

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 29754
Docket No. 49495
19-1-NRAB-00001-180239**

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**

STATEMENT OF CLAIM:

It is hereby requested that Engineer K. F. Montes' 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 September 1, 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 as a Conductor on July 15, 2013. He was subsequently promoted to Engineer in January 2014. On the date of the incident, the Claimant was assigned and working as the Engineer on train H-HOUTULI-27A. Two Managers were conducting operational tests on the territory. The crew was issued a

Box 1 crossing activation failure or disabled notification requiring them to stop and protect the road crossing at Main Street in Brenham, Texas, Milepost 126.10. In order to pass this test, the crew had to comply with GCOR 6.32.2 which requires the crew to stop the train before occupying the crossing. “After a crew member is on the ground at the crossing to warn highway traffic, proceed over the crossing as directed by that crew member. Then proceed at normal speed.” The rule further requires the crew to sound the whistle. The crew stopped at milepost 126.01, approximately nine tenths of a mile short of Main Street where the restriction was in effect, and properly protected that crossing. The Claimant and his crew then passed 126.10 without stopping or sounding the whistle, contrary to the Rule and instruction.

The Carrier issued a Notice of Investigation letter dated August 2, 2016, which stated as follows: “... for the purpose of ascertaining the facts and responsibility, if any, in connection with your alleged failure to comply with instructions of a verbally issued crossing warning failure requiring crew to stop and protect movement over Main Street, Brenham TX, MP 126.10 on the Galveston Subdivision at approximately 12:35 hours on July 27, 2016. The alleged violations occurred while working as a crew member on train HHOUTUL127A on duty at 06:45 on 7/27/2016 at Houston, TX...”

After postponement, the Investigation was held on September 1, 2016. Following the Investigation, the Claimant received a Discipline Notice dated September 9, 2016, finding a violation of GCOR 1.1.1 Maintaining a Safe Course, GCOR 1.3 Rules, GCOR 1.47 Duties of crew members, GCOR 5.8.4 Whistle Quiet Zone, GCOR 6.32.2 Automatic Warning Devices, and GCOR 6.3 Main Track Authorization. The Claimant was dismissed. The Organization appealed the Carrier’s decision by letter dated June 23, 2016, and the Carrier denied the same on July 13, 2016. The Organization advanced the claim to the Highest Designated Officer by letter dated September 10, 2016, and the same was denied on November 3, 2016. A formal conference was held with no change in the position of the Carrier. This matter is before the 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 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 contends that the Claimant shared the responsibility with his Conductor to comply with the restriction. The test required checks and balances between both crew members to operate the train in a safe manner. The Carrier further contends that the Claimant was familiar with the territory and the multiple crossings located therein. The Claimant knew the correct milepost since he wrote it down. The Carrier further contends that substantial evidence, inclusive of the Claimant's admission that he protected the wrong crossing, supports a violation of the cited Rules. Based thereon, the Carrier contends it has met its burden of proof that Claimant violated the Rules. Moreover, the Carrier contends there was no disparate treatment between the Claimant and the Conductor. Both the Claimant and the Conductor were disciplined for the violation. The Conductor, unlike the Claimant, had no active discipline on his record, and he consequently received a Level S-30day record suspension. On the other hand, the Claimant had a prior suspension for a serious rule violation with a three-year review period and was properly dismissed in accordance with the PEPA policy. It is the position of the Carrier that the claim should be denied.

The Organization contends that the Carrier failed to provide the Claimant with a fair and impartial Investigation. The FRA Locomotive Engineer Review Board (LERB) granted the certification appeal based upon procedural grounds; the Road Foreman who conducted the test, testified against the Claimant at the Investigation and also signed the Notice of Revocation. The LERB determined that the failure to separate roles created a conflict of interest and an appearance of impropriety. The Organization argues that the revocation and discipline arise from the same proceedings and therefore this claim should be sustained. The Organization further contends that the Carrier failed to prove any culpability of the Claimant in the incident. The Claimant relied on his Conductor to perform his duties properly. The Organization contends that the Claimant was not in the position to see that his Conductor had misidentified the crossing while operating the train. The Claimant is entitled to the expectation that his tenured and experienced Conductor would properly perform his duties. The Organization further argues that the Carrier's decision to

hold the crew equally responsible is an abuse of discretion. Moreover, the Organization contends that there was no just cause to discipline and that the penalty of dismissal is arbitrary and unreasonable for a controlled operational test. The Organization argues that there was no danger to the public or risk of loss to the Carrier. 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 consolidates the discipline Investigation and the FRA certification hearing. Unlike the LERB appeal, the foreman, as the Carrier's witness, did not have multiple roles in this discipline proceeding which would result in a conflict of interest. The Board finds the Claimant was afforded a fair and impartial Investigation

The Board has reviewed the evidence and testimony in this matter and must conclude that there was insufficient evidence in the record to support the finding that the Claimant violated the Carrier's Operating Rules. The Claimant admitted that he and his crew failed to protect the crossing in accordance with the instructions of the dispatcher in noncompliance of the cited Rules. The evidence does not support a finding that the Claimant shared responsibility with his Conductor in checking the switchbox to determine the correct milepost. The Dispatcher notified the crew that the crossing at milepost 126.10 was malfunctioning. The Claimant correctly wrote the milepost number. The crew held a proper job briefing and took into account the two crossings in the area. The Claimant explained that he made the erroneous assumption that when the Conductor was on the ground, the Conductor confirmed the crossing as discussed in the job briefing. He then protected the crossing and told him to go ahead. The assumption was erroneous indeed. The Conductor testified that when he exited the train, it started to rain. The conductor then went back to retrieve his slicker and then went to the crossing, and, unbeknownst to the Claimant, did not check the box. There is no evidence that the Conductor communicated to his engineer his failure to check the signal box. If the Conductor had communicated the information, it would have then been incumbent on the Claimant to take the necessary action to protect the correct milepost.

Here, there is no legitimate expectation or rule that makes the Claimant responsible to double check the inspection of the milepost by the Conductor. The failure on the part of the Conductor to check the milepost is not imputed to the Claimant.

The Board finds no just cause to discipline. Back pay is awarded subject to deductions for outside earnings.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant 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 15th day of July 2019.