

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 30024
Docket No. 49905
20-1- NRAB-00001-190035**

The First Division consisted of the regular members and in addition Referee Michael D. Phillips 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 D. E. Terrell’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 November 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.

On October 4, 2017, Claimant D. E. Terrell was assigned as the Conductor on train U-RLATND0-16T out of Silsbee, Texas. The crew had been issued Track Warrant No. 820-10, which gave them authority to proceed to the East Siding Switch (ESS) at Bragg, MP 129.06, on main track with instructions to clear the main track

into the siding. Approximately 394 feet from ESS Bragg, the Claimant initiated an emergency brake application, but the train passed the switch by approximately 75 feet.

By letter dated October 12, 2017, the Claimant and his Engineer were issued a Notice of Investigation for the purpose of determining responsibility in connection with their alleged failure to clear the main track as outlined in Track Warrant 820-10 resulting in exceeding their authority limits. The notice stated that both Claimant and the Engineer were ineligible for Alternative Handling “because the charge involves alleged violation of rules associated with BNSF’s Critical Work Practices.” Nevertheless, the Engineer was afforded Alternative Handling in lieu of discipline.

After two postponements, the Investigation was held November 9, 2017. By letter dated November 21, 2017, the Claimant was notified that he had been found in violation of GCOR 1.1 Safety, GCOR 1.1.2 Alert and Attentive, GCOR 1.3.3 Circulars, Instructions, and Notices, GCOR 1.47 Duties of Crew Members, GCOR 6.3 Main Track Authorization, GCOR 14.1 Authority to Enter TWC Limits, GCOR 14.2 Designated Limits, and GCOR 14.3 Operating with Track Warrants, and he was dismissed in accordance with the Carrier’s Policy for Employee Performance and Accountability (PEPA).

The Organization appealed the Claimant’s discipline assessment pursuant to the applicable collective bargaining Agreement, but the parties were unable to resolve the matter on the property. The case now comes before us for resolution.

At the outset, we note that the parties do not dispute that the train exceeded the authority limits when it passed ESS Bragg. They disagree, however, on the extent of the Claimant’s responsibility for the incident and on the appropriateness of the discipline levied against him.

The Carrier contends that the Claimant endangered his crew and other trains operating on the same subdivision when he exceeded his authority and was on a portion of track not authorized for his movement. It states that the Claimant admitted that he exceeded his authority and that he was jointly responsible for ensuring his train did not exceed the authorized limits. The Carrier argues that these facts meet its burden of providing substantial evidence of a violation.

While conceding that the engineer took responsibility for his role in the incident, the Carrier maintains that GCOR 1.47 Duties of Crew Members identifies both the Conductor and Engineer as responsible for the safety and protection of their train and observance of the rules. It argues that GCOR 1.47 does not permit the Organization to shift blame for the incident entirely to the Engineer and that the Claimant did not take appropriate action to prevent the authority violation. It notes that evidence at the Investigation established that the train was approximately 400 feet from the limits and moving at a speed of 25 mph when the Claimant induced the emergency brake application, summarizing his actions as “too little, too late.” It disputes the Organization’s position that the Claimant could not have done anything more to prevent the incident, stating that the Claimant should have taken action sooner.

The Carrier also contends that dismissal was appropriate in the circumstances. It argues that the Claimant was not eligible for Alternative Handling pursuant to the terms of the Safety Summit Agreement which sets forth that process. It states that employees are not eligible for Alternative Handling if they have had a violation of the same Class I offense in the previous 24 months and that the Claimant had been disciplined for a different authority violation in June of 2016, thus making him ineligible. The Carrier further notes that the Safety Summit Agreement contains a dispute resolution process which was not pursued on the property, making it improper for the Organization to raise the matter here.

The Carrier observes that an authority violation is categorized as a Serious Violation under PEPA. It points out that the Claimant had his certification revoked as a result of the violation and that the Claimant’s discipline history reflects five marks of discipline and two instances of alternative handling. It also states that this was the Claimant’s second active Serious level violation and that under PEPA, a second such violation within the applicable review period may result in dismissal. The Carrier urges that the violation here could have had serious consequences and that in light of all the circumstances, the dismissal should not be disturbed.

