

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 30038
Docket No. 49919
20-1-NRAB-00001-190049

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 T. R. Hopkins’ 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 July 28, 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 May 16, 2017, Claimant T. R. Hopkins was assigned as the Engineer on train L-SWE0071-16 when he was involved in a derailment. The Claimant attempted to re-rail the equipment and delayed notifying his Supervisor that there was damage to the equipment. He was subjected to a reasonable cause drug and alcohol test at that time. On May 31, 2017, the Claimant admitted his misconduct associated with the incident, and he signed a waiver accepting a Level S 30 day

record suspension pursuant to the Carrier's Policy for Employee Performance and Accountability (PEPA) for his violations of GCOR 1.6, 6.5, 7.12, 1.1.3, and 1.4.

The Claimant's drug and alcohol test resulted in a positive reading for marijuana, and on June 8, 2017, he was notified to attend an Investigation regarding his alleged violation of GCOR 1.5 and the BNSF Policy, Rules, and Procedures on the use of Alcohol and Drugs. Following postponements, the Investigation was held on July 28, 2017, during which the Claimant admitted he had used marijuana. By letter dated August 24, 2017, the Claimant was notified that he had been found guilty of testing positive for a controlled substance, and he was dismissed in accordance with 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's position is that the Claimant should not have been charged with a violation and that the discipline should be rescinded. The Organization contends that the process here violated the principle of double jeopardy because the Claimant had already been disciplined in connection with the May 16, 2017 derailment. It maintains that the two incidents are intertwined and that the Carrier cannot punish the Claimant twice for the same incident. The Organization points to arbitration awards which have held that employees cannot be charged multiple times for events arising from a single occurrence, and it urges that the Carrier cannot have two bites from the apple. It concludes that imposition of more than one penalty for a single offense is contrary to the concepts of due process and fundamental fairness as guaranteed by the collective bargaining agreement, and it requests that the Board rule in favor of the Claimant on that basis without considering the merits.

As for the assessment of discipline, the Organization urges that the Claimant should have been allowed an opportunity to rehabilitate. It notes that the Claimant admitted he had marijuana in his system and thanked the Carrier for having policies in place that would help him reach sobriety. It observes that the Claimant contacted the Carrier's EAP counselor and completed a rehabilitation program, demonstrating that he was on the right path. The Organization faults the Carrier

for taking into consideration the discipline issued for the operating Rule infractions to reach its discipline assessment here, contending that the drug test failure and the derailment incident should be treated as one event.

The Organization further contends that the Carrier should have allowed the Claimant to continue with the EAP process rather than resort to discipline. It posits that Claimant's violations in the derailment incident were the result of his inability to cope with stress and addiction, and it states that in such circumstances the Carrier should be required to offer an opportunity for rehabilitation. The Organization states that the Claimant's actions were not egregious enough to warrant a stand-alone dismissal, and it concludes that under the circumstances of the case and considering the Claimant's years of service, the Carrier's decision to dismiss him was arbitrary and unreasonable.

The Carrier's position is that the charges were proven by substantial evidence and that the discipline assessed was appropriate. It notes that the test results proved that the Claimant had a prohibited substance in his system, and it points out that Claimant admitted his use of a controlled substance during the hearing. The Carrier thus maintains that it has met its burden of establishing that the Claimant violated the GCOR 1.5 and the BNSF Policy on Drugs and Alcohol.

The Carrier also disputes the Organization's arguments regarding double jeopardy. It states that the GCOR 1.5 offense is a separate violation from the operating rule violations Claimant admitted to committing in connection with the derailment. The Carrier points to prior on-property awards which have addressed this concept and which found that a positive drug test is a separate offense from an operating rule incident.

With respect to the level of discipline assessed, the Carrier notes that employees are put on notice they may not report to service with measurable amounts of controlled substances in their systems and that violation of that prohibition is considered a Serious level offense under PEPA. It points out that under PEPA, a second Serious Violation within the applicable review period may result in dismissal. The Carrier also emphasizes that the Claimant's record contains multiple discipline entries, including a dismissal in 2013 for which the Claimant was reinstated through managerial leniency. Because of the seriousness of

the instant violation, coupled with the Claimant's discipline record, the Carrier maintains that it was within its right to dismiss the Claimant from service.

The Board has carefully reviewed the record in this matter, and we find no reason to disturb the discipline assessment. At the outset, we note that there is no question whatsoever regarding the Claimant's violation of the cited Rule and policy. The Claimant candidly admitted as much at the Investigation, and that admission, coupled with the undisputed test results, more than satisfies the Carrier's burden of establishing the infraction.

We also find no indication of procedural irregularity. Although the Organization points us to arbitral authority proscribing multiple discipline assessments for the same incident, our examination of those awards reveals that they involve instances where the very same conduct was sanctioned twice. Here, we find that the discipline assessed for the substance violation involved separate and distinct conduct from the conduct which constituted the operating Rule infractions. We concur with the authority cited by the Carrier which held that separate discipline for two separate and distinct violations, one of which was a positive drug test, is not improper.

Having found that the Rules violations were established and that no procedural errors arose, we turn to the level of discipline assessed. As noted above, the Organization states that the Carrier should have afforded Claimant an opportunity for rehabilitation and it urges the Board to overturn the dismissal as being harsh and excessive. We are aware of no absolute right, however, to an opportunity for rehabilitation after a violation of this nature. Moreover, to overturn the Carrier's assessment would require the Board to find that the Carrier acted arbitrarily or capriciously. We do take note of the Claimant's acceptance of responsibility and desire for rehabilitation, which is admirable. Nevertheless, the Rule violations at issue are extremely serious. Leniency is not within our prerogative, but rather it lies with the Carrier, and in light of all the circumstances, including the Claimant's record of discipline, we cannot find that the Carrier's decision to dismiss the Claimant was arbitrary or capricious. Therefore, we must deny the claim.

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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.