

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 30032
Docket No. 49913
20-1- NRAB-00001-190043

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 J. Douglass’ 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 20, 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 September 17, 2017, Claimant J. Douglass was assigned as a Helper on the YHOU9011-17A, switching cars at Houston South Yard. During the course of their moves, the crew kicked car EPCX 3413 into track 915, but the car stopped short of the clearance marker for that track. The Claimant then lined the switch back to the

B Lead for the next move. Foreman Benard then mounted the rear car and initiated a shoving movement of 20 cars. After traveling approximately three car lengths, however, the Foreman jumped from the car when it was moving at five MPH and sustained serious injuries. The Claimant noticed the Foreman on the ground and stopped the move.

By letter dated October 2, 2017, the Claimant and the rest of the crew were notified of an Investigation to determine their responsibility in connection with their alleged carelessness of safety of themselves and others when failing to leave equipment in the clear and alleged failure to safely ride equipment in possible violation of GCOR 1.6 Conduct, GCOR 7.1 Switching Safely and Efficiently, TSR 13.1.5 Riding In or On Moving Equipment, GCOR 1.1.1 Maintaining a Safe Course, and GCOR 1.1.2 Alert and Attentive. After multiple postponements, the Investigation was held on December 20, 2017. By letter dated January 11, 2018, the Claimant was notified that he had been found in violation of the cited 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 challenges the Claimant's dismissal on both procedural and substantive grounds. It first states that the Carrier did not provide the Claimant with a fair and impartial Investigations because the Carrier did not produce photographs taken during a reenactment. The Organization contends that if the pictures had been included in evidence at the Investigation, they would have bolstered the Claimant's case and shown that he was not at fault for the incident. It states that the Carrier should have taken a recess to obtain the photos and that their absence leaves the record incomplete of all relevant facts.

With respect to the merits, the Organization maintains that the Carrier failed to prove that the Claimant was culpable. It states that photos introduced at the hearing show that car EPCX 3413 was not fouling the lead at the time of the incident, relying on an FRA definition of fouling the track and a definition found in the Carrier's Safety Rules Glossary. 49 CFR Section 218.93 defines fouling track as follows:

“Foul or fouling a track means rolling equipment or on-track maintenance of way equipment is located such that the end of the equipment is between the clearance point and the switch points leading to the track on which the equipment is standing.”

The TY&E Safety Rules Glossary defines Fouling Track as “Closer than or within 4 feet of the nearest rail.”

The Organization contends that the clearance marks on the rail of track 915 do not accurately mark the actual point of clearance for equipment on the lead. It states that photos show the end of the last car in track 915 was more than 4 feet from the nearest rail and that there was sufficient clearance room for the foreman to ride by on the side of the car.

The Organization further asserts that the Claimant has been made a scapegoat for the incident and that it was the Foreman who was to blame. It states that the Foreman determined the route was clear before he gave the engineer instructions to shove back and that the car allegedly to foul would have been right next to him when he did so. It notes that the Claimant was further down the lead having a radio conversation with another yard job to find out if there was more room in track 915 so they could add cars there. The Organization maintains that the Foreman was in control of the move when he initiated the shove and that it was his duty to verify the route was clear for the movement and to provide visual protection on the point. It states that the Foreman did not job brief with the Claimant before initiating the shove.

The Organization also questions why the Foreman chose to ride the cut in the first place. It states that the move could have been safely accomplished by the Foreman sending the cars to the Claimant without need to ride the shove. It also questions the Foreman’s decision to ride the side of the car which was nearest the cars on track 915 rather than on the opposite side where no cars were present. The Organization posits that if the Foreman had not made the decision to ride the cut as he did, there would have been no incident inasmuch as the cut passed by the standing car on track 915 without colliding.

With respect to the level of discipline assessed, the Organization urges that it was excessive and disparate compared to other similarly situated employees and that

it did not comport with the provisions of PEPA. The Organization refers to employee transcripts for four other employees which indicate they received Standard level discipline for leaving equipment to foul. It also points to one instance where an employee was merely required to participate in a coaching and counseling session.

The Organization notes that in this specific case, disparate treatment is shown by the fact that the Foreman was assessed only a Level S record suspension for his violation of the same Rules as the Claimant was found to have violated. It states that the Carrier improperly determined the Claimant was the ultimate cause of the incident and that he should not have been dismissed simply because an accident occurred. The Organization concludes that this was not a case where discharge for a single incident was warranted and that the Carrier's decision was arbitrary and unreasonable. It requests that the Claimant's dismissal be set aside and that he be returned to service.

The Carrier's position is that the Claimant violated multiple safety Rules on the date in question. It states that the Claimant knew car EPCX 3413 was not past the clearance points on track 915 and that it was by definition fouling the switching lead by over a full car length. The Carrier contends that the Claimant allowed the Foreman to ride a car forward despite that knowledge, putting the Foreman in grave danger and violating GCOR 7.1 Switching Safely and Efficiently, which provides in pertinent part:

“Do not leave equipment standing where it will foul equipment on adjacent tracks or cause injury to employees riding on the side of a car or engine.

On tracks where clearance point is indicated, leave equipment beyond the clearance point.”

The Carrier argues that the Claimant's admission that he knew the car was fouling the lead when his Foreman began riding towards it is more than sufficient proof that he violated GCOR 7.1. It further states that such conduct constitutes a violation of GCOR 1.6 which states that employees must not be “1. Careless of the safety of themselves or others” and “2. Negligent.”

