

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43334
Docket No. MW-44394
19-3-NRAB-00003-170504**

The Third Division consisted of the regular members and in addition Referee Mark L. Burdette when award was rendered.

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

PARTIES TO DISPUTE: (

(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [thirty-five (35) calendar days off without pay] imposed upon Mr. C. Tirone by letter dated July 28, 2016 in connection with allegations that:
... while you were acting as the Trackman for I&R Crew #5445, Superintendent Jeff Gerossie observed you allegedly using unauthorized electronic devices to peruse social media on company time in violation of Pan Am Safety Rules.'
was unwarranted and on the basis of unproven charges (Carrier's File MW-16-16 STR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Tirone shall *** be immediately restored to service and he be made whole for any loss of pay, including overtime and any benefit loss he may have incurred.”**

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.

Claimant C. Tirone has established and holds seniority under the Maintenance of Way Agreement and had approximately nineteen (19) years of service with the Carrier and was assigned as a trackman prior to the rise of this dispute.

On May 4, 2016, the Claimant was assigned to be on patrol when he was allegedly observed by Superintendent Jeff Gerossie, using an unauthorized electronic device to peruse social media on company time. By letter dated May 10, 2016, the Carrier directed the Claimant to attend a formal investigative hearing regarding his alleged use of an unauthorized electronic device while on company time. After multiple postponements, the hearing was held on July 15, 2016 and by letter dated July 28, 2016 the Claimant was issued a thirty-five (35) calendar day suspension. By letter dated August 25, 2016, the Organization appealed the Carrier's discipline and requested that the Claimant be reinstated and compensated for any loss of pay, including overtime and any benefit loss he may have incurred.

Relevant Contract Provisions

"Article 26. Discipline

- 26.1 No employee will be disciplined without a fair hearing. The notice of hearing will be mailed to the employee within 14 days of the Carrier's first knowledge of the act or occurrence. The notice of hearing will contain the employee of the act or occurrence to be investigated. Such information will include date, time location, assignment, and occupation of employee at the time of the incident. The notice of hearing will also include a list of witnesses to be called. The hearing will be scheduled to take place on a regularly scheduled work day within 30 days of the Carrier's first knowledge of the act or occurrence. The hearing may be postponed by either party due to sickness,**

injury, or vacation of principals or witnesses. The hearing may be postponed for other reasons by mutual consent of the parties. The hearing may be adjourned to secure necessary witnesses or if it cannot be completed in a day. Hearings will be held at one of the following locations, whichever is closest to the employee's headquarter point - Waterville, Rigby, No. Billerica, East Deerfield. Employees required to attend a hearing at a "location other than the location closest to the headquarter point will be allowed Personal Auto Expense payment from the location closest to the headquarter point to the location where the hearing is held and return.

* * *

- 26.3 The employee will have the opportunity to request that the Carrier provide necessary witnesses not listed on the notice of hearing and will have the opportunity to secure the presence of witnesses in his own behalf. The employee will have the right to representation and he and his representative will have the right to question all witnesses.

* * *

- 26.5 If the finding of the hearing is that the employee is not at fault, he will be compensated for the actual wages lost, if any. If no wages are lost, employee will be paid in accordance with Article 38 of this Agreement.

* * *

- 26.7 If the Carrier's discipline decision is modified or overturned at any stage of handling resulting in a payment to the employee, such payment may be offset by any earnings received by the employee during the relevant time period which would not have otherwise been earned but for the discipline. The Carrier will work with the appropriate government agencies to assure that no Railroad Retirement benefits are adversely affected by the operation of the above provision."

The Carrier has the burden of proving the charge levied against the employee. The Carrier's witness Todd Chessie testified that he was contacted by his wife who was on Facebook concerning the post alleged by Christopher Tirone. The post, introduced into evidence, shows a post time of 7:31 AM on May 4, 2016, and states:

"Bet your boy Todd wouldn't do that!!"

Mr. Gerossie was notified by Mr. Chessie at approximately 11:45 AM of the post, and proceeded to investigate. He determined that Tirone's start time was at 7:00 AM, and that the post was made at 7:31 AM, while Tirone was on duty.

In his defense, Tirone claims that he could not have made the post because he was in East Portal on tractor patrol where there is no cell service at 7:31 AM. He claims that perhaps his significant other made the post since she has the password, and sometimes posts on his account. Tirone did not produce his significant other as a witness at the hearing to support his defense.

Mr. Gerossie testified that it takes approximately 45 minutes to get from East Deerfield to East Portal, so Tirone would not have been to East Portal by 7:31 AM. Tirone claims to have left early to arrive at East Portal at about 7:30 AM, but did not claim overtime or supply testimony from the Foreman who he claims requested the early departure.

While this case is based on circumstantial evidence, the Claimant's defense is self-serving and was not supported by evidence. Given the prior disciplinary record of the Claimant which was introduced at the hearing and made a part of the record, the discipline assessed by the Carrier was reasonable and will not be disturbed by the Board.

AWARD

Claim denied.

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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 14th day of December 2018.