

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 30036
Docket No. 49917
20-1-NRAB-00001-190047**

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 S. D. Berg’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 13, 2017 (sic December 12, 2016).”

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 13, 2016, Claimant S. D. Berg was working as the Engineer on train H-RICBAR1-11A in the Richmond, California yard. During his tour of duty, the Claimant’s crew was instructed to take three cars from its train and set them on the working lead track. After setting the cars out on the lead, the move required the Claimant to pull forward and then shove back to rejoin the rear of the train. As the Claimant pulled forward, he operated the first 80 feet of the train, or approximately

1.5 engine lengths, through an improperly lined switch. When he initiated the shove movement back through the switch he had just run through, the lead locomotive and second locomotive derailed, and the Claimant put the train into emergency.

By letter dated November 28, 2016, the Claimant was notified of an Investigation to determine his responsibility in connection with failing to stop short of the switch not properly lined for the intended route resulting in the derailment. The notice indicated possible violations of GCOR 1.6 Conduct, GCOR 6.28 Movement on Other than Main Track, GCOR 8.2 Position of Switches and GCOR 8.15 Switches Run Through. After multiple postponements, the Investigation was held on December 12, 2016. By letter dated January 4, 2017, the Claimant was notified that he had been found in violation of the cited Rules, and he was dismissed from service pursuant to 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 contends that the Carrier did not grant Claimant a fair and impartial Investigation because the Hearing Officer also issued the discipline. It states that the Hearing Officer had already prejudged the Claimant and conducted the Investigation in a manner intended to find the Claimant guilty. The Organization argues that the multiple roles of the Carrier Officer require the discipline to be set aside.

The Organization also contends that the Claimant was improperly denied Alternative Handling (AH) under the Safety Summit Agreement (SSA) because the Carrier improperly considered the Claimant to have had a prior Class I violation within the applicable review period. The Organization notes that the Claimant had been dismissed in June of 2014 for passing a stop signal, but that he had been reinstated in January of 2016 by an award of Public Law Board 7477, with the dismissal reduced to a "lengthy suspension." The Organization argues that there should have been no additional review period once the Claimant was returned to service. The Organization also takes exception to the Carrier's position that AH

was not available because the violation was willful in nature, contending that the Carrier's definition of willful is not supported by the SSA or FRA definitions. It maintains that the Claimant's offense is one of the rule violations for which AH is available under the SSA and that the Carrier's denial of AH was unreasonable and inconsistent with the SSA.

With respect to the incident itself, the Organization argues that the Carrier unfairly placed the responsibility on the Claimant. It points to the Claimant's testimony that the Conductor had assured him the switch had been properly lined before the Claimant began moving backwards. It notes that the Conductor, who had little experience, did not get on the ground to check the switch position or even turn in his seat to look. The Organization states that the Claimant reasonably relied on his Conductor to provide him with accurate information, especially since the switch stand was on the conductor's side, and that it was unjust to blame the Claimant for the new Conductor's failure to perform his job properly. In those circumstances, and considering the Claimant's years of service, the Organization maintains that the decision to dismiss the Claimant was arbitrary and unreasonable, and it requests that the dismissal be set aside.

The Carrier, on the other hand, maintains there is no reason to disturb the discipline assessment in this case. It states there are no procedural issues, that the evidence clearly established the Claimant's Rule violations, and that the level of discipline was warranted in the circumstances.

The Carrier notes that prior awards have upheld the practice of a Hearing Officer issuing discipline, and it states that the Hearing Officer here showed no bias or prejudice in his handling of the Investigation. It maintains that the Claimant's right to a fair and impartial Investigation was not impacted by the multiple roles of the Hearing Officer.

As for the facts of the incident, the Carrier asserts there is no dispute that the Claimant ran through the switch that was not lined for his intended movement and that he then shoved back through it causing the derailment. It states that such conduct clearly violates the provisions of the cited Rules, including GCOR 8.2 which requires employees to ensure a switch is properly lined for the intended movement and GCOR 8.15 which prohibits employees from running through an improperly

lined switch but which also provides if an employee does so, he must continue movement through the switch and not change direction. The Carrier observes that both the Claimant and his Conductor confirmed they had not verified the switch position prior to running through it.

The Carrier also disputes the Organization's argument that the Conductor told the Claimant the switch was properly lined for their movement. It states that, while the Claimant testified, he asked the conductor if the switch was lined for them before he shoved back, the Conductor testified he did not say the switch was lined. The Carrier notes that the Claimant's statement made on the day of the incident did not mention such a discussion with the Conductor. It further observes that the Conductor had already signed a waiver accepting responsibility such that he had no reason to provide false testimony. It urges that the Claimant's Rule violations cannot be excused by another crew member's conduct.

