

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 30027
Docket No. 49908
20-1- NRAB-00001-190038**

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 M. S. Dorsey’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 December 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.

On December 4, 2017, Claimant M. S. Dorsey was assigned as the Engineer on train H-AMSTUL1-04A to operate from Amarillo, Texas to Enid, Oklahoma. Enroute the crew was instructed by the Train Dispatcher to put their train into track 3106 at Waynoka Yard due to congestion in Enid. The Dispatcher advised that a van would

take the crew to Enid and a relief crew would take the train from Waynoka to Enid, and he advised them to stop prior to fouling the east end of Waynoka Yard. The crew tied their train down and took the van back to the entry of the yard to place the derail back into derauling position, then continued to Enid.

Subsequently, another train entered the Waynoka Yard from the west and stopped short of track 3106 to line the switch for the lead. The Conductor of that train noted it was close clearance between the rear car of the Claimant's train and the lead and he did not feel it was safe to proceed, so he contacted the Dispatcher to advise that the Claimant's train needed to be pulled further east. The local Superintendent overheard that radio conversation and drove to Waynoka Yard to inspect the situation. When he arrived he took a photo of the rear portion of the Claimant's train.

By letter dated December 7, 2017, the Claimant and his Conductor were notified of an Investigation to determine their responsibility in connection with their alleged leaving equipment standing where it will foul equipment on adjacent tracks or cause injury to employees riding on the side of a car or engine, in possible violation of GCOR 7.1 Switching Safely and Efficiently, GCOR 1.6 Conduct and GCOR 1.47 Duties of Crew Members. The Investigation was held December 21, 2017, after which both crew members were found to have violated the charged Rules, and they were dismissed by letter dated January 18, 2018.

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.

The Organization challenges the discipline assessment on multiple grounds. It states that there were procedural errors and that the evidence did not establish any Rule violations on the Claimant's part. It also contends that the discipline assessment was harsh, arbitrary and unreasonable.

With respect to the procedures employed, the Organization maintains that the Carrier failed to provide a fair and impartial Investigation because the Carrier failed to provide all witnesses to the incident. It points out that neither the Conductor nor the Engineer of the crew which discovered the situation were called at the Investigation, and it states that hearsay evidence was submitted instead. The Organization contends that without the other Conductor's presence, it was impossible to establish why he was

concerned about the location of the rear car of the Claimant's train.

The Organization also argues that the Carrier failed to meet its burden of establishing wrongdoing on the part of the Claimant. It states that it was the dispatcher who instructed him to stop his train short of fouling the east end of the Waynoka Yard. It also contends that the Claimant had received paperwork in Amarillo which indicated the train was 5,309 feet long, and that having set out one car enroute and not changing his counter setting, the Claimant was justified in relying on the counter to determine he was clear of the west lead when he stopped. The Organization further states that the photograph taken by the superintendent is insufficient to establish that the rear car was fouling the lead and that the Carrier should have used a tape measure as confirmation.

As for the level of discipline imposed, the Organization contends that the Carrier misused its Policy for Employee Performance and Accountability (PEPA) to dismiss the Claimant. It disputes that the Claimant actually had five violations within the preceding 12 months because even though the first discipline assessment was on December 15, 2016, the incident occurred on November 20, 2016, more than one year prior to the incident here. It states that the Carrier's application of PEPA is patently unfair because it permits consideration of events which occurred well more than 12 month earlier to be considered for later discipline assessments. The Organization posits that the review period should be measured from the date of the incident in every situation or from the date discipline is assessed, and that to have it any other way is illogical and unfair.

Regardless of that calculation method, the Organization urges that dismissal in this instance was not appropriate. It observes that the Claimant's other discipline marks in the review period were attendance related, and it argues that in light of the Claimant's years of service, the decision to dismiss him was arbitrary and unreasonable. While not conceding that any Rule violation had been established, the Organization concludes that the case does not rise to the level of immediate discharge in any event.

The Carrier's position is that the Claimant committed a serious Rules violation when he left his cars fouling another track, setting up another train for a collision. It states that if the other crew had not been alert and attentive, the resulting incident could have been catastrophic.

