

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43335
Docket No. MW-44469
18-3-NRAB-00003-170592**

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

**(Brotherhood of Maintenance of Way Employees Division -
(International Brotherhood of Teamsters**

PARTIES TO DISPUTE: (

(Springfield Terminal Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed on Mr. J. Waltman by letter dated July 12, 2016 for alleged use of an explosive device on the property on December 5, 2015 of which you claimed no knowledge when interviewed by the Carrier was on the basis of unproven charges, excessive and in violation of the Agreement (Carrier’s File MW-16-12 STR).**
- (2) The discipline (dismissal) imposed on Mr. P. Jackson by letter dated July 12, 2016 for alleged use of an explosive device on the property on December 5, 2015 of which you claimed no knowledge when interviewed by the Carrier was on the basis of unproven charges, excessive and in violation of the Agreement (Carrier’s File MW-16-13).**
- (3) As a consequence of the violation referred to in Part (1) above, Claimant J. Waltman shall be reinstated to service with seniority and all other benefits and rights unimpaired, have his record cleared of the charges leveled against him and be compensated all losses incurred (straight time and overtime), until he is returned to work.**
- (4) As a consequence of the violation referred to in Part (2) above, Claimant P. Jackson shall be reinstated to service with seniority**

and all other benefits and rights unimpaired, have his record cleared of the charges leveled against him and be compensated all losses incurred (straight time and overtime), until he is returned to work.”

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 Carrier waived its Article 25.5 objection on time limits to permit the Board to hear and rule on the merits of the Claim.

Claimant J. Waltman has established and holds seniority under the Maintenance of Way Agreement and had approximately eleven (11) years of service with the Carrier and until this event held an unblemished work history. Claimant Waltman was assigned as an upload operator for the construction crew prior to the rise of this dispute.

Claimant P. Jackson has established and holds seniority under the Maintenance of Way Agreement and had approximately eighteen (18) years of service with the Carrier while establishing a nearly unblemished work history and was assigned as a foreman of a scrap crew prior to the rise of this dispute.

On December 5, 2015, the Claimants were assigned to Rigby Yard where there was an alleged use of an explosive device(s) on the Carrier's property and by letters dated May 24, 2016 (Transcript Exhibit A), the Carrier directed the Claimants to attend a formal investigative hearing regarding their alleged knowledge and possible unauthorized use of explosives while on company time. After a postponement, the

hearing was held on June 28, 2016 and by letters dated July 12, 2016 (Employees' Exhibits "A-1" and "A-2"), the Claimants were subsequently notified that they were each found guilty to be in violation of Pan Am Safety Rules PGR-A, PGR-C, PGR-D, PGR-H, PGR-J & PGR-L and that they would immediately be terminated from employment with the Carrier.

“PGR-A states: Safety is of the first importance in the discharge of duty. Obedience to the rules is essential to safety and to remain in service.

PGR-C states in relevant part:

Employees must devote themselves exclusively to the Company's service while on duty. They must cooperate and assist in carrying out the rules and instructions and must promptly report to the proper officer any violation of the rules or instructions, any condition or practice which may imperil the safety of trains, passengers or employees, and any misconduct or negligence affecting the interest of the Company.

To remain in the service, employees must refrain from conduct which adversely affects the performance of their duties, other employees or the public.

PGR-D states:

Employees must exercise care to prevent injury to themselves or others. They must be alert and attentive at all times when performing their duties and plan their work to avoid injury.

PGR-H states in relevant part:

...Abuse, misuse, defacing, of or deliberate damage to or destruction of Company property, tools, or equipment is prohibited and is sufficient casue for dismissal.

PGR-J states:

Employees must be observant and use common sense at all times.

PGR-L states in relevant part:

Employees who are dishonest, immoral, vicious, quarrelsome, and uncivil in deportment or who are careless of the safety to themselves or of others will not be retained in the service.”

While the incident took place on December 5, 2015, the Carrier did not become aware of the matter until May 11, 2016, when it was provided with a video of the alleged incident by employee Derek Short. Short’s explanation of the delay between the recording of the event and the report to the Carrier was the he forgot about it, until he found it necessary to remove some items from his phone due to capacity restrictions.

