

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 30030
Docket No. 49911
20-1- NRAB-00001-190041

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 B. T. Tuttle’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 September 7, 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 June 2, 2017, Claimant B. T. Tuttle was the Engineer on train H-KCKBAR9-30A. The train was operating westbound on the Seligman Subdivision when it had an unanticipated emergency application. After the train stopped and the Conductor made the necessary emergency calls, the Claimant and his Conductor began discussing plans

to address the situation when an eastbound train approached and stopped at the head end of the Claimant's train and offered assistance. The eastbound train continued at restricted speed inspecting the Claimant's train. The Claimant's Conductor departed the cab to begin walking the train at which time he requested "in between" protection over the radio. The Claimant responded "set and centered."

The eastbound train found that an air hose had separated near the rear of the Claimant's train and stopped to reconnect it. The Conductor of the eastbound train also radioed the Claimant for "in between" protection, and the Claimant again responded, "set and centered." After the air hose was reconnected, the Claimant's Conductor knocked off hand brakes he had set and returned to the cab, and the crew continued on. On June 13, 2017, however, the Carrier's remote audit desk notified Road Foreman of Engines (RFE) Heintz that the Claimant's reverser had not been centered before the Claimant advised his conductor "set and centered," and that he had not centered it for over 17 minutes.

On June 21, 2017, the Claimant was notified of an Investigation to determine his responsibility for his alleged carelessness of safety when he failed to center the reverser after granting the set and centered request from his Conductor. The notice indicated possible violations of GCOR 1.1.1 Maintaining a Safe Course, GCOR 1.3.1 Rules, Regulations, and Instructions, GCOR 1.4 Carrying Out Rules and Reporting Violations, GCOR 1.47 Duties of Crew Members, GCOR 1.6 Conduct and TSR 13.1.1 Going Between Cars or Locomotives. After multiple postponements, the Investigation was held on September 7, 2017, after which the Claimant was found to be in violation of the charged Rules, and by letter dated September 21, 2017, the Claimant 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 before us for resolution.

The Organization challenges the discipline assessment on both procedural and substantive grounds. It first alleges that the Claimant was not provided with a fair and impartial Investigation because the Hearing Officer also issued the discipline. It asserts that the Hearing Officer had already prejudged the Claimant's guilt and then steered the Investigation in a direction to find the Claimant guilty.

With respect to the merits of the case, the Organization contends that the Carrier failed to prove that the Claimant committed the charged Rule violations. It states that the Claimant testified he did center the reverser when his Conductor requested “in between” protection. It notes that the Claimant further testified that when the eastbound Conductor requested “in between” protection 17 minutes later, he looked down to verify the reverser was centered and that he decided to remove it completely at that time.

The Organization points out that the Claimant also testified that when he first attempted to remove the reverser for the “in between” request from the eastbound conductor, the reverser was difficult to remove. The Claimant explained that he had to wiggle it around a little in the center spot before it would come free, but that such occurrence was not uncommon. The Organization contends, however, that those circumstances raise a question about the accuracy of the event recorder tape and that it is likely that the switch indicating the reverser position could read incorrectly until it is wiggled or removed.

The Organization also argues that the Carrier presented no evidence that the locomotive did not have a possible flaw in the reverser lever mechanism. It states that the evidence which was introduced regarding the reverser showing as centered at other times that day was not corroborated by personal testimony. It also notes that there was no reverser in place when the Claimant initially boarded the train such that the download readings did not reflect what would occur if the reverser had been in place and centered. The Organization concludes that the evidence presented by the Carrier is insufficient to discredit the Claimant’s testimony.

As for the level of discipline imposed, the Organization urges that even if the Claimant could be considered culpable, the sanction of dismissal was excessive. It states that there was no evidence that the Claimant’s Conductor ever placed his body “in between” the equipment, and it further contends that the train could not have moved until its air brakes had recovered so no one was ever in danger. It discounts the testimony of the RFE who stated that he had seen trains move while in emergency, contending that his saying so raised questions about his knowledge. The Organization maintains that these circumstances, including the Claimant’s years of service with minimal discipline, mitigate against assessing dismissal, and it requests that the discipline be set aside.

The Carrier's position is that the Claimant committed one of the Critical Eight Deadly Decisions and that the Claimant's Conductor was placed in a potentially perilous situation. It states that evidence introduced at the Investigation proved that the Claimant failed to provide his Conductor proper "in between" protection, and that the consequences could have been dire.

