

**NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION**

**Award No. 30037
Docket No. 49918
20-1-NRAB-00001-190048**

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 J. S. Veir’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 August 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 July 7, 2017, Claimant J. S. Veir was working as the Engineer on train N-WINWIN1-07A, operating eastbound on the Phoenix Subdivision. Track authority on the Phoenix Subdivision was governed by Track Warrant Control. Track Warrant 896-6 gave the Claimant authority to proceed to the West Siding Switch (WSS) Williams, at MP 378.9. The Claimant’s Conductor was copying a new Track Warrant 896-14 when the train passed WSS Williams. Track Warrant 896-14,

which was not authorized until 46 seconds after the train had already passed WSS Williams, gave authority from WSS Williams to East Siding Switch (ESS) Williams where they would be meeting an opposing westbound train. The Claimant did not stop the train at ESS Williams, however, until he was past the limits of his authority. The Claimant then requested permission from the dispatcher to back the train, and he shoved 344 feet back to clear the switch at ESS Williams. The Claimant's Conductor then notified a Supervisor of the matter.

By letter dated July 19, 2017, the Claimant was notified of an Investigation to determine his responsibility for his alleged exceeding the limits of Track Warrant 896-6 at WSS Williams, his alleged carelessness of safety when failing to stop short of the clearance point of ESS Williams while operating under Track Warrant 896-14, and his alleged failure to limit in-train forces when shoving the train back to clear the ESS Williams. The notice indicated possible violations of GCOR 1.6 Conduct, GCOR 1.3.1 Rules, Regulations, and Instructions, GCOR 1.47 Duties of Crew Members, GCOR 1.1 Safety, GCOR 6.3 Main Track Authorization, GCOR 6.22 Maintaining Control of Train or Engine, GCOR 6.8 Stopping Clear for Meeting or Passing, GCOR 14.2 Designated Limits, GCOR 14.3 Operating with Track Warrants, GCOR 14.9 Copying Track Warrants, ABTHR 103.6.6 Shoving Movements, ABTHR 103.4 Throttle Handling, and ABTHR 103.0 Train Handling. The Investigation was held August 7, 2017, after which the Claimant was notified by letter dated August 24, 2017 that he had been found in violation of the charged Rules. In accordance with the Carrier's Policy for Employee Performance and Accountability (PEPA), he was dismissed from service.

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 argues that the Carrier failed to provide the Claimant a fair and impartial Investigation because the Hearing Officer also issued the discipline. It states that the Hearing Officer prejudged the Claimant and steered the investigation in one direction to find Claimant guilty.

The Organization also contends that the Carrier improperly denied the Claimant the opportunity to receive Alternative Handling (AH) under the Safety Summit Agreement (SSA). It states that the Rule violations with which the Claimant was charged are those which qualify for AH, and it disputes the Carrier's contention that the violations were willful. The Organization points to the FRA definition of willful as acts which are intentional, voluntary and purposeful acts of free will, and it maintains that the Claimant's actions in this case do not fit that definition. It points to prior awards which confirm that the Carrier must abide by the SSA, and it urges that the Claimant was entitled to AH under that agreement.

With respect to the evidence presented at the Investigation, the Organization argues that the Road Foreman of Engines (RFE) who testified at the investigation did not establish the accuracy of the locomotive downloads. It notes that the violations involved short amounts of time and relatively short distances, and it states that without details to authenticate the measurements, there was insufficient evidence to establish the alleged violations. The Organization further contends that, because the RFE's data was not credible, the Carrier cannot rely on "coerced" statements and testimony of the Claimant and his Conductor as the sole means of proof. It also states that the evidence did not establish that the Claimant was dishonest in stating he did not believe he was outside his limits, noting the lack of signage and the short distance at issue.

The Organization concludes that, even if the charges could be considered proven, the decision to dismiss Claimant was arbitrary and unreasonable. It points to Claimant's years of service and his prior unremarkable discipline record, and it contends that Claimant's actions could not be considered so egregious as to warrant stand-alone dismissal. The Organization requests that the dismissal be set aside and that Claimant be returned to service.

The Carrier's position is that there is no question the Claimant exceeded the limits of his authority on two separate occasions. It states that locomotive downloads, expert witness testimony and photographic evidence proved that the Claimant passed WSS Williams before obtaining proper authorization and then exceeded his authority limits again at ESS Williams, fouling the adjacent siding in the path of the oncoming westbound train. The Carrier also points to the Claimant's testimony at the Investigation in which he admitted both violations.