The Organization responds that the discipline assessed was unwarranted and not supported by the evidence. While, as noted above, it does not deny that the crew exceeded their track warrant authority, it maintains that there was no evidence of wrongdoing by the Claimant. The Organization states that the Claimant did everything he could to convince the Engineer to slow the train and that in the end it

was the Claimant who was forced to put the train into emergency. It points to the Code of Federal Regulations provision introduced at the Investigation which provides in part regarding criteria for revoking certification (49 CFR Section 242.403):

- “(4) Failure to take appropriate action to prevent the locomotive engineer of the train the conductor is assigned to from occupying main track or a segment of main track without proper authority or permission. Appropriate action does not mean that a conductor must prevent a violation from occurring at all costs; the duty may be met by warning an engineer of a potential or foreseeable violation.”

The Organization contends that the Claimant did take “appropriate action” as required by the regulation and that such action also complies with GCOR 1.47 which required him to “act responsibly.” It states that the Engineer’s testimony confirmed that the Claimant had alerted him to the upcoming authority limits, questioned whether he would be able to stop, and then placed the train into emergency. It also notes that the Engineer was a 16-year employee with an excellent reputation for train handling skills on which the Claimant justifiably relied. The Organization maintains that shared responsibility does not equate to equal culpability, and it urges that the Claimant’s actions here do not warrant a finding of guilt.

With respect to the level of discipline issued, the Organization contends that the degree assessed the two crew members was remarkably disparate. It notes that the Engineer did not receive any discipline, but rather he received Alternative Handling despite the Investigation Notice stating he was not eligible for the same reason it said the Claimant was not eligible. The Organization maintains that the reason the Claimant was denied Alternative Handling is not one of the criteria set forth in the Safety Summit Agreement and that the Carrier only raised its current rationale during the claim handling process rather than at or before the Investigation. The Organization also states that the Engineer’s record reflects he had a prior instance of Alternative Handling similar to the Claimant’s on his record, further demonstrating disparate handling between the Claimant and his engineer. The Organization concludes that, while the Claimant should not have been found culpable at all, to treat the crew members so differently was arbitrary, excessive and unreasonable, and it requests that the Claimant’s discipline be set aside.

We first address the Organization's argument that the Claimant was entitled to Alternative Handling under the Safety Summit Agreement. The Organization is correct that the Safety Summit Agreement does not include as a criterion for ineligibility the verbiage contained in the Notice of Investigation. There are other ineligibility criteria in the agreement, however, which may in fact be applicable here. We do not reach that issue in this case, though, because the agreement does contain an escalation provision which was not exhausted.

With respect to the Rule violations set forth in the dismissal letter, there is no question that the Claimant's train exceeded the limits of its authority. There is also no question that crew members are jointly responsible for the safe handling of their train. Nevertheless, it is well established that the relative culpability levels of crew members are not always identical. In this case, we note that it was undisputed that the Claimant alerted his Engineer to the limits of their authority, that the Claimant questioned the Engineer as to whether he would be able to stop, and that the Claimant - not the Engineer - was the crew member who took the step of initiating an emergency brake application. We have carefully reviewed the record, and we find that culpability for the incident lies mainly with the Engineer.

Moreover, even if we were to find that the Claimant shared some level of culpability for the incident, we find the discipline assessed to him as compared to the Engineer to be excessive. As just noted, it was the Claimant who had to put the train into emergency. The Engineer, who failed to properly stop the train and who did not apply the emergency brake, was initially deemed ineligible for Alternative Handling for the same stated reason as the Claimant was, yet he ultimately received Alternative Handling in lieu of discipline. While the crew members had different prior discipline records, we do not find that the Claimant's was so much more significant that he should be dismissed while the Engineer received training. We cannot reconcile such vastly divergent assessments, especially when we find that the Engineer's culpability was the more significant, if not the sole, cause of the incident.

In light of these findings, we conclude that the Claimant's dismissal must be set aside and the incident treated as one eligible for Alternative Handling like his engineer received. We note that the Claimant had his certification revoked and ineligible for service during the revocation period, and it is our understanding that the revocation was not appealed to the appropriate review body. Therefore, he would not be eligible for back pay during the period of his revocation. He is otherwise

entitled to back pay, less an offset for outside earnings made during the period of his dismissal.

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 29th day of January 2020.