

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 29710
Docket No. 49497
19-1- NRAB-00001-180241

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 Conductor E. A. Odom's discipline be reversed with seniority unimpaired, requesting pay for all lost time, with no off set 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 June 21, 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 March 26, 2012 and was employed as a Trainman. During the events that led to this dispute, Claimant was working as a Conductor and assigned to operate train X-CPIRED9-20A. Carrier alleges that Claimant failed to correctly perform the initial terminal air brake test when he failed to

complete a walking freight car safety inspection at Corpus Christi, and the Claimant said he did the inspection.

The Carrier issued a Notice of Investigation letter dated May 22, 2017, which stated as follows:

“...alleged failure to correctly perform initial air brake test and safety inspection. Alleged violation occurred while working as a crew member of train X CPIRED9 20 A, on duty May 20, 2018 at 1945 hours in Corpus Christi, TX. This investigation will determine possible violation of ABTHR 100.2 Safety Inspection of Freight Cars, ABTHR 100.10 Initial Terminal and Road Air Brake Test (Class 1 Air Brake Test), GCOR 1.33 Inspection of Freight Cars, GCOR 1.1.1 Maintaining a Safe Course, GCOR 1.47 Duties of Crew Members and GCOR 1.6 Conduct.”

After a postponement, the Investigation was held on June 21, 2017. Following the Investigation, the Claimant received a Discipline Notice dated July 5, 2017, finding a violation of ABTHR 100.2 Safety Inspection of Freight Cars, ABTHR 100.10 Initial Terminal and Road Air Brake Test (Class 1 Air Brake Test), GCOR 1.33 Inspection of Freight Cars, GCOR 1.1.1 Maintaining a Safe Course, GCOR 1.47 Duties of Crew Members and GCOR 1.6 Conduct. The Claimant was dismissed. The Organization appealed the Carrier’s decision by letter dated July 21, 2017 and the Carrier denied the same on August 15, 2017. The Organization advanced the claim to the Highest Designated Officer by letter dated September 28, 2017, and the same was denied on November 26, 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 provided a fair and impartial Investigation. The Carrier asserts that that the CBA does not provide for discovery. Notwithstanding, the Superintendent provided the local representative with the radio downloads and a list of evidence. The Supervisor also suggested a meeting to allow the local representative to view the engine downloads with the Road Foreman. The Hearing Officer also permitted recesses to review the evidence. The Carrier contends that that the testimony and evidence established at the Investigation establishes that the Claimant failed to comply with the Carrier's safety Rules. The Claimant's briefing with his Engineer suggests that he only walked one side, and the Claimant never stated that he completed the inspection of the Engineer's side at Interstate Grain. Based thereon, 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 Claimant had an active Level S violation for failure to stop at a signal displaying a stop indication at the time of the incident. Dismissal is appropriate under the Carrier's practices and policy. It is the position of the Carrier that the claim should be denied.

The Organization contends that the Carrier denied the Claimant of a fair and impartial Investigation. The Organization's local representative requested discovery from the Carrier and of the requested information, only the radio download was turned over to the Organization in preparation of the claim. The Organization argues that the refusal to honor the discovery request denies the Claimant of rights of due process of law, an opportunity to prepare his defense. The Organization contends that the Hearing Officer was biased and assumed multiple roles in the Investigation proceedings. The Organization argues that the Hearing Officer became the "judge, jury and executioner." The Organization further contends that while the rule is clear that a freight car inspection as outlined in GCOR 1.33 must be performed on both sides of standing equipment, it does not restrict the manner of inspection. The evidence

established that the track inspection of both sides of the train was completed before the Trainmaster stopped the crew. Moreover, the Organization contends that there was no just cause for dismissal, and if the Claimant is found to be culpable, the penalty of dismissal is excessive. 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 controlling Agreement does not provide a provision for discovery request in the grievance process. The Board is limited by the terms of the Agreement and cannot amend, modify, or add to the agreement. This provision must be negotiated between the parties at the table. Notwithstanding, the record reflects that the Carrier Officer provided the radio downloads and a list of evidence to the local BLET representative. The Supervisor also suggested a meeting to allow the local representative to view the engine downloads with the Road Foreman. Absent specific contractual language, due process makes it incumbent on the Hearing Officer to regulate the hearing in such a manner to allow sufficient and reasonable time so the Claimant and his representatives may review evidence during the investigation hearing.

The Board finds that the Hearing Officer provided adequate recess and that the record does not reflect an abuse of his role as a trier of fact. The Board finds no material procedural error.

The Carrier charged the Claimant with multiple operational rules, all of which stem from the alleged failure to inspect both sides of the cars in a freight train. The Claimant states both that he did not walk the train 100% and also that he did complete the inspection prior to the train being stopped. The Carrier's witness maintains that the Claimant did not fully perform the inspection. The Board notes that the Hearing Officer weighed the conflicting testimony and found the Carrier's witness more credible. The quantum of proof is substantial evidence in this industry. The test is whether there is substantial evidence to support the conclusion of the Carrier. The Board finds that the penalty is commensurate with the offense, given the nature of the offense and employment record of the Claimant.

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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 17th day of June 2019.