The Carrier points to the testimony of RFE Heintz who submitted data from the locomotive event recorder as well as audio recordings of the radio communications which took place at the time. It states that the data revealed that, although the Claimant responded to his Conductor's request for protection with "set and centered," the download showed that the Claimant did not actually center the reverser until the eastbound Conductor requested similar protection over 17 minutes later. The Carrier posits that such conduct is a clear violation of TSR 13.1.1 - Going Between Cars or Locomotives, which provides in pertinent part "The crew member at the controls of the locomotive must fully apply the independent brakes, center the reverser, and then acknowledge the radio transmission . . . 'Set and centered.'"

The Carrier rejects the Organization's arguments regarding any alleged inaccuracy of the event recorder download. The Carrier points to additional data from the event recorder download showing the reverser registering as centered multiple times before, during and after the Claimant's use. It notes that the Claimant himself testified that it is not unusual to have to wiggle a reverser to remove it from the control stand, thus negating the implication that the event recorder malfunctioned in this lone instance.

With respect to the Organization's argument that the train would not have moved because it was in emergency, the Carrier states there are no exceptions to TSR 13.1.1 and that there are no instances where an Engineer is exempt from providing proper protection. The Carrier also suggests that if the Claimant adhered to the Organization's belief, he may have had a false sense of security such that he didn't feel the need to physically center the reverser. The Carrier further contends that it is irrelevant whether the Conductor actually went "in between" and that once he requested protection, the Claimant was obligated to provide it.

Finally, the Carrier asserts that there were no procedural errors in the handling of the case. It points to prior awards which have rejected the Organization's contentions regarding multiple roles of hearing officers. It further states that the Hearing Officer's

conduct in this case was not prejudicial to the Claimant.

Turning to the level of discipline assessed, the Carrier reiterates that the Rule violations at issue are very serious and that the Claimant violated procedures designed to protect employees from serious injury or death. It notes that the Claimant's record reveals he had committed two Serious level violations in 2016, and that less than a year later he committed yet another Serious level offense. The Carrier maintains that it could have dismissed the Claimant for the second Serious level offense under the PEPA progression, but that it showed leniency at that time. It concludes that the Claimant had demonstrated a pattern of unacceptable behavior, that dismissal is consistent with PEPA, and that his dismissal should not be disturbed.

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. We again reject the contention that it is a procedural error for a Hearing Officer to assess discipline. We find no indication that the Hearing Officer here was biased or prejudged the Claimant's guilt.

With respect to the merits, it is the Carrier's burden to prove that the Claimant committed the charged Rule violations. The standard of proof pertaining to this forum is production of substantial evidence, and we find that standard has been met here. Although the Claimant denied committing the violations, the Carrier produced evidence in the form of locomotive downloads and radio transmissions which indicate the reverser was not centered until the Claimant received the second request for "in between" protection from the eastbound conductor. It also established that the downloads of the Claimant's locomotive accurately showed the reverser to be in centered position at other times close to the incident in question. In those circumstances, the Carrier found the Claimant's denial to be less credible than the download data and supporting evidence, and as an appellate body we are not in a position to overturn such a credibility determination. We note that even the emails submitted by the Organization regarding alleged issues with reversers several years earlier advised that overcoming locomotive download evidence with only a denial is not likely to succeed. In this instance, we conclude that the Carrier did introduce substantial evidence to support the conclusion that the charged Rules had been violated and that the Claimant's testimony to the contrary does not alter that conclusion.

Having found that the charges were proven, we next turn to the level of discipline

assessed. As noted above, the Organization maintains that dismissal was excessive when the Claimant's 23 years of service are considered along with his record and the circumstances of the case. The Carrier disagrees, stating that the seriousness of the violation coupled with the Claimant's discipline record support application of the PEPA progression provisions and that dismissal was warranted. Again we have carefully reviewed the record, and we concur with the Carrier that failing to provide "in between" protection is a very serious rule violation. We also note that the Claimant did sign two waivers for Level S violations on the same date in December 2016 for which he received a record suspension. Prior to that, however, his discipline record for over 15 years was unremarkable, reflecting only two formal reprimands, one for unnecessary radio communication while working as a Conductor and one for an attendance matter. While the Rule violations at issue are indeed serious, we believe that the circumstances of the case, coupled with the Claimant's lengthy service with minimal discipline until recently, necessitate a finding that permanent dismissal was not warranted. The Claimant is to be returned to service with seniority and other rights unimpaired, 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.