

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43513
Docket No. MW-44603
19-3-NRAB-00003-180039**

The Third Division consisted of the regular members and in addition Referee Meeta A. Bass 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 [thirty-five (35) working days suspension] imposed on Work Equipment Repairman A. Bentley by letter dated May 18, 2016 was without just cause, excessive and in violation of the Agreement (System File J-1634D-405/8-111 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Bentley shall be:**

“* reinstated to service with all seniority rights restored and all entitlement to, and credit for, benefits restored, including vacation and health insurance benefits.**

The Claimant shall be made whole for all financial losses as a result of the violation, including compensation for:

- 1) straight time for each regular workday lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the Claimant at the time of removal from service (this amount is not reduced by earnings from alternate employment obtained by the Claimant while wrongfully removed from service);**

- 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement that became effective while the Claimant was out of service;**
- 3) overtime pay for lost overtime opportunities based on overtime for any position Claimant could have held during the time Claimant was removed from service, or on overtime paid to any Junior employee for work the Claimant could have bid on and performed had the Claimant not been removed from service;**
- 4) health, dental and vision care insurance premiums, deductibles and co-pays that he would not have paid had he not been unjustly removed from service;**
- 5) also all months of service credit with the Railroad Retirement Board he would have accumulated had he not been unjustly removed from service.**
- 6) all time credit for days of service towards vacation and insurance.**

All notations of the dismissal should be removed from all Carrier records 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.

On May 5, 2015, Claimant reported to work at 5.55 A.M.; his start time was 5:30 A.M. Claimant did not report or call in prior to the start time to protect his assignment. His supervisor had contacted him at 5:40 A.M., and Claimant explained that he had overslept and was on the road to work.

The Carrier issued a Notice of Investigation letter dated May 5, 2016 and May 10, 2016, which state: “The purpose of the investigation and hearing is to develop all facts and circumstances and place responsibility, if any, in connection with an alleged incident that took place on Thursday May 5, 2016 when you did not show up to work at your designated starting time in Bellevue, IA.”

After a postponement, the investigation hearing was held on May 17, 2016. Claimant received a Discipline Notice dated May 18, 2016, finding a violation of GCOR 1.13 and GCOR 1.15, and as a result, the Carrier assessed a thirty-five (35) day working suspension. The Organization appealed the Carrier’s decision by letter dated July 5, 2016, and the Carrier denied the same on August 29, 2016. The Organization advanced the claim to the Highest Designated Officer by letter dated October 17, 2016, and the same was denied on December 12, 2016. A formal conference was held with no change in the position of the Carrier. This matter is before this Board for a final resolution of the claim.

The Board has reviewed the record developed by the parties during their handling of the claim on the property, and considered evidence related to the following to make its determination of this claim:

- “1) Did Claimant receive a full and fair investigation with due notice of charges, opportunity to defend, and representation?**
- 2) If so, did the Carrier establish by substantial evidence that Claimant was culpable of the charged misconduct or dereliction of duty?**
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory or unreasonably harsh in the facts and circumstances of the case?”**

The Carrier contends that Claimant received a fair and impartial hearing in accordance with the controlling agreement, and the procedural error alleged by the Organization is without merit. There is substantial, probative evidence in the record to support a finding of guilt of the charges. The Carrier further contends that the penalty of thirty-five (35) day working suspension is commensurate with the offense. Lastly, it is the position of the Carrier that the claim should be denied or dismissed in its entirety.

The Organization contends that Claimant was denied his procedural and other rights to a fair hearing when the Carrier allowed the same Carrier officer to issue the charges, serve as the hearing officer, and also issue the discipline. Further, the Organization contends that the Carrier failed to meet its burden of proof that the Claimant was guilty of the alleged rule violations, and failed to show that the level of discipline was appropriate. Lastly, it is the position of the Organization that the claim be sustained as submitted.

This Board has reviewed the record before us, and finds that the proceedings do not appear to have been conducted in a fair and impartial manner and therefore, breach the covenant of good faith. The multiple roles played by the hearing officer resulted in a denial of due process and prejudice to the Claimant. Due process requires more than impartiality but the appearance of impartiality as well. The hearing officer must avoid conduct that may reasonably be perceived as prejudiced or biased. The Carrier officer who decided: 1) that a charge was in order; 2) later governed and controlled the investigation hearing process, i.e., the admission of evidence, overruling objections, and so forth, and 3) then determined, in reliance of the record that was established, that he was correct to issue said charge; and 4) administered the discipline that he determined appropriate; gives the appearance of acting as judge, jury and executioner. The hearing procedure, as applied in this matter, fails to comply with any notion of a fair and impartial hearing. No reasonable person would place their trust and confidence in the fairness of the procedure employed that appears dubious at best. No reasonable person would place their trust and confidence in the impartiality or fairness of the procedure employed in this case.

The Board finds that the Carrier failed to afford the Claimant a fair and impartial investigation hearing. The certainty of success or merits of its actions does not negate fairness and impartiality of the process. Therefore, the failure of the Carrier to

provide a fair and impartial investigation in accordance with the controlling agreement in this instance nullifies the action taken and the penalty imposed.

AWARD

Claim sustained.

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 27th day of March 2019.