

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 30029
Docket No. 49910
20-1- NRAB-00001-190040

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. A. Macias’ 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 10, 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 November 2, 2017, Claimant M. A. Macias was working as a Herder at Hobart yard in Los Angeles, California, when he attached to inbound train Z-NYCLAC9-31L, which had arrived at Strip Track 1. The train was too long for that

track, so the crew had to make a cut and then shove the balance of the train into Old Yard Track 4413.

The Claimant had a job briefing with the Conductor, and he then assumed responsibility to line the switch to enter Track 4413 and to protect the shove movement. After the Conductor stopped and protected a crossing at the west end of the lead, he radioed the Engineer to shove 15 car lengths towards the Claimant, who was waiting at the east end of Track 4413. Before the move started, however, the Claimant assumed control of the shoving movement by radioing the engineer that the train was clear to shove 80 car lengths.

Once the Claimant took control of the shove movement, the Conductor boarded a yard van and traveled toward the clearance point at the west end of Track 4413. At that time he noticed the train was headed into Old Yard Track 4411 rather than 4413, and he notified the engineer to place the train into emergency. Before it could stop, the train impacted an RCO unit in Track 4411 and derailed. When a Supervisor responded to the incident and interviewed the Conductor and the Claimant, the Claimant acknowledged he had mistakenly lined the switch for the lead, which led to Track 4411, instead of the intended route towards Track 4413.

By letter dated November 7, 2017, the Claimant was notified to attend an Investigation regarding his alleged failure to properly line the train for its intended route and to properly protect the movement while shoving, resulting in the impact and derailment on Track 4411, indicating possible violations of GCOR 1.1.1 Maintaining a Safe Course, GCOR 1.47 Duties of Crew Members, GCOR 1.6 Conduct, GCOR 6.5 Shoving Movements, GCOR 6.28 Movement on Other than Main Track, and GCOR 8.2 Position of Switches. After multiple postponements, the Investigation was held on January 10, 2018. As a result of the Investigation, the Claimant was notified on February 6, 2018 that he had been found in violation of the charges Rules, 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 first contends that the Carrier failed to provide the Claimant with a fair and impartial Investigation. It notes that the Claimant was withheld from service pending the Investigation but that the other crew members were not. The Organization states that such action is a clear indication that the Carrier had prejudged the Claimant and that the outcome was predetermined. It points to prior awards which have found it inappropriate to withhold an employee from service pending investigation, and it posits that such practice was a fatal flaw in the process here necessitating reversal of the discipline assessment.

It further argues that the Carrier's prejudgment was demonstrated when the Hearing Officer only questioned the Claimant and saw no reason to question any of the other crew members. The Organization states that the purpose of the Investigation was to gather all the relevant facts and that the failure to question the other crew members undermined that process and was prejudicial to the Claimant.

The Organization also argues that the issuance of dismissal in this case was harsh and egregious. It states that while the Claimant accepted full responsibility for his actions, the blame was not his to bear. The Organization contends that the Conductor was at fault for not verifying that the switch was properly lined before initiating the move with a 15-car count and that it was the Conductor who failed to properly protect the shove. It maintains that if the Conductor had complied with GCOR 6.5 Shoving, the incident would never have occurred and that to lay the fault of the incident solely on the Claimant is unwarranted.

The Organization urges that the decision to dismiss the Claimant was arbitrary and unreasonable. It reiterates that the Claimant accepted responsibility for the incident even though it was not his fault. It also notes that the Claimant has a long tenure and that, while his record is not perfect, he has not had an operating violation in many years. It concludes that, under the circumstances, the dismissal should be overturned and the Claimant should be returned to service.

The Carrier's position is that the evidence presented at the Investigation overwhelmingly proved the Claimant's violation of the cited Rules. It points to testimony from the Terminal Superintendent who arrived shortly after the incident and interviewed the Claimant and the Conductor and who stated the Claimant admitted he incorrectly lined the switch and took full responsibility. It also notes the transcribed radio transmissions which indicate the Claimant was responsible for lining the route,

and it observes that while the conductor issued the initial instruction to shove back 15 cars, the train had not yet moved when less than a minute later the Claimant took over the shove and issued the instruction to shove back 80 car lengths.

The Carrier also emphasizes that the Claimant admitted to violating each of the charged Rules during the Investigation. It maintains that the Rules infractions resulted in a significant collision and derailment, which were depicted in photographs and confirmed by the Terminal Superintendent's testimony. The Carrier states that the testimony and evidence entered during the Investigation, coupled with the Claimant's admissions, are substantial evidence of the Rules violations.

The Carrier further states that the Claimant was afforded a fair Investigation. It points out that there is no provision in the applicable collective bargaining Agreement prohibiting the Carrier from withholding an employee from service pending an Investigation. It also notes that the Claimant readily admitted to violating the Rules immediately following the incident and that he was withheld from service for the safety of himself and others. The Carrier maintains that no decision was made until after the Investigation concluded and the transcript was reviewed.

The Carrier also contends there is no evidence that the Conductor was at fault. It denies that the Conductor gave the impression the route was lined properly, noting that it was the Claimant who testified he lined the switch and who issued the instruction to shove back 80 car lengths before the train had ever moved. The Carrier also notes that neither the Claimant nor his representative questioned the Conductor and that the Claimant affirmatively testified that he did not think any of the other crew members were at fault. Lastly, the Carrier observes that the Claimant's representative stated at the Investigation he did not think it was necessary to question the other crew members, in contradiction to the Organization's current position.

In light of the above, the Carrier maintains that the decision to discipline the Claimant was not arbitrary or unreasonable. It notes that failing to protect a shove is very dangerous and that prior awards have recognized the seriousness of such an offense. It states that the Claimant in this case violated a work procedure designed to protect employees and others from potentially serious injury or other harm, and that the outcome here was significant.

The Carrier notes that the Claimant has an extensive discipline history, including a prior dismissal, and that several of his previous discipline events have involved improperly lining his route and collisions. It states that this was the Claimant's second active Serious level Rules violation, and that PEPA indicates dismissal in such circumstances. It also posits that due to the seriousness of the incident and the multiple Rule violations that occurred, the incident qualified as a standalone dismissal event. The Carrier concludes that dismissal was appropriate in these circumstances and that the discipline should not be disturbed.

We have carefully reviewed the record, and we find no procedural issues which would prevent us from considering the merits of the case. The cases cited by the Organization regarding withholding an employee from service prior to a Investigation involve different circumstances from the instant case, and we do not find the procedure prejudiced the Claimant here. We likewise find that the decision at the Investigation not to question the other crew members after the Claimant had admitted to responsibility for the incident was not prejudicial.

With respect to the merits of the case, there is no question that the Carrier has met its burden of establishing by substantial evidence that the cited Rules were violated. The Claimant candidly admitted his responsibility and the specific Rule violations, both immediately after the incident and again at the Investigation. While the Organization maintains that the blame should be spread, we do not find evidence in the record to support that position.

Having found that the Rule violations were established; we turn to the level of discipline assessed. As previously mentioned, the Organization urges the Board to reduce the discipline assessed as being harsh and excessive, particularly in light of the Claimant's acceptance of responsibility. To overturn the Carrier's assessment, however, would require the Board to find that the Carrier acted arbitrarily or capriciously. The Claimant's acceptance of responsibility is admirable. Nevertheless, the Rule violations at issue are indeed serious and the resulting damage was significant. While the Claimant does have many years of service, he also has many discipline entries on his record as well. In light of all the circumstances, we cannot find that the Carrier's judgment was arbitrary or capricious, and we will not substitute our judgment for the Carrier's.

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.