

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43516  
Docket No. MW-44692  
19-3-NRAB-00003-180181**

**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 [five (5) day record suspension] imposed on Mr. J. Bergendahl, by letter dated September 29, 2016, for alleged violation of Engineering Safety Rule Book E-2 #1 in connection with a motor vehicle accident that occurred on August 4, 2016 was excessive, unsupported and in violation of the Agreement (System File J-1634D-409/Bergendahl 5/0 – MVA DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Bergendahl’s record shall be cleared of the charges leveled against him and he shall be reimbursed for any days of missed pay as a result of this suspension and any overtime he missed at work as a result of the suspension.”**

**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 August 4, 2016, Claimant was assigned to operate a Carrier vehicle. While Claimant was operating said vehicle, Claimant hit a third party building and damaged an attached air conditioning unit.**

**The Carrier issued a Notice of Investigation letter dated August 12, 2016, which stated as follows: “The purpose of this investigation/hearing is to determine the facts and circumstances and to place responsibility, if any, in connection with your alleged Motor Vehicle Accident resulting in air conditioner damage at Aleris Rolled Products in Davenport, IA on August 4th, 2016. This indicates a possible violation of, but is not limited to, the following rules: Engineering Safety Rule Book E-2 #1.”**

**The investigation hearing was held on August 31, 2016. Following the investigation hearing, Claimant received a Discipline Notice dated September 29, 2016, finding a violation of Engineering Safety Rule Book E-2 #1 and was assessed discipline of five (5) day record suspension. The Organization appealed the Carrier’s decision by letter dated October 17, 2016 and the Carrier denied the same on October 21, 2016. The Organization advanced the claim to the Highest Designated Officer by letter dated December 12, 2016, and the same was denied on February 10, 2017. 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 was afforded a fair and impartial investigation in accordance with the controlling Agreement. The Carrier argues that the notice of hearing contains sufficient information to apprise the Claimant of the act and occurrence to be investigated as well as the date, time and place of investigation. The Carrier opines there was substantial, probative evidence established to support the Claimant's guilt of the offense with which he was charged. Claimant admitted to operating the vehicle and "clipping," in his words, the air conditioning unit. The discipline of five (5) day record suspension with zero (0) days served without pay is commensurate with the nature of the proven offense and the Claimant's record. Lastly, it is the position of the Carrier that the claim should be denied.

The Organization contends that the Carrier failed to meet its burden of proof that the Claimant was guilty of the alleged rule violations. The Organization argues that the record reflects Claimant complied with the mandates of Engineer Safety Rule Book E-2#1. It is undisputed that Claimant required his passenger to exit the vehicle and provide backup assistance; Claimant did all that he could to ensure compliance to the rule. The Carrier witness did not observe the accident, and the Carrier's case was predicated on speculation, innuendo and assumption in support of the charges against the Claimant. The Organization further contends that the discipline is excessive. Claimant was not accustomed to the size of the vehicle and relied on his ground guide who was not charged in the incident; therefore, there is disparate treatment. Lastly, it is the position of the Organization that the claim should be sustained.

Having reviewed the evidence, the Board finds that the Carrier afforded Claimant a fair and impartial hearing. The Carrier charged the Claimant with violation of the Engineering Safety Rule Book, Rule E-2#1 which states: "the driver of the vehicle is accountable for safe vehicle operation. The driver must take whatever actions necessary to prevent contact with other vehicles, objects or persons." The Board finds that the charges were established by substantial evidence in the record. Claimant does not dispute hitting the AC unit with the company vehicle during the

course of his employment. In his testimony, he stated “I don’t deny that I clipped it, by the way this picture’s taken, I mean it looks like that AC unit... you should have saw that.” Moreover, Claimant stated “I offered to pay for the AC unit to avoid all this lawyer stuff you know, but nobody wanted to go that route so here we are.” These statements by Claimant constitute admissions to material facts at issue. The Carrier has met its burden of proof. The Engineering Safety Rule Book, Rule E-2#1 places responsibility on the driver of the vehicle; the other worker was not the driver. The Board further finds that the discipline is commensurate to the proven charge in consideration of the Claimant’s record, and the facts and circumstances in this case.

**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 27th day of March 2019.**