

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

Award No. 29755
Docket No. 49500
Case No. 19-1-NRAB-00001-180245

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

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

STATEMENT OF CLAIM:

It is hereby requested that Conductor J. D. Templeton'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 May 11, 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 June 9, 1998. The Claimant had been notified by the Carrier that he was scheduled for annual Computer Based Training (CBT) on April 18, 2016. The Claimant was working as a Conductor in Fort Worth, Texas. The Claimant requested and was granted a layoff in order to travel to Fort

Worth and take his CBT testing the following day. On the morning of April 18th, the Claimant's car did not start. He initially attempted to make the repairs himself; he was successful at getting the car started but the car still had mechanical problems. On April 19th, the Claimant drove the car to the repair shop and his girlfriend travelled behind him to subsequently drive the Claimant to his parents' home to secure another vehicle. The Claimant testified that he could not secure the vehicle from his parents' home until this date because they were out of town, and the house was locked with the keys inside their home. The Claimant was withheld from service for two days until he completed his certification. On April 20th, the Claimant went to the railroad office and took the test; the Claimant failed one portion of the test. The Claimant explained that he had forgotten his glasses and had difficulty viewing the questions. On April 21st, the Claimant returned to the railroad office with his glasses, retook the examination and passed. The Claimant was released from service on that date. His certification did not lapse during the period in question.

The receipt from the repair shop indicated a cost of \$1,488.82.

The Carrier issued a Notice of Investigation letter dated April 21, 2017, which stated as follows: "...failure to comply with instructions from the proper authority as evidenced by your alleged failure to complete your annual training requirements by the assigned deadline of April 18, 2016 when instructed to do so, resulting in a lapse of your annual training and your subsequently being held from service. The date BNSF received first knowledge of this alleged violation is April 19, 2016..."

After some postponement, the Investigation was held on May 11, 2016. Following the Investigation, Claimant received a Discipline Notice dated May 20, 2016, finding a violation GCOR 1.13 Reporting and Complying with Instructions, GCOR 1.6 Conduct and GN 101 Training and Certification. 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 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 was indifferent to his duties to comply with General Notice 101 which states employees are responsible for knowing when their exam expires and to complete them at least three weeks ahead of the expiration date to allow for processing of exam results. The Carrier argues that the Claimant failed to ask for assistance and chose to ignore the notification of his examination due date. The Claimant did not contact his Supervisor regarding his car troubles or lack of transportation. It is not disputed that the Claimant failed to complete his examination by the due date. Based thereon, the Carrier further contends that the company has met its burden of proof. Moreover, the Carrier contends that the discipline was commensurate with the nature of the offense. The Claimant was appropriately dismissed under BNSF's PEPA Policy as this was his second serious violation in a three-month span. 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 when the Carrier denied the Claimant's request for postponement contrary to the Schedule Rule. The Organization contends that the General Notice 101 explicitly states that failure to complete the training on the due date will result in the employee being held from service, and only directs the employee to contact his Supervisor if he fails the test a second time. The Organization references Public Law Board 6851 Award No. 6 where the Carrier issued a letter to another conductor directing him to complete the test within five (5) days. The Organization contends that the Carrier cannot impose inconsistent requirements on similarly situated employees. Moreover, the Organization contends that the penalty of dismissal is arbitrary, capricious and wholly unreasonable for an 18-year veteran with only a Level S discipline on his record for an unrelated event. 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. There is insufficient evidence that the Carrier could not have honored the request for the continuance. However, the Claimant was present with a representative, and was afforded an opportunity to recess during the Investigation. The Board finds

no due process violation for the conducting officer to issue discipline absent any showing of impropriety, and there was no evidence of impropriety.

The record reflects that the Claimant failed to comply with instructions to complete his training by the posted completion date of 2-29-16 and was withheld from service in accordance with General Notice 101. The Carrier has substantiated the violation. Contrary to the arguments of the Organization, GN 101 reads, "Disciplinary action, if deemed appropriate, will be handled by Division Officer(s)" and the discipline is warranted. The Claimant acknowledged that his deadline date was April 18, 2017. He simply failed to get it done due to the circumstances mentioned above. The Claimant violated the GN 101. Based upon totality of the circumstances, the Board does not find a violation of GCOR 1.06.

The Organization further argues that the just cause standard as set forth in the parties' CBA overrides any unilateral policies which the Company established without the Organization's agreement. The Organization is correct in this regard. The propriety of the dismissal as the penalty for the proven violation of GCOR 1.13 Reporting and Complying with Instructions and GN 101 Training and Certification termination action must be analyzed through the application of the traditional just cause analysis, not simply by assessing whether the Company correctly applied its unilaterally established, progressive discipline policy. The just cause standard provides for an inquiry of whether the penalty imposed appears to be unreasonable, arbitrary and/or capricious. The Carrier recognizes these circumstances as mitigation but states that the Claimant should have contacted his Manager. The Claimant was an 18 year employee at the time of the incident.

In summary, the Board has reviewed and carefully weighed all the arguments and evidence in the record. The Board finds that the Carrier has established with substantial evidence that the Claimant violated GCOR 1.13 Reporting and Complying with Instructions and GN 101 Training and Certification. There is no finding of a violation of GCOR 1.6, a serious violation in accordance with the PEPA Policy, Appendix B (6). There was insufficient evidence of disparity in treatment. The Board finds that the GN 101 serves a legitimate purpose in management of the workforce, and its "soft" deadline for examination attempts to avoid disruption in services of the Carrier.

The Board does find, however, that the penalty imposed was excessive and unreasonable in consideration of the totality of the circumstances. Here, the Claimant missed the "soft deadline" but not the actual deadline for his certification. The Claimant's actual certification did not lapse during the period in question. The

violation of the operating rule did not result in an FRA suspension. The Claimant did not account for the unplanned mayhem in his procrastination to complete the certification, and the best course of action would have been to discuss his transportation issues with his Supervisor, which he did not. GN 101 requires that an employee be withheld from service until the requirements have been completed under the “soft” deadline date, and discipline should not be issued unless it is appropriate. The on-property correspondence suggests that “had Claimant reached out to his supervisor, it is possible he would have been granted an extension.”

The Claimant was an 18 year employee at the time of the incident, and his discipline record is mostly comprised of attendance violations. The Claimant signed a waiver for an incident related to not protecting his job assignment on July 24, 2015 and was assessed a ten (10) day record suspension with a 12 month review period. The Claimant was assessed a 20 day record suspension with a 12 month review period related to a missed call on January 1, 2016. The Claimant signed a waiver for an incident related to not protecting his job assignment on February 12, 2016 and was assessed a 30 day record suspension with a 36 month review period.

The aforementioned circumstances do not arise to the level of termination. The Board finds there was no just cause for termination. A review of the BNSF’s policy indicates that the standard violation a fourth offense results in a 30 day record suspension. The penalty is hereby modified to a Fourth Standard Violation, and the Claimant is assessed a 30 day record suspension. Any back pay is subject to offset for outside earnings.

AWARD

Claim sustained in accordance with these findings.

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.