

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43336  
Docket No. MW-44470  
19-3-NRAB-00003-170593**

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 Co.**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline [sixty (60) day suspension] imposed on Mr. C. Begin by letter dated July 12, 2016 concerning the 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-16-14 STR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Begin shall 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 C. Begin has established and holds seniority under the Maintenance of Way Agreement and had approximately five (5) years of service with the Carrier while establishing a nearly unblemished work history and was assigned as a chauffeur for a log truck prior to the rise of this dispute.**

**On December 5, 2015, the Claimant was assigned to Rigby Yard where there was an alleged use of an explosive device(s) on the Carrier's property and by letter dated May 24, 2016 (Transcript Exhibit A), the Carrier directed the Claimant to attend a formal investigative hearing regarding his alleged knowledge of unauthorized use of explosives while on company time. After a postponement, the hearing was held on June 28, 2016 and by letter dated July 12, 2016 (Employee Exhibits "A-1") the Claimant was subsequently notified that he was found guilty to be in violation of Pan Am Safety Rules PGR-A, PGR-C, PGR-J & PGR-L and that he was immediately issued a sixty (60) day suspension 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-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.**

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

#### **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 information sufficient to apprise 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.**

- 26.2 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. Suspension pending a hearing will not be considered as prejudicial to the employee and will be used sparingly by the Carrier.**
- 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.**
- 26.4 The Employee must be notified within fifteen (15) days of the completion of the hearing if discipline will be assessed. The employee and the General Chairman will be provided with a copy of the hearing transcript at the time the discipline decision is rendered. The types of discipline which may be assessed are reprimand, disqualification, deferred suspension, relevant training, actual suspension, and dismissal. The types of discipline may be assessed individually or in combination. The employee will be required to serve deferred suspension only if he commits another offense for which discipline is imposed within the succeeding six (6) months period.**
- 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 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.

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-J, and PGR-L are not fully supported by the evidence presented during the hearing.

PGR-A was not supported in the case of Chris Begin. There is no evidence that he did an unsafe act, or that he was guilty of any safety rule violation.

PGR-C was 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 Claimant 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. Other employees were not disciplined for their failure to timely report the incident.

There was no probative evidence presented that the Claimant can be charged with a violation of PGR-J, a lack of employing observation and common sense.

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 Claimant was "...dishonest, immoral, vicious, quarrelsome, and uncivil in deportment."

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 imposition of a sixty (60) day suspension, it must be timely, conclusive, and with regard to the due process owed to the Claimant. Those factors are not present in the instant case.

The primary evidence against the Claimant – 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.

The Claimant is to be compensated for the sixty (60) day suspension which was imposed in 2016. Overtime and benefits claims during the period of suspension are unduly complicated, speculative, 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.