comply with instructions...”

After some postponement, the Investigation was held on October 4, 2016. Following the Investigation, Claimant received a Discipline Notice dated October 27, 2016 finding a violation TSR 1.5.6 Smoking, GCOR 1.6 Conduct and GCOR 1.13 Reporting and Complying with Instructions. The Organization appealed the Carrier’s decision by letter dated November 17, 2016 and the Carrier denied the same on December 1, 2016. The Organization advanced the claim to the Highest Designated Officer by letter dated January 27, 2017, and the same was denied on March 25, 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, and holding multiple Investigations for the three cases did not affect the Claimant's rights. The Carrier contends that substantial evidence was introduced at the hearing to support the cited Rule violations. The Road Foreman observed the Claimant placed something underneath his leg (presumably a cigarette butt), and later then tossed something out of the window. Also, the Foreman saw and smelled cigarette smoke in the locomotive, and by smoking in the locomotive the Claimant failed to comply with the cited Rules. The Carrier also asserts that when confronted with the alleged violations, the Claimant became agitated and cursed at the Road Foreman. The Carrier contends that the credibility findings of the Hearing Officer should not be disturbed by the Board. Based thereon, the Carrier contends that the Carrier has met its burden of proof that the Claimant violated the Rules. Moreover, the Carrier contends that the discipline was commensurate with the nature of the offense. The Carrier maintains that it properly assessed the Claimant's record which indicates 18 marks of discipline, and his alternative handling another seven instances of documented Rule violations that were handled by non-punitive measures. It is the position of the Carrier that the claim should be denied.

The Organization contends that the Claimant was not afforded a fair and impartial Investigation. The Organization contends that the Carrier failed to establish a Rule violation by substantial evidence. The record consists of conflicting statement between the Road Foreman and the Claimant. The Claimant does not deny that he was agitated by the false allegations of the Road Foreman but his conduct was not "hostile." The Road Foreman acknowledged that he did not see the Claimant smoking a cigarette

but the Carrier acted on mere suspicion of the Road Foreman when charging the Claimant with the cited Rule violations. The Claimant does not deny that he was agitated by the false allegations of the Road Foreman but the Claimant denies that his conduct was “hostile.” Further, the “hostile conduct” as described by the Road Foreman does not constitute behavior that arises to the level of a Rule violation. The Organization asserts that the real basis for these charges is that The Claimant “ratted out” the Road Foreman to the other crew members. Moreover, the Organization contends that the discipline was unwarranted and is not supported by the evidence. It is the position of the Organization that the claim should be sustained.

The Carrier charged the Claimant with violation of TSR 1.5.6 Smoking, GCOR 1.6 Conduct and GCOR 1.13 Reporting and Complying with Instructions that reads:

“S-1.6.6 Smoking

BNSF prohibits smoking in all enclosed properties by employees, customers, contractors, vendors, and guests. Outdoor smoking should be confined to designated smoking areas where provided and must not interfere with non-smokers' rights to clean air as they enter and leave buildings.

"Smoking" means lighting, burning, inhaling or exhaling any substance, tobacco or vapor product including electronic cigarettes or other devices (pipes, cigars) which emits either vapor or smoke.

***Enclosed properties' means all SWF-owned or leased office space or buildings, shops, automobiles, rail or work equipment vehicles, locomotives, and all other railroad rolling stock. All other federal, state, and local smoking laws / prohibitions must also be complied with.**

Rule 1.13 Reporting and Complying with instructions:

Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by manager of various departments when the instructions apply to their duties.”

“Rule 1.6 Conduct:

Employees must not be:

1. Careless of the safety of themselves or others.
2. Negligent
3. Insubordinate
4. Dishonest
5. Immoral
6. Quarrelsome
or
7. Discourteous

Any act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported.

Indifference to duty or to the performance of duty will not be tolerated.”

The Board has reviewed the record, and finds no material procedural error in this case. After carefully reviewing the transcript, submissions and other matter records, the Board finds that the Carrier has failed to establish by substantial evidence a violation of the cited Rules. The conflicting testimony of the Foreman and the Claimant, does not support a violation of Rule S-1.5.6. The Board notes that the Road Foreman testifies that he boards the locomotive, sees and smells smoke but says nothing to the Claimant at that time when there is a duty to speak, especially when the Foreman has coached and counseled the Claimant in the past regarding smoking. Then, the Road Foreman observes the Claimant throw a cigarette butt out the window, but does not confront him or retrieve the cigarette butt. The Foreman stated he observed the Claimant throw a cigarette butt out the window, but did not say anything explaining that. “He [the Claimant] was in a conversation with the Conductor outside the locomotive, talking out the window, and we were getting down to, to, I mean the act was already done, so I, I chose to wait for the appropriate time.” If the Claimant had thrown out a cigarette butt while talking to the Conductor, the Board is perplexed why the Conductor was not called to testify. In addition, if indeed the Claimant had informed the other members of his crew that they were under observation, would he not heed his own counsel? The Claimant does not deny that he smokes in designated areas which he proffers as an explanation for the alleged smell of smoke. When the Road Foreman originally boarded the train the Conductor and the WTA Superintendent were present outside the train. Why were neither called as a witness?

In addition, if the Claimant informed other members of the crew of the presence

of the Road Foreman in the yard, why were none of the crew called to testify? The record does not reflect the testimony of any other crew members that were present. The Board finds from that the conflicting evidence introduced and the glaring absence of supporting testimony that there is insufficient evidence to support the smoking charge.

The Road Foreman describes the Claimant as upset, angry, agitated using a raised voice. In the opinion of the Board, the meeting with the Claimant and the Foreman could have been more civil, however, the Claimant's behaviors, swaying back and forth during the conversation, murmuring and complaining when leaving the office, his declaration of denial, and his accusation that management, and the only evidence of profanity was his statement that "all management was out to get him and that, um, he was tired of this shit" rises to the level of discipline for discourteous or hostile conduct directed at the supervisor. In addition the Claimant did not make any gestures toward him. He did not threaten him verbally or physically. The Road Foreman further testifies that "and when I released him from the conversation, it carried on across the room to the, uh where another one of his coworkers were sitting...still very agitated, but yet again the coworker is not called as a witness.

The Board finds that the absence of corroborating testimony constitutes lack of a fair Investigation and due diligence in presenting the Charge. The Board finds no just cause for discipline. Any back pay resulting from this award is subject to deductions of outside earnings.

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 17th day of June 2019.