

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43519
Docket No. MW-44804
19-3-NRAB-00003-180289**

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 (30) days with ten (10) days served without pay] imposed on Mr. J. Lee, by letter dated December 6, 2016, for alleged violation of GCOR 1.13 Reporting and Complying with Instructions and GCOR 1.1.4 Condition of Equipment and Tools in connection with allegations that he failed to document a brake test as required on October 11, 2016 was without just cause, excessive, on the basis of unproven charges and in violation of the Agreement (System File B-1634D-202/USA-BMWED_DM&E-2017-00004 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Lee’s record shall be cleared of the charges leveled against him and he shall now be ‘... made whole by compensating him for all wage and benefit loss suffered by him for any time of loss in connection with 10 actual days suspension with 20 days deferred, any and all expenses incurred or lost as a result and any other loss by compounding such discipline with any other in the future. This remedy includes loss of Holiday compensation for Claimant serving discipline in the form of suspension around the four (4) Holidays of Christmas Eve, Christmas Day, New Year’s Eve, New Year’s Day, and potential loss of personal leave days. Any unused vacation as a**

result of the suspension removing the Claimants ability to utilize his earned vacation must be paid out immediately. ***”

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 was hired on March 19, 2012. On October 11, 2016, Claimant was working as Welder Helper in a joint elimination project near Winona, Minnesota. His supervisor observed that Claimant did not have a brake test written down on his job briefing task assessment book. Claimant stated the test was completed but was not documented.

The Carrier issued a Notice of Investigation letter dated October 13, 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 you allegedly failing to document your brakes test as you are required on October 11, 2016. This indicates a possible violation of, but is not limited to, the following rules: GCOR 1.13 Reporting and Complying with Instructions, and GCOR 1.1.4 Conditions of Equipment and Tools.”

After a postponement, the investigation hearing was held on November 11, 2016. Following the investigation hearing, Claimant received a Discipline Notice dated December 6, 2016, finding a violation of and assessing a thirty (30) day suspension; ten (10) of which were without pay. The Organization appealed the Carrier’s decision by letter dated January 17, 2017, and the Carrier denied the same on January 20, 2017.

The Organization advanced the claim to the Highest Designated Officer by letter dated February 9, 2017, and the same was denied on April 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 received a fair and impartial hearing in accordance with the controlling agreement. The Carrier is not precluded from submitting, or the hearing officer allowing, rules that pertain to the incident. The charging officer, who was also the witness stated in the Notice of Investigation, was present at hearing. The fact that the signatory of the Notice of Investigation was not present at the hearing should be of no consequence. 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 (30) day suspension with ten (10) days served without pay is commensurate with the offense and Claimant’s discipline record. 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. The Organization argues that the unilateral postponement of the investigation hearing, the submission of rules into the record which were not listed in the notice letter, and the fact that the signatory of the Notice of Investigation was not present at the hearing violated the fair hearing rights of the Claimant. The

Organization contends the Carrier failed to meet its burden of proof that the Claimant was guilty of the alleged rule violations. Further, if it is determined that a violation occurred and discipline is warranted, the Organization argues that Carrier disciplined Claimant in a discriminatory manner. The disparate treatment should mitigate the penalty. Lastly, it is the position of the Organization that the claim be sustained as submitted.

This Board has reviewed the record before us, and has found that the Carrier failed to postpone the initial investigation hearing in accordance with the controlling agreement of the parties.

Rule 1- Scope states “the rules in this Agreement shall govern the hours of services, rates of pay and working conditions of DM&E employees represented by BMWED who work in the Engineering Department and who are generally involved in basic inspection, maintenance and repair of DM&E’s track and certain structures which are located on the right-of-way and used by DM & E to meet its common carrier obligations. Additionally, Rule 34(4) Discipline and Investigations further states “the investigation will be held not more than ten (10) working days from the date of the notice referenced in paragraph (2) above, unless postponed by mutual agreement of the Company and the General Chairman.”

The Notice of Investigation dated October 13, 2016 instructs the Claimant to attend a formal investigation into the incident on October 21, 2016 at 10:00 A.M. The scheduling of the original hearing date is in compliance with the Agreement of the parties. Sadly, the hearing officer had a death in his family, and was not able to proceed with the investigation on the original scheduled date. The hearing officer attempted to contact the Vice-chairman without success but did not attempt to contact the General Chairman as stated in the Agreement. The Carrier did not assign a new hearing officer but rather postponed the hearing without an agreement with the General Chairman. The Carrier conducted the hearing on November 11, 2018 over the objections of the Organization. The decision was therefore unilateral and contrary to the negotiated terms of the Agreement which states that the investigation will be heard within ten (10) days absent a mutual agreement.

The Board finds that the Carrier failed to comply with the rules and procedures regarding postponement in violations of the parties’ Agreement, and thus held the

investigation outside of the contractual ten (10) day time frame in violation of Claimant's rights under the Agreement.

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.