The Carrier notes that GCOR 7.1 Switching Safely and Efficiently specifically instructs "Do not leave equipment standing where it will foul equipment on adjacent

tracks.” It maintains that per that Rule, the Claimant was required to stop his train where it was not fouling adjacent tracks, but that he left his train foul of the adjacent track threatening the safety of the crew members on the next train entering the yard. The Carrier notes that the facts were established by the Superintendent who responded to the scene, viewed the location of the car and took a photograph to confirm his observations.

With respect to the absence of the other crew at the Investigation, the Carrier states that the case was not based on their observations. Although they alerted the Dispatcher, and ultimately the Superintendent, of their concern, it was the Superintendent who took exception and made the decision to charge the Claimant. The Carrier notes that he was present to testify to what he observed and to support that testimony with photographic evidence.

The Carrier also rejects the contention that the Claimant was merely following the Dispatcher’s directions to stop short of fouling the east end of the yard. The Carrier argues that even if such instructions were given, they did not relieve the Claimant of his responsibility to comply with GCOR 7.1 and the rest of the operating Rules. Likewise, the Carrier discounts the argument that the Claimant’s reliance on his counter was sufficient. It states that there is no evidence of any issue with the counter, either before or after the incident. Moreover, it urges that the Rule places responsibility on the Claimant to ensure his train is left in the clear and that there is no exception in the Rule for reliance on a counter. The Carrier maintains that the Claimant’s statements regarding the counter are unverifiable, and even if true, they do not absolve him of his responsibilities to ensure the train was in the clear.

The Carrier also notes that the Claimant and his Conductor rode in the van around the rear of the train, but that the Claimant said he was relaxing in the vehicle and took no notice of the position of the train. The Carrier states that the failure was not due to a malfunction with the counter but rather the Claimant’s own choice not to verify whether he was in the clear.

The Carrier concludes that the evidence established the rear of the train was not in the clear. It points to both the photograph taken by the Superintendent and the Superintendent’s testimony as confirmation of that fact. It also notes that the crew did not deny that the train was fouling the adjacent track but that instead they merely testified that they didn’t look when they passed it in the van.

With respect to the discipline assessed, the Carrier maintains that the decision to dismiss the Claimant was properly made after considering the seriousness of the Rules violations along with the Claimant's personal record. It reiterates that failing to ensure equipment is not left to foul is extremely dangerous and it notes that prior awards have reached that same conclusion. The Carrier further notes that the Claimant's record includes five violations in less than twelve months preceding this event such that he could have been dismissed under PEPA for the previous violation. It states that this incident is actually the Claimant's sixth violation in one year and that he was properly dismissed from service.

We have carefully reviewed the record in this case, along with all of the parties' arguments, and we first find no procedural barrier to our consideration of the merits. Although the second crew made the initial report of concern regarding clearance, the Superintendent was the one who made inspection of the scene and photographed the position of the train. In these circumstances, we do not find the absence of the other crew to have deprived the Claimant of a Investigation.

We also find that the Carrier has submitted substantial evidence to support the charges, which is the burden it bears in this proceeding. We find that the testimony of the Superintendent regarding his direct observations, along with the photograph, was sufficient to establish the location of the rear of the train, and that absence of a tape measurement does not diminish that proof. We also concur that the Claimant's alleged reliance on his counter, when he could have confirmed the train's location visually, does not relieve him of responsibility. Moreover, while it is not binding on us, we note that another board has already considered the discipline assessed to the Claimant's Conductor, and that body likewise found that there was substantial evidence to support the charges. We reach the same conclusion.

Having found that the charges were proven, we turn to the level of discipline assessed. As noted above, the Organization contends that dismissal in these circumstances is excessive, especially considering the Claimant's years of service. The Carrier is correct that the Claimant has multiple discipline events within a short period prior to this one, and we do not believe it was inappropriate to tally them as it did, but we note that they involve attendance matters rather than operating rule violations. We also note that the board which considered the Claimant's Conductor's case returned the Conductor to service without back pay. We have carefully considered all of the circumstances of this case, and we conclude that the Claimant likewise should be

returned to service, but without pay for time out of service.

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.