

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42776
Docket No. MW-42958
17-3-NRAB-00003-140387**

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Dakota, Minnesota & Eastern Railroad Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed on Mr. M. Nelson by letter dated March 21, 2013 alleged violation of General Code of Operating Rules 1.6 Part 1 Careless of the safety of themselves and others; Rules 1.6 Conduct Part 2 Negligent; Rules 1.1.1 Maintaining a safe course; Rules 1.1.2 Alert and Attentive; Canadian Pacific Core Safety Rule 15 and Policy 5612-U.S. Discipline Policy: Item #5 willful indifference to the safety of themselves and others ‘... in connection with your MVA on March 4, 2013 while on duty (assigned to operate a company vehicle) in Wells, Minnesota, on the Jackson Subdivision was without just cause, excessive and on the basis of unproven charges (System File J-1334D-502/08-0004)**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Nelson shall ‘* * * be compensated all lost time, be made whole for all losses until he is returned to work and have any reference to the investigation removed from his personnel record as outlined in Rule 34(6) of the effective Agreement.”**

FINDINGS:

The Third 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.

The Claimant had established and held seniority within the Carrier's Maintenance of Way Department for over 23 years. On March 4, 2013, the date of the incident giving rise to the dispute now before this Board, the Claimant was assigned and working as an Assistant Foreman Truck Driver at Wells, Minnesota, Jackson Subdivision.

In response to an email from Mark Milewsky, Division Engineer – US East – Mason City, Kent Maxon, Road Master, Mason City and the Claimant's superior in the chain of command (Claimant's Manager) conducted a safety conference call to his crew at Wells on the morning of March 4, 2013, which crew included the Claimant involving the topic of "safe movements, safe Company vehicle operations" and stressing, there is no need for anybody to get hurt or equipment damage. This topic was a part of the main topic which pertained to Winter Storm Preparation. Shortly after the safety conference call concluded, the Claimant, driving a Carrier vehicle out of a Carrier garage, a part of his assignment he had performed literally hundreds of times before, hit the overhead garage door as it was partially opened at the time causing around \$2,000 worth of damage to the door and an unknown amount of damage to the adjacent structure. The Claimant voluntarily and promptly reported the occurrence of the accident to Carrier Management upon which information Carrier responded by immediately removing the Claimant from service.

By letter dated March 4, 2013, the very same date as the occurrence of the accident, the Carrier instructed the Claimant to attend an investigation on March 8, 2013 to determine all of the facts and circumstances and to place responsibility, if any, in connection with his Motor Vehicle Accident (MVA) in Wells, Minnesota on the Jackson Subdivision. A formal investigation/hearing convened as scheduled on March 8, 2013 and by letter dated March 21, 2013 the Claimant was advised that testimony and evidence presented during the Hearing established his responsibility in connection with the charges, that is, the violations he allegedly committed (see the charges noted

in Item (1) of the Statement of Claim above) and as a result, the Carrier assessed the Claimant the ultimate discipline of dismissal.

The Carrier assessed the Claimant the ultimate quantum of discipline of dismissal based not only on the March 4, 2013 accident but also on having committed serious safety rules violations on February 13, 2013, to wit: 21.1.3 Working Limits; 29.3 Employee in Charge; 29.4 Employee Responsible for On Track Protection; and 30.0 Job Briefing. With respect to the last rule cited, eerily, like the accident that is the subject of this claim, the Claimant committed the violations cited within one to two hours after participating in a safety meeting. The Claimant waived his right to a formal investigation and instead signed an Admission of Responsibility Statement (a document approximating a last chance agreement), the terms of which included the following: 1) Claimant was assessed a 5 days unpaid suspension and a 5 days deferred suspension; and 2) One year probation during which any major rules violations will result in additional discipline, up to and including dismissal.

The Claimant's dismissal was effective as of March 21, 2013, yet the record evidence reflects that notice of his dismissal was not mailed to him until April 5, 2013. No reason was provided in explanation of this delayed notice. The record evidence also reflects that Carrier assessed the discipline of dismissal under its revised policy, Policy 5612, the revision date being March 17, 2013 just four (4) days prior to Carrier's decision to dismiss the Claimant. Under the section titled "Progressive Discipline" Policy 5612 reads in pertinent part as follows:

"* * * No discipline will be assessed until a fair and impartial formal hearing has been held or the employee has waived the right to a hearing by accepting responsibility unless applicable contract provisions provide for automatic forfeiture of seniority.

Infractions will be dealt with using progressive discipline, unless they warrant outright dismissal.