With respect to the discipline assessed, the Carrier contends that it was appropriate considering the Claimant's discipline history. It states that the Claimant was not eligible for AH because Claimant had less than one year of service between his last Class I offense and the current offense and because the offense constituted gross negligence as defined by federal regulations. It also maintains that the dispute resolution process set forth in the SSA was not followed, and it notes that AH is only available for employees who accept responsibility, which it finds lacking here due to the argument that the Claimant's Conductor was the one at fault.

The Carrier further maintains that this was the Claimant's second Level S violation within the applicable review period under PEPA. It states that if an employee commits two Level S infractions within that review period, dismissal is appropriate. It notes PEPA provides a three-year review period for Level S violations and that the instant infraction occurred less than one year after the Claimant had been reinstated with a time-served suspension. It notes other awards which have upheld dismissal for causing a derailment while within a Level S review period, and it urges that dismissal here was appropriate for the Claimant's repeated Rule violations.

We have carefully reviewed the record in this case, and we find no procedural barrier to our consideration of the merits. It has been held in many awards that it is not improper for a Hearing Officer to issue discipline, and we find so again in this case.

We note at the outset there is really no question that the Claimant violated the Rules with which he was charged. The Claimant admitted at the Investigation he did not know whether the switch was properly lined for his intended movement when he ran through it initially. And while he testified that he asked the Conductor whether the switch had been lined for them prior to shoving back, there was conflicting testimony on that point. The Carrier was not obligated to find the Claimant's testimony conclusive, especially when his contemporaneous statement made no mention of discussing the switch position prior to beginning the shove. While it certainly appears that the Conductor was at fault too, we do not find that the Conductor's actions absolve the Claimant of his own responsibility to refrain from operating through a misaligned switch and to refrain from shoving back through it once he ran through it the first time.

Having found the Rule violations to have been established, we turn to the level of discipline assessed. We have reviewed the Claimant's record and the award reinstating him to service from his prior dismissal and compared them to the SSA and PEPA. The Claimant's record reflects one Level S assessment on October 17, 2012, which resulted in a 36-month retention period. His next Level S violation occurred on March 19, 2014, only 14 months into his review period, which resulted in his dismissal on June 2, 2014.

The Claimant was then reinstated to service by the award dated January 12, 2016. That award states that, while the charged violations had been proven, mitigating circumstances led the board to order that the period of time the Claimant was off work should be considered a lengthy disciplinary suspension. The instant violation occurred November 13, 2016, 11 months after the reinstatement.

The Organization urges that the Carrier should not have considered the Claimant to be within the review period of any prior Level S assessment and that therefore he was eligible for AH, such that the current Level S should not have been elevated to dismissal. We note, however, that the PEPA review period specifically

applies only to time in service, providing the following example for calculating a review period:

“Review Period:

The review period for a Serious level violation begins the date the discipline is assessed and expires after 36 months of service (or 12 months if qualifying as referenced above).

Example: An employee commits a Serious violation on January 1, 2013, and is issued a Level S 30-day record suspension with a three year review period on February 1, 2013. Under this scenario, the review period would run to February 1, 2016. However, if the employee takes a one year leave of absence (from January 1, 2014 to December 31, 2014), the Serious violation review period would run to February 1 2017, since only the time in service is credited towards completion of the review period.”

While the Board is not necessarily bound by a carrier’s policy if we find application of it to be arbitrary or unreasonable, we find that consideration of only actual service time in this instance to be within the Carrier’s discretion. Our understanding of the purpose of a review period is that it allows employees to demonstrate that they can work safely and in compliance with applicable Rules, and if an employee is out of service for an extended period as noted in the example above, such demonstration cannot be made. Applying that premise to the instant facts, the time between the Claimant’s June 2014 dismissal and his January 2016 reinstatement does not lessen the 36-month review period applicable to his prior Level S violations.

In such circumstances, we find no error in the Carrier’s determination that the Claimant’s Level S retention period began when he was reinstated. It follows that it was not error to find him ineligible for AH for the instant violation which occurred less than a year later nor was it inconsistent with PEPA to find that dismissal for the instant Level S violation was appropriate. As noted above, the Organization nevertheless maintains that dismissal in this case was harsh and excessive and it urges the Board to overturn that assessment. To overturn the

Carrier's assessment, however, would require the Board to find that the Carrier acted arbitrarily or capriciously. Based on our consideration of all the circumstances, we cannot find that the Carrier's judgment was arbitrary or capricious, and therefore 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.