

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 30028
Docket No. 49909
20-1- NRAB-00001-190039**

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. G. Wilson’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 January 9, 2018.”

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 30, 2017, the Claimant was assigned as the Engineer on Train V-BLUSBD3-29A from Kansas City, Kansas. The crew received General Track Bulletin 23661, which contained a Form A speed restriction of 25 MPH from MP 163.5 to 165.0

on the Emporia Subdivision. The train entered the limits of the Form A in excess of the speed restriction, however, and when the crew reached their destination, the Conductor notified a Road Foreman of Engines (RFE) of the incident. Locomotive downloads were obtained and reviewed, and the crew members had their FRA certifications revoked.

By letter dated November 2, 2017, the Claimant was notified of a formal Investigation to determine his responsibility in connection with his alleged failure to comply with the requirements of the Form A. After multiple postponements, the Investigation was held on January 9, 2018. Although the Claimant and his Conductor testified that they entered the Form A limits at less than 10 MPH over the restriction, the RFE testified that the locomotive downloads revealed they had entered the restriction at 42 MPH, or 17 MPH over the limit. By letter dated January 29, 2018, the Claimant was notified that he had been found in violation of GCOR 1.47 Duties of Crew Members, GCOR 1.6 Conduct, GCOR 5.4.2 Display of Yellow Flag, GCOR 6.31 Maximum Authorized Speed, and GCOR 15.1 Track Bulletins, and he was dismissed from service 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 to us for resolution.

The Organization challenges the discipline assessment on both procedural and substantive grounds. It first contends that the Carrier did not grant the Claimant a fair and impartial Investigation in that the hearing officer also served as the discipline officer. It argues that it is unfair to allow a single officer to serve both functions and that the officer had prejudged the Claimant as evidenced by the leading nature of the questions he asked of the Carrier witness.

The Organization also maintains that the Carrier improperly denied the Claimant access to Alternative Handling (AH) as described in the Safety Summit Agreement (SSA) dated February 6, 2002. It states that the Claimant was eligible for AH because the Claimant's actions fit none of the exceptions set forth in the agreement for denial of AH. It further contends that employees have been granted AH for a wide range of violations over the years pursuant to the terms of the agreement, and that the denial of AH in this instance was arbitrary and unreasonable.

With respect to the facts of the incident, the Organization contends that the crew was provided confusing information in the bulletin. It notes that there were two Form A restrictions at the location in question, with one of them not being effective until noon. It states that overlapping restrictions such as this are not a common occurrence, and that once the crew realized one restriction was already in place, the Claimant took appropriate action to slow the train. The Organization maintains that those facts do not indicate any willful disregard in the incident.

The Organization urges that in these circumstances, the decision to dismiss the Claimant was excessive and unwarranted. Noting the Claimant's 23 years of service, it states that any assessment should have been instructive and not punitive and that the Carrier's application of the escalation provisions of PEPA in this case was unjust. The Organization maintains that the Carrier did not establish that the Claimant's actions were so egregious as to warrant stand-alone dismissal, and it requests that the dismissal be set aside.

The Carrier, on the other hand, contends that there is no reason to disturb the discipline assessment in this case. With respect to the Organization's procedural challenges, the Carrier states that the Claimant was not harmed by the multiple roles of the hearing officer. It points to prior awards which have rejected the argument that it is improper for a hearing officer to issue discipline, and it requests that we reach the same conclusion.

The Carrier also maintains that AH was properly denied. It states that the Claimant was ineligible for AH on two fronts. First, it states that the Claimant's violation was willful under the Federal Railroad Administration's definition and that the Claimant was thus ineligible under Part I, Article III of the SSA. Second, the Carrier contends that the Claimant was ineligible for AH because he had committed a similar violation in the preceding 12 months. It also notes that the record does not reflect that the Organization utilized the dispute resolution process set forth in the SSA.

With respect to the facts of the incident, the Carrier states that the evidence established the Claimant's Rule violations. It notes that not only did the evidence from the locomotive downloads and the expert testimony of the expert witness confirm that the Claimant exceeded the Form A speed restrictions, but that the Claimant admitted he entered the restriction over the permitted speed. It also notes that yellow flags were appropriately displayed ahead of the restriction and that there was no reason for the

Claimant to be confused about his obligations to ensure the train did not exceed the maximum authorized speed.

Addressing the level of discipline assessed, the Carrier points out that prior awards have recognized that speeding in a restricted area is a significant matter with potential serious consequences. The Carrier states that the Claimant was in an active review period for a prior Serious level violation, which was also for failing to comply with a speed restriction, and that under PEPA, a second Serious violation committed within the applicable review period may result in dismissal. It also notes that the Claimant's discipline record contains multiple instances of discipline for speed restriction violations, and it urges that application of the PEPA progression guidelines in light of that pattern of behavior was just and proper.

We have carefully reviewed the record in this case and the parties' arguments, and we find no procedural barrier to our consideration of the merits. The issue of whether a hearing officer may also issue discipline has been addressed in many prior awards. Absent any indication of prejudice or other misconduct, those awards consistently find that it is not improper for a hearing officer to issue discipline. We reach that conclusion here too.

With respect to the application of the SSA and denial of AH, we find no evidence that the Carrier misapplied the agreement. Section VI.B.(i) of the SSA provides in pertinent part that an "employee is ineligible for alternative handling if he/she has . . . (3) a Class I violation in the previous 12 months, or (4) a violation of the same Class I offense in the previous 24 months." The record here reflects that the Claimant signed a waiver for exceeding maximum authorized speed through a Form A on August 30, 2017, less than three months before the incident in question. In those circumstances, we find that the portion of the SSA quoted above renders the Claimant ineligible for AH.

We also find that the Carrier has met its burden of establishing by substantial evidence that the Claimant was in violation of the cited rules. The accuracy of the locomotive downloads had not been questioned, and they established that the Claimant entered the 25 MPH speed restriction at 42 MPH and did not bring the train's speed to within the requirements for another 1555 feet. Although the Claimant contended that the train speed was only 34 MPH when it entered, which would be one mile per hour under the FRA certification threshold, the Carrier was not obligated to find that testimony credible, and we are in no position to overturn that assessment in this

appellate forum. Moreover, even if the train's speed had been 34 MPH instead of 42 MPH, it was still considerably higher than the Form A permitted.

Having found that the Rules violations were established, the Board turns to the level of discipline assessed. As previously mentioned, the Organization urges the Board to overturn the discipline as being harsh and excessive, especially in light of the Claimant's years of service. To overturn the Carrier's assessment, however, would require the Board to find that the Carrier acted arbitrarily or capriciously. We note that the Claimant's record does reflect multiple prior instances of similar rules violations and that the most recent such event was not long before the one in question here. The Rules violations at issue are serious, and in light of all the circumstances, we cannot find that the Carrier's judgment was arbitrary or capricious. Therefore we will not substitute our judgment for the Carrier's now.

AWARD

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 29th day of January 2020.