The Carrier also takes exception to the Organization's observation that there was no collision. It points out that the clearance markers on track 915 were clearly visible and that the equipment on it extended more than an entire car length past the markers. The Carrier states that if the Claimant had complied with GCOR 1.7 and not left the equipment between the clearance markers and the lead, then the Foreman would not have been put in a position of choosing whether to dismount the moving car or risk riding into a possible collision. It points to testimony from a Carrier Officer who observed that even if one car can pass by equipment left past a clearance point, other equipment may be wider and there must be room for people riding the equipment to pass as well.

The Carrier further maintains that the Foreman's actions do not insulate the Claimant from his own Rule violations. While it concedes that the foreman bore some responsibility and was charged with violating TSR 13.1.5 - Riding In or On Moving Equipment, the Carrier reiterates that the Claimant knew the equipment in track 915 was beyond the clearance points yet he allowed his Foreman to ride the shove anyway. It urges that the Foreman's responsibility does not absolve the Claimant of his own culpability.

With respect to the Organization's procedural argument, the Carrier contends that the Claimant was not disadvantaged by the absence of the reenactment photographs. It points out that, although the Investigation had been postponed multiple times, the Organization did not request that the photos be present until late the evening before the Investigation. It notes that the Claimant's representatives had made timely requests for other items of evidence and that such requests were granted. The Carrier also contends that the Organization's stated reason for introducing the reenactment photographs is not compelling. It notes that the representative indicated they would show that there was plenty of room for the foreman to pass the cars on track 915, but it posits that photos from a reenactment would be less representative of the facts than the photos taken the day of the incident. The Carrier states that the relevant photographs were those of the actual position of the equipment at the time of the incident and that the Claimant suffered no prejudice by the absence of photos taken another time when the equipment could not be in exactly the same place.

Turning to the assessment of dismissal, the Carrier maintains that the decision to dismiss the Claimant was not arbitrary, but rather it was in keeping with the provisions of PEPA which state that stand-alone dismissible violations include a Rule

violation that could or does result in a serious collision or derailment or serious injury to another employee. The Carrier states that the Claimant's actions of knowingly leaving cars in the foul and allowing his Foreman to ride a shove towards them were the direct cause of the Foreman's injury and that therefore his stand-alone dismissal was reasonable and in keeping with PEPA. The Carrier also avers that the Organization's reference to other employee records is not properly before the Board, and that even if they could be considered, there is no showing that the other employees were similarly situated to the Claimant. It asks that the discipline assessed be upheld.

We have carefully reviewed the record in this matter, and we find no procedural barrier to our consideration of merits. We do find the Hearing Officer's stated reason for his insistence that the reenactment photographs not be introduced to be less than compelling. Certainly the request for them could have been more timely, but it appears that the Hearing Officer was willing to take time during the investigation to obtain evidence such as locomotive downloads and the presence of another Carrier Officer, and there was no explanation of how the representative's request for production of the photographs would have been any more burdensome. Nevertheless, in light of the introduction of the photographs taken on the day of the incident which unequivocally show car EPCX 3413 to be over a full car length past the marked clearance point, we do not find that the absence of the reenactment photographs was so prejudicial as to have denied the Claimant a fair Investigation.

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 applicable in this forum is production of substantial evidence, and we find that standard to have been met here. We are not convinced by the Organization's argument that the Rules were not violated simply because the cut of cars the Foreman was riding did not collide with the cars on track 915. GCOR 7.1 clearly and unequivocally states that on tracks where clearance point is indicated, employees must not leave equipment beyond the clearance point. Here, there is no question whatsoever that car EPCX 3413 was over a full car length beyond the clearance point, and further there is no question that the Claimant was aware the car was beyond the clearance point when the Foreman began to ride the shove. We do not believe the Organization's reference to the FRA or glossary definition of "fouling" in any way changes the fact that GCOR 7.1 was violated. And while it appears that the Foreman also bears some level of culpability for the incident; his actions did not relieve the Claimant of his own responsibility to comply with the cited rules.

Having found sufficient evidence to establish the charged violations, we turn to the level of discipline assessed. As noted above, the Organization states that dismissal was excessive in light of the Carrier's handling of other employees and the Foreman, and because the infraction here should not be considered a stand-alone dismissible offense. With respect to the discipline records of other employees, while we question whether they are properly before us, we are not convinced in any event that there is sufficient similarity in their circumstances to warrant comparison to the Claimant's case.

The Foreman's case is of course much more similar. Nevertheless, we find there is a significant difference between riding a car without being sure if there is adequate clearance, as the Foreman did, and knowing that equipment extends more than a car length past the clearance marker and allowing another employee to ride a shove towards it. We find sufficient difference in the two employees' actions to warrant different discipline assessments, so we cannot conclude that the Foreman's assessment requires modification of the Claimant's assessment.

To overturn the Carrier's assessment would require the Board to find that the Carrier acted arbitrarily or capriciously. The Rule violations in question here are indeed serious, and their violation had significant consequences. We have carefully reviewed the record, and in light of all the circumstances, we cannot find that the Carrier's decision to dismiss the Claimant was arbitrary or capricious. Therefore we must deny the claim.

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.