The Carrier suspended the two employees prior to their hearing, providing only the statement that the hearing was to review a “safety concern”. Given the fact that the triggering incident occurred six months before the Carrier’s knowledge or Investigation, it is not reasonable to believe that the employees constituted a threat to Carrier personnel, or property at the time of their suspension, which is a prerequisite to a pre-hearing suspension. The suspension was also based on evidence of an infraction which was tenuous at best.

This action violates the provision in Article 26.1 and 26.2, which state:

“26.1 No employee will be disciplined without a fair hearing. ***

26.2 An employee may not be suspended pending a hearing except when the act or occurrence to be investigated is of a serious nature such as Rule G, insubordination, extreme negligence, dishonesty, or when continuing an employee in service may constitute a threat to Carrier personnel, carrier property, or property entrusted to the custody of the Carrier. *”**

The Brotherhood also takes issue with the Carrier’s conduct of the hearing, citing meetings between the impartial Hearing Officer and the Charging Officer, as well as potential witnesses in advance of the hearing, asserting a claim that the Claimants were denied due process and a fair hearing as a result. It further

provides support for this assertion in prior awards from Arbitrator Helburn and Knapp.

The Carrier has the burden of proof in a discipline or discharge case. In this case, the evidence against the employees is tenuous. The incident occurred some 6 months before the charges and Investigation. The video which purports to support the charges against the employees is inconclusive and was taken in violation of a Carrier rule prohibiting the use of video on Carrier property. The audio makes it clear that there were fireworks going off, but it is not possible to determine from the video who is responsible. The testimony of the witnesses and the Claimants was inconclusive.

Further, the Carrier has based the discharge on multiple rule violations, and thus must prove each violation in order to support the discharge. The charges of violation of Rules PGR-A, PGR-C, PGR-D, PGR-H, PGR-J, and PGR-L are not fully supported by the evidence presented during the hearing.

It is clear that there was a violation of PGR-A, an unsafe act was committed in the discharge of fireworks. It is not clear that the Claimants were the ones responsible for that violation.

PGR-C was also violated, to the extent that there was not a timely report of an incident which was an unsafe condition, but again, it is not clear that the Claimants had the sole responsibility to report the incident, as there were a number of other employees who could also have made that report, including Mr. Short who took the video.

A PGR-D violation by the Claimants is not supported by the evidence in this case. There is no probative evidence of a lack of care, nor of a condition which would cause injury to any employee that can absolutely be attributed to the Claimants.

PGR-H was not violated based on the evidence presented in this case. There was no evidence of damage to Company property discovered by Officer Fowler when he conducted his Investigation. Granted, it was some six months after the alleged incident.

There was no probative evidence presented that the Claimants can be charged with a violation of PGR-J, a lack of employing observation and common sense. Such a charge might be valid if it could be proven that the Claimants were the ones who were shooting off firecrackers beyond a reasonable doubt. The evidence presented does not establish that critical fact. Whether or not that charge alone would be sufficient to support a discharge need not be addressed here.

PGR-L, again, may have been violated as a result of this incident, only to the extent that an unsafe act occurred. The evidence does not support that the Claimants were "...dishonest, immoral, vicious, quarrelsome, and uncivil in deportment." If it could be proven beyond a reasonable doubt, (which it was not based on the evidence presented), that the Claimants were the ones shooting off firecrackers, to the detriment of other employees, and lied about it during the Investigation, then a charge of dishonesty could be appropriate.

It cannot be denied that the use of fireworks in close proximity to others in a work setting is not safe, and is a serious infraction. However, if the incident is serious enough to warrant the industrial capital punishment of dismissal, it must be timely, conclusive, and with regard to the due process owed to the Claimants. Those factors are not present in the instant case.

The primary evidence against the Claimants – a video allegedly taken by Employee Derek Short on the evening of December 5, 2015 – but not presented to the Company until May 11, 2016 is tainted evidence. There is a rule against employees taking videos on Company property without permission. In addition to being taken in violation of Company rules, the video is inconclusive and was not presented in a timely fashion. Nor was the incident reported by Short or any other employees contemporaneously with the event - which it should have been, and would have allowed a better Investigation and a possibly a more clear determination of who was responsible.

Claim is sustained in part. The Claimants are to be reinstated with seniority rights unimpaired, and be compensated for lost straight time wages, including the time for the inappropriate pre-hearing suspension, offset by outside earnings. Overtime and benefits claims during the period of separation are unduly complicated and burdensome (or impossible) to accurately determine, and are therefore not made a part of this award.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 14th day of December 2018.