

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43520  
Docket No. MW-44835  
19-3-NRAB-00003-180330**

**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) days with two (2) days to be served as time off] imposed on Mr. J. Legel, Jr., by letter dated November 9, 2016, for alleged violation of GCOR 2.21 - Electronic devices, GCOR 2.7 - Monitoring radio transmission and GCOR 1.29 - Avoiding delays, in connection with allegations that he delayed Train 476 Southbound on September 30, 2016 while operating Form B was excessive, on the basis of unproven charges and in violation of the Agreement (System File J-1634D-410/USA-BMWED\_DM&E-2017-00005 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Legel, Jr.’s record shall be cleared of the charges leveled against him and he shall now:  
“\*\*\* be reimbursed for any days of missed pay, including holidays, as a result of this suspension and any overtime he missed at work as a result of the suspension.  
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 September 29, 2016, Claimant was working as the Clinton Section Foreman near Buffalo Crossing. During the job briefing, the Roadmaster gave instructions to use the company issued cell phone due to the area being a dead zone. On said date, the Roadmaster received a voice mail from the East Director of the Operations Center. The message said that they were unable to reach Claimant for 15 minutes and were requesting assistance. The Roadmaster attempted to contact Claimant twice on his company cell phone with no response. The Roadmaster then contacted another foreman who was working in the vicinity of the Claimant, and was unable to reach him as well. The other foreman contacted the Roadmaster, and communicated to the Claimant the information regarding the train that was attempting to contact him. The Roadmaster went to the location and discussed the situation with Claimant. Claimant told him that he did not hear the dispatcher and could not hear his phone. Claimant was using the backhoe to put in ties and did not hear the phone ring. The Roadmaster confirmed that the outside speaker was functional, and that the dispatcher attempted to contact him on the correct channel. When Claimant looked at his phone, he discovered that he had two (2) missed calls from the Chief, two (2) missed calls from the Roadmaster, and two (2) missed calls from another Roadmaster. When questioned why he did not position himself to hear the phone, Claimant explained that he was working. The train was delayed thirty (30) minutes.

The Carrier issued a Notice of Investigation letter dated October 13, 2016, as corrected, 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 delaying train 476 Southbound 30 minutes on the Davenport sub on September 30, 2016 while operating Form B. This indicates a possible violation of, but is not limited to, the following rules: GCOR 2.21- Electronic devices, GCOR 2.7 - Monitoring radio transmission, and GCOR 1.29 - Avoiding delays.”**

**The investigation hearing was held on October 20, 2016. Following the investigation hearing, Claimant received a Discipline Notice dated November 9, 2016, finding a violation of GCOR 2.21, GCOR 2.7, and GCOR 1.29 and assessed discipline of five (5) days with two (2) days to be served as time off. The Organization appealed the Carrier’s decision by letter dated December 27, 2016 and the Carrier denied the same on February 13, 2017. The Organization advanced the claim to the Highest Designated Officer by letter dated April 28, 2017, and the same was denied on April 28, 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 governing Collective Bargaining Agreement. The Notice of Investigation was issued in compliance with the Agreement. Rule 34 does not require a specific charge nor does the Agreement prohibit additional potential rules to be admitted during the course of the hearing. The hearing officer did not show bias**

when he allowed the admission of recorded statements of the dispatcher without having the direct testimony of the dispatcher. The Carrier contends that the Organization received a copy of the transcript in compliance with Rule 34(9) of the Agreement. The inadvertent omission of an exhibit that was later submitted in the appeal response did not prejudice the Organization from representing Claimant in the appeal process. Further, the Carrier contends that substantial probative evidence supports the charges that Claimant's failure to respond to multiple calls caused a train delay. Moreover, the Carrier contends that the discipline imposed is progressive and appropriate based on multiple missed calls and the nature of the offense. It is the position of the Carrier that the claim should be denied.

The Organization contends that the Carrier denied Claimant his procedural rights and other rights to a fair and impartial hearing. The Carrier issued a vague charge letter which was amended twice to correct the date of the investigation and the date of the alleged violation. The Organization contends that the Carrier failed to meet its burden of proof that the Claimant was guilty of the alleged rule violations. Claimant did not delay the train. While Claimant admitted to having missed calls, the reason that the calls were missed was due to the fact that Claimant is a "working foreman." The Organization further contends that Claimant was disciplined in a disparate and discriminatory manner which voids the Carrier's disciplinary action. Lastly, it is the position of the Organization that the claim be sustained.

Having reviewed the evidence, the Board finds that the Carrier afforded Claimant a fair and impartial hearing. The Board has reviewed the procedural objections of the Organization and finds them to be without merit.

The Carrier charged the Claimant with violation of GCOR 2.7 -Monitoring radio transmission which states:

**"Radios in attended base station or mobile units must be turned on to the appropriate channel with the volume loud enough to receive communications. Employees attending base stations or mobile units must acknowledge all transmissions directed to the station or unit."**

The record establishes that the charging manager was notified via voicemail from the East Director Operations Center that they were unable to reach Foreman Legel and

needed assistance in reaching him. A southbound train had been delayed fifteen (15) minutes. Several unsuccessful attempts were made to reach the Claimant by phone. Ultimately, another foreman contacted Claimant and relayed the information regarding the train. The total time of delay is thirty (30) minutes. The charging manager testified that his expectations would be that Claimant would have either A) stop work, clear the track, and give him a call or B) conduct a job briefing and designate another employee as the Employee in Charge to respond to his calls. Claimant testified that he did assign other individuals to listen for the radio while he was working on the track, but no one heard any communications on the radio.

The Board finds there was insufficient evidence that Claimant was guilty of GCOR 2.7 -Monitoring radio transmission.

The Carrier charged the Claimant with violation of GCOR 2.21 which states:

**“Railroad operating employees may use railroad supplied electronic devices to send or receive work related information with railroad supervisors, railroad customers, railroad dispatchers, railroad customers service employees or other railroad employees as necessary in the performance of their duties.”**

The Rule then states that the railroad road employees cannot use railroad supplied electronic devices for other stated purposes and working conditions listed in the rule. It is not disputed that the Claimant neglected the phone or chose not to use it; therefore, he could not have violated this rule. According to the testimony of the Claimant, he did not hear the phone ring because he was using a backhoe to put in ties. GCOR 2.21 speaks to what circumstances a railroad operating employee may or may not use a railroad supplied electronic device. It has no application to noncompliance with briefing instructions to respond to his supervisor by use of the cell phone. The Carrier cannot meet its burden.

The Carrier charged the Claimant with violation of GCOR 1.29 which states:

**“Crew members must operate trains and engines safely and efficiently. All employees must avoid unnecessary delays.”**

The allegation for said violation of GCOR 1.29 is that Claimant caused a delay of the train. Claimant was working as Clinton Section Foreman. It is not disputed that the area where Claimant was working is in a dead zone for radio transmissions. This is why his supervisor instructed him to use the company cell phone for communication purposes. Claimant had possession of the company cell phone but could not hear the ringer while he was using the backhoe. The duties of a foreman include more than just operating a backhoe. Claimant had responsibility for main line track authority. Although he designated individuals to be responsible for monitoring the radio, he did not designate anyone to monitor his cell phone while working in an area that has communications problems.

Accordingly, reference to violations of GCOR 2.7 and GCOR 2.21 should be removed from the Claimant's record. The Board finds that there is substantial evidence in the record that Claimant violated GCOR 1.29. The Board further finds that the discipline imposed is commensurate with the offense and the record of the Claimant.

**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 27th day of March 2019.