

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 30034
Docket No. 49915
20-1-NRAB-00001-190045

The First Division consisted of the regular members and in addition Referee Michael D. Phillips when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Locomotive Engineers and Trainmen
(BNSF Railway Company)

STATEMENT OF CLAIM:

“It is hereby requested that Engineer M. D. Montoya’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 Level “S” 30 Day Record Suspension be removed from his personal record, resulting from the investigation held on September 14, 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 17, 2017, Claimant M. D. Montoya was called as the Engineer on train Z-LACNYC9-17L at Needles, California. Around 20:00 hours, Trainmaster Lanahan arrived at the Needles depot and noticed the train stopped for a crew change. At 20:56, the Trainmaster overheard the Claimant radio the inbound crew to see if they had any trouble with the Positive Train Control (PTC) equipment.

The Claimant then toned the PTC desk, but when they responded approximately a minute later, the Claimant told them to disregard.

The Trainmaster then called the Claimant to inquire as to what was going on and if there was an issue. The Claimant briefly responded to both questions indicating there was no issue and that he had to address PTC and do a departure test. The Trainmaster then questioned the Claimant as to why the departure test was taking so long because the train had been sitting there for 25 minutes. The total interaction was as follows:

“Trainmaster: Trainmaster to 8230.

Claimant: BNSF 8230, go ahead, over.

Trainmaster: What we got going on?

Claimant: We don’t have anything going on now. Uh thanks a lot, over and out, 8230 out.

Trainmaster: Well, what is the issue?

Claimant: There was no issue. It was a PTC had to do a departure test and uh that was all, thank you, over and out.

Trainmaster: Okay, what seems to be the issue because it doesn’t take this long to do a departure test. The train has been sitting there for 25 minutes, over.

Claimant: Well, it does take that long, boss, if uh you have never done a departure test before and uh so it took a minute for that and we had to look over the bulletins. It’s a process, boss. BNSF 8320, out.

Trainmaster: Do you have a student aboard?

Claimant: Yeah, yeah, a student. Uh I never did a departure test before, boss. Uh have you? Over.

Trainmaster: Normally it doesn't take this long. How long before we start moving?

Claimant: We're going to move now, as soon as you let me off the radio, boss. 8230 West East out."

The Trainmaster then radioed the Conductor and asked who the student was, to which the Conductor answered: "There's not a student on here uh Ryan, it's the Engineer. He hadn't done a departure test, run a PTC uh over."

By letter dated July 10, 2017, the Claimant was notified that an Investigation had been scheduled to determine his responsibility in connection with his alleged discourteous and quarrelsome behavior toward a BNSF Manager resulting in the delay of his train. The Notice of Investigation referenced possible violations of GCOR 1.29 Avoiding Delays, GCOR 1.3.1 Rules, Regulations, and Instructions and GCOR 1.6 Conduct. The Investigation was postponed three times before being held on September 14, 2017. Two other Investigations regarding other charges were also held that day. Neither the Claimant nor his representative appeared for the hearings. By letter dated September 29, 2017, the Claimant was assessed a Level S 30 Day Record Suspension 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 argues that the Claimant did not receive a fair and impartial Investigation because the Investigation was held in absentia. It states that at the date of the Investigation the Claimant was on a board designated for employees who are ill or who have an ill family member and that the Carrier should have postponed the hearing again. The Organization contends that the Carrier did not act in good faith while conducting the Investigation and that it denied the Claimant an opportunity to present a proper defense to the charges. While acknowledging that there are some circumstances in which the Carrier can proceed with an Investigation in absentia, the Organization states that the Carrier here failed to establish that the Claimant had been properly notified to attend.

With respect to the merits of the case, the Organization maintains that the transcript does not contain evidence to support the charges. It states that the Trainmaster exaggerated the allegations that the Claimant was being dishonest, insubordinate, quarrelsome and attempting to delay the train. The Organization also asserts that the Trainmaster was the first to insult the Claimant by suggesting he was a Student Engineer who did not know how to do his job and that he provoked the Claimant rather than being patient and offering assistance.

The Organization also notes that the Trainmaster testified he is not a promoted Engineer and has never engaged PTC or done a departure test, so that his presumptions on how long the test takes are not supported. It states that sometimes there are communication issues and the test make take a bit longer to complete, but that there is no evidence that the Claimant purposely delayed the train's departure. The Organization also contends that the Trainmaster's repeated radio questioning was a distraction that impacted Claimant's ability to stay focused on his tasks.