First Infraction 5 working days unpaid suspension

Infractions occurring within 24 months of compensated active service of a previous infraction will be handled as follows:

Second Infraction	10 working days unpaid suspension
Third Infraction	30 working days unpaid suspension
Fourth Infraction	Dismissal”

Inexplicably, Claimant gave Carrier Notification of Retirement dated April 9, 2013 indicating on the Notification form that effective April 1, 2013 that “I will retire from the service of the Canadian Railroad Company.” Further, the Notice stated the following:

“By this letter, I do, on the effective date of my retirement, relinquish all seniority rights with the Canadian Pacific Railroad Company in connection with my employment by the Canadian Pacific Railroad Company, its successors or assigns.

By this notice I am requesting the Canadian Pacific Railroad Company to promptly make payment to me for all remaining vacation earned and not yet taken.”

Notwithstanding the Claimant’s having retired from service effective April 1, 2013, the Organization later filed a written claim on behalf of the Claimant two months later to Division Engineer Mark Milewsky dated June 3, 2013, contesting the Claimant’s dismissal. Among the grounds stated for contesting the quantum of discipline assessed the Claimant, was the Organization’s argument that charging the Claimant with having committed six rules violations associated with the accident which in its estimation was minor in nature was excessive as well as unsupported especially in light of his long service with the Carrier of 23 years, his relatively clean work record of one track in time violation and a minor incident of sliding into a ditch on an icy road and having maintained an excellent work history.

The Organization argues that even in light of the fact that the Claimant was determined by Carrier to be wholly responsible for the accident resulting in the damage to the overhead garage door and undetermined damage to the physical structure of the garage, nevertheless the accident in its entirety was exceedingly minor and both arbitral precedent and the Carrier’s own progressive discipline policy provides for a quantum of discipline to be administered far short of dismissal and, in fact, short of the 30 day maximum suspension under such circumstances. The Organization further argues that even given the existence of the Claimant’s Admission of Responsibility and the terms set forth therein and agreed to by the Claimant

associated with serious rules violations committed on February 13, 2013, dismissal of the Claimant for the March 4, 2013 accident was excessive as the AOR provided that commission of any major rules violation during the one (1) year probation would result in additional discipline, up to and including dismissal meaning that such additional discipline could be addressed by assessing a quantum of discipline less severe than dismissal.

In its defense that dismissal was the appropriate quantum of discipline to be assessed the Claimant for his flagrant disregard for safety and operating rules, safety of his coworkers and his own personal safety, dismissal of the Claimant was fully warranted and should not be disturbed by the Board, citing one Second Division Award and two Third Division Awards emphasizing the Board's proper role and function in discipline cases. A leading case among the three cases cited by the Carrier is Third Division Award No. 21299 which reads in pertinent part as follows:

“Numerous prior awards of this Board set forth our function in discipline cases. Our function in discipline cases is not to substitute our judgment for the Carrier's, nor to decide the matter in accord with what we might of might not have done had it been ours to determine, but to pass upon the question of whether, without weighing it, there is substantial evidence to sustain a finding of guilty. If that question is decided in the affirmative, the penalty imposed for the violation is a matter which rests in the sound discretion of the Carrier. We are not warranted in disturbing Carrier's penalty unless we can say it clearly appears from the record that Carrier's action with respect thereto was discriminatory, unjust or unreasonable, capricious or arbitrary, so as to constitute an abuse of that discretion.”

The Board reaffirms the principles so eloquently stated in the above Third Division Award No. 21299. In the instant case, Carrier proved by substantial evidence that the Claimant was the sole person responsible for incurring the subject accident resulting in the damage to the overhead garage door in the amount of about \$2,000 and damage to the physical structure of the garage which monetary value was left undetermined in the record evidence. With the Claimant's guilt established by substantial evidence, the only issue to be decided by the Board is whether the quantum of discipline assessed the Claimant of dismissal rises to an action meeting the threshold definitions of discriminatory, unjust or unreasonable, capricious or arbitrary, deemed to constitute an abuse of that discretion on the part of Carrier.

We concur in the Organization's position that charging the Claimant with a total of six rules violations was excessive as a lesser number of charges would have been sufficient to prove by substantial evidence the Claimant's guilt especially in light of the fact that he voluntarily admitted to causing the accident in question at the time of its occurrence. Nevertheless, excessively charging the Claimant is not the same as imposing a quantum of discipline that can be deemed discriminatory, unjust or unreasonable, capricious or arbitrary, so as to constitute an abuse of Carrier's discretion. We are persuaded by the whole of the record evidence that Carrier took into account both the mitigating and the aggravating factors in determining that dismissal of the Claimant was the appropriate quantum of discipline to be assessed the Claimant, those being respectively his 23 years of service and an overall good work record over all those years on the one hand and the terms of his Admission of Responsibility providing for the possibility of dismissal for commission of another serious rules violation within the one year probationary period and Carrier's Discipline Policy which also permits the assessment of dismissal under its progressive disciplinary scheme.

Based on the foregoing findings the Board rules to deny the Claim in its entirety.

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 Third Division

Dated at Chicago, Illinois, this 24th day of October 2017.