Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
FIRST DIVISION

Award No. 30035
Docket No. 49916
20-1-NRAB-00001-190046

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 Dismissal 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 July 18, 2017, Claimant M. D. Montoya was assigned as the Engineer on train Z-ATGSBD7-14L. While at his initial terminal of Winslow, Arizona, the Claimant performed a setout of 17 cars from the head end of his train. After performing the set out, he backed his units to the rear portion of the train, made a joint, and cut in air. The air pressure charged to 90 psi and the Claimant departed.

A review of the event recorder, however, revealed that the Claimant did not conduct a 20 psi set and release test before his departure.

By notice dated July 28, 2017, the Claimant was notified that an Investigation had been scheduled to determine his responsibility in connection with his alleged failure to perform an Application and Release (Class 3) air test after making the set out. The notice referenced possible violations of ABTHR 100.15 Application and Release Test, GCOR 1.47 Duties of Crew Members and GCOR 1.3.1 Rules, Regulations, and Instructions. The Investigation was postponed multiple times before being held on September 14, 2017. Two other investigations regarding other charges were also held that day, one of which is the subject of Docket No. 49915 which is also pending before the Board. Neither the Claimant nor his representative appeared for the Investigations. By letter dated September 29, 2017, the Claimant was notified that he had been found guilty of violating the cited Rules, and he was dismissed 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's position in this case with respect to alleged procedural defects is similar to its position in Docket No. 49915. It again challenges the fact that the Investigation was held in absentia and it asserts there is insufficient evidence that the Claimant actually received notification of the Investigation. In this case, it also contends that the Carrier improperly held multiple Investigations on the same day, negating the concept of progressive discipline prior to termination, and it objects that the Hearing Officer in this case was also the Hearing Officer in the other two cases and that he issued the discipline in all three. It alleges that the multiple roles of the Carrier Officer resulted in prejudgment and an unfair Investigation.

The Organization also argues that the Carrier prejudged the Claimant when it improperly declined to offer the Claimant an opportunity for Alternative Handling under the Safety Summit Agreement. It disputes the Carrier's position that the Claimant was not eligible because the Rule violation at issue was "willful" so as to constitute gross negligence. It accuses the Carrier of applying the Safety

Summit Agreement in an unreasonable manner, stating that the Claimant's violation fits the definition of offenses eligible for Alternative Handling.

With respect to the discipline assessed, the Organization contends that dismissal is arbitrary, capricious and wholly unreasonable. It states that the Carrier has exaggerated the seriousness of the incident and that it has assessed a penalty out of proportion with the event. The Organization asserts that in light of the Claimant's years of service and the other circumstances of the case, dismissal is excessive and it should be overturned.

The Carrier's position with respect to the procedural challenges is likewise similar to its position in Docket No. 49915. The Carrier also states that there was no improper stacking of discipline. It notes that the three Investigations involved incidents which occurred on three separate dates. It maintains that the investigations would have been held separately but that the Claimant had requested multiple postponements. The Carrier further contends that it is not improper for a Hearing Officer to issue discipline and that the Claimant was not harmed by the multiple roles.

The Carrier also argues that the Claimant was ineligible for Alternative Handling, citing several portions of the Safety Summit Agreement. It notes that the Agreement requires an employee to accept responsibility for the violation and that the record reflects the Claimant did not do so. Second, it states that the Claimant exceeded the threshold for eligibility in that he had a previous Class I violation within the previous 12 months. Third, the Carrier maintains that the violation constituted gross negligence as defined in federal regulations and that such "willful" violations are excluded from consideration for Alternative Handling. Finally, it points out that the Safety Summit Agreement contains a dispute resolution mechanism and that the Claimant did not follow that process here.

With respect to the assessment of discipline, the Carrier avers that it was appropriate in consideration of the seriousness of the violation and of the Claimant's record. It states that this is the Claimant's second Serious level violation under PEPA within 12 months and that dismissal for a second Level S is warranted by the PEPA progression. It also maintains that the Claimant has a lengthy discipline history and that in light of all the circumstances, there is no reason to disturb the discipline assessment.

We have carefully reviewed the record, and we find no procedural bar to our consideration of the merits. For the same reasons stated in Docket No. 49915, we find no error in the fact that the Investigation was held in absentia. We also reject the contention that it is improper for a Hearing Officer to issue discipline. It has been observed on many occasions that a Hearing Officer is in position to observe witnesses testify and judge credibility, so that Hearing Officer is also in a position to determine if discipline is warranted. We also find in these circumstances where the Claimant requested multiple postponements that the fact multiple Investigations were held on the same date does not require the discipline assessments to be set aside.

With respect to the merits of the case, there is no dispute that the Claimant failed to conduct the required brake test. The downloads were more than sufficient evidence of that fact, and there has been no challenge in that regard. We find that the Rule violations were proven by substantial evidence, the standard we employ in these matters.

As for the arguments regarding Alternative Handling, we do not believe denial of that option is indicative of prejudgment such that the discipline should be impacted. As noted above, there is no question that the evidence adduced at the Investigation established the Claimant's Rule violations, so we are not convinced that prejudgment was an issue. With respect to the Claimant's rights under the Safety Summit Agreement to receive Alternative Handling, we agree that the Carrier cannot impose disqualification criteria not contained in the Agreement. The Carrier is correct, however, that the Agreement contains a dispute resolution provision to address issues of whether a particular employee is eligible. There is no indication in this record that such process was followed, and therefore we do not believe the matter is properly before us. In any event, after considering all the arguments advanced by both parties on the matter of Alternative Handling, we do not find that its denial should impact the discipline assessment here, assuming that the Claimant even requested it.

Having found that Claimant was properly found in violation of the charged Rules, we turn to the level of discipline assessed. We agree with the Carrier that the Claimant's Rule violation is serious and warrants significant discipline. We also note that the Claimant has a lengthy discipline record, albeit with most of the assessments occurring in 2003 or earlier. Our finding in Docket No. 49915, in which we overturned a disciplinary assessment against the Claimant involving alleged

discourteous radio communications, also impacts our assessment of the discipline here. In light of all the circumstances, we conclude that the Claimant should be returned to service, without pay for time lost, and with a Level S assessment and a retention period consistent with PEPA.

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.