With respect to the Claimant's statement that he had a student, the Organization asserts that the Claimant was responding to a sarcastic comment from the Trainmaster and that such communications are not uncommon in the railroad industry. It maintains that the Claimant's communications were straightforward and to the point, at least until he was provoked, and that the entire episode was overblown. It urges that the decision to impose discipline for this event was arbitrary and unreasonable, and it requests that the discipline be overturned.

The Carrier's position is that the Claimant committed serious Rules violations when he failed to avoid unnecessary delays to a priority train and when he directed discourteous and quarrelsome behavior toward his Supervisor. It states that the Claimant was responsible for the timely handling of the priority train, yet when he experienced some sort of difficulty initiating PTC and performing a departure test, he would not share the difficulty, he was discourteous and quarrelsome in his interactions with the Trainmaster, and his actions led to train delay. It characterizes the interaction between the Trainmaster and the Claimant as the Trainmaster trying to assist the departure and the Claimant giving short, terse and dishonest responses which added 25 minutes of train delay. The Carrier maintains that the short, terse responses coupled with the erroneous response that he did have a student constitute a violation of GCOR 1.6, particularly the portion prohibiting discourteous and quarrelsome behavior, and that his unwillingness to

provide his Supervisor with a complete answer prevented the Trainmaster from assisting and lead to the delay.

With respect to the procedures employed, the Carrier contends that there was no error in holding the Investigation in absentia. It notes that the Claimant chose not to attend after being properly notified and that there was no indication that the Claimant suffered from an illness or injury which would prevent him from attending.

As for the discipline assessed, the Carrier maintains that it was appropriate in the circumstances. It contends that the Claimant's behavior could have resulted in dismissal and that the record suspension was lenient, pointing to prior awards involving employees who delayed work performance and were discourteous and dishonest. The Carrier states that the Claimant has an extensive discipline history and that he has been extended prior opportunities. It concludes that in consideration of the seriousness of the Claimant's behavior and in consideration of the Claimant's record, the record suspension was an appropriate sanction which should not be disturbed.

Based on our review of the record, we find no procedural barriers to our consideration of the merits of the case. While holding an Investigation in absentia is not the ideal method of procedure, it is not prohibited in all circumstances. In this case, we note that the Claimant had been notified of the charges and there was testimony from the Carrier witness that the Claimant had advised he would not be attending. There is also nothing in the record to establish that the Claimant was ill or otherwise prevented from attending. The Organization's contention before us that there is no proof that the Claimant was ever notified was not raised on the property, so we will not consider it now, but we do note that the Claimant's multiple requests for postponement would indicate that he did receive the notices. We likewise do not find it impermissible to hold multiple Investigations on the same day inasmuch as it appears that the Claimant's postponement requests contributed to that circumstance.

Turning to the merits, however, we do not find substantial evidence in the record to support the charges. We have carefully reviewed the radio communications between the Claimant and the Trainmaster and we do not find that they rise to the level asserted by the Carrier. We find no evidence of any argument whatsoever between the two men in their communication regarding the reason the

train had not left. And while the Carrier characterizes the Claimant's responses as short and terse, or as the Hearing Officer commented "quick and straight to the point," we do not find that the Claimant's brevity amounts to discourtesy worthy of discipline. With respect to the Claimant's statement that he had a student, we note that he was neither charged with nor was he found guilty of being dishonest, and in consideration of the overall interaction, we do not find that lone comment to rise to the level of either argumentative or discourteous.

We also find that there is not substantial evidence that the Claimant violated GCOR 1.29 Avoiding Delays, which provides in pertinent part "All employees must avoid unnecessary delays." Although the Carrier states that the train was delayed 25 minutes, we note that the trainmaster testified the usual time for Z trains to depart Needles is approximately ten minutes, so any delay in departure would have to exceed that time frame. Moreover, there is no dispute that the Claimant was experiencing issues with initializing PTC and performing the departure test, nor was there any evidence to dispute the Claimant's assertion that he had not done it before. He contacted both the inbound crew and the PTC desk, and the Conductor who did testify at the Investigation stated that the Claimant was having those issues. We therefore find no indication that the Claimant's asserted reason for the delay was contrived or that he intentionally delayed departure. We also note that the time stamps on the radio communications reflect that the communications between the Claimant and the Trainmaster consumed approximately six minutes before the train departed. Thus, even if we could agree that the Claimant's communication style impeded the Trainmaster from assisting him, which we do not, the short time involved does not amount to a violation of Rule 1.29 in these circumstances.

In light of the above, the claim must be sustained, although we note that the Claimant did not lose pay for attending the Investigation and he is not entitled to compensation. The discipline, however, must be removed.

AWARD

Claim sustained.

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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.