The Carrier also contrasts the Claimant's ultimate admissions with his initial statement in which he said he had come "to a stop within my limits but due to the poorly marked clearance point and no sign, I came to stop too close to frog for meet with westbound." The Carrier characterizes that statement as intending to deceive local management about the authority violation, and it emphasizes the photographs taken from the nose of the locomotive when it stopped plainly show the Claimant could not have believed he had stopped within his limits. The Carrier also points out that GCOR 6.8 required the Claimant to stop at least 400 feet from the clearance point in light of the oncoming train, and it questions why Claimant would have backed up 344 feet to clear the switch if he truly believed he had not exceeded his authority.

The Carrier also disputes any excuses offered for the Claimant's violations. It states that the Claimant cannot shift his own responsibilities to his Conductor and that any fault on the other crew member's part does not insulate the Claimant from liability. The Carrier further states that any lack of signage at ESS William had no impact on the Claimant's initial authority violation at WSS William and that the Claimant should have been aware that the clearance point at ESS William was not in foul of the switch. It again notes that if the Claimant had complied with GCOR 6.8 and stopped 400 feet before the clearance point of the facing point switch, he would not have been in position to exceed his authority.

Regarding the procedures employed, the Carrier disputes the Organization's arguments regarding the multiple roles of the Hearing Officer. The Carrier points to prior awards which have found it is not improper for a Hearing Officer to issue discipline, and it states that the Hearing Officer in this case conducted a fair investigation.

The Carrier also contends that the Claimant was not eligible for AH in this case due to the nature of the violations. It states that the Claimant's violations were willful as defined by the FRA and that he also was not eligible because he had been charged with violating the personal conduct rule. It further notes that the SSA has a process for dispute resolution which should have been followed.

With respect to the level of discipline assessed, the Carrier maintains that its decision to dismiss the Claimant was not an arbitrary one. It points to provisions of

PEPA which categorize authority violations as Serious level violations. It further observes that PEPA considers multiple Serious violations committed in the same tour of duty as a stand-alone dismissible event. The Carrier notes that the Claimant was less than two months into the review period for a previous Level S infraction, and it states that he therefore stood for dismissal on two fronts, both as a stand-alone dismissible event for the multiple infractions in a single tour of duty and for two Serious level violations within a review period.

Aside from the policy provisions, the Carrier also urges that exceeding track warrant authority is among the most serious offenses that can be committed. It points to prior awards which have recognized the significance of such violations and upheld resulting dismissals, and it stresses that it should not be required to retain an employee who commits multiple safety violations and then is not honest about them. The Carrier concludes that the Claimant's dismissal should not be disturbed.

We have carefully reviewed the record in this case and the parties' arguments, and we first find no procedural barrier to our consideration of the merits. It has been held in many prior awards that it is not improper for a hearing officer to assess discipline, and we make that same finding here. We find no indication that the Claimant was denied a fair and impartial Investigation.

We also find no error in the Carrier's determination that the Claimant was ineligible for AH under the SSA. Regardless of whether the Claimant's train handling violations could be considered willful, the SSA also exempts from AH handling instances involving violations of the personal conduct Rule. Although the Claimant ultimately conceded he had exceeded his authority after being confronted with the photos and download evidence at the hearing, his initial statement was sufficiently inconsistent with acceptance of responsibility for the Carrier to conclude he was being untruthful and thus not eligible for AH.

With respect to the merits of the case, the Carrier was obligated to present substantial evidence to support the allegations of Rule violations, and we find that the Carrier has met that burden. Although the Organization questions at this stage whether the download data presented at the Investigation was accurate, we note that the record is devoid of such arguments being presented on the property. Even so, we find that the photographs and testimony, including the Claimant's ultimate

admissions, clearly establish that the Claimant exceeded his authority limits at both ESS and WSS Williams. In light of that evidence, we also find no reason to overturn the Carrier's conclusion that the Claimant was deceptive in his initial report of whether he had exceeded his limits at ESS Williams. We find no extenuating circumstances which would relieve the Claimant of his responsibility to comply with the cited Rules, and we conclude that sufficient evidence was produced to establish his violations.

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 us to find that the Carrier acted arbitrarily or capriciously. We note that the Claimant's discipline record reflects several disciplinary notations in a relatively recent timeframe, including two prior Level S assessments. In consideration of the seriousness of the instant Rule violations and all the other 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 now.

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.