

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43521
Docket No. MW-44836
19-3-NRAB-00003-180331**

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 [ten (10) day suspension] imposed on Mr. J. Bergendahl, by letter dated November 15, 2016, for alleged violation of ES Safety Rule E-29#19 Tools with Sharp Edges/ Knife Use in connection with his alleged improper use of a knife without gloves on October 17, 2016 was excessive, unsupported and in violation of the Agreement (System File J-1634D-411/USA-BMWED_DM&E-2017-00007 DME)..**
- (2) As a consequence of the violation referred to in Part (I) 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.**

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.

Carrier hired Claimant on June 14, 2010. On October 17, 2016, Claimant was working as a Welder Helper. Claimant and Claimant's supervisor participated in a safety conference call. While in the office and during the call, Claimant's supervisor witnessed Claimant cleaning underneath his nails with a pocket knife.

**The Carrier issued a Notice of Investigation letter dated October 17, 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 improper use of a knife without gloves on October 17, 2016. This indicates a possible violation of, but is not limited to, the following rules:
ES Safety Rule E-29 #19 Tools with Sharp Edges/Knife Use."**

After a postponement, the investigation hearing was held on October 20, 2016. Following the investigation hearing, Claimant received a Discipline Notice dated November 15, 2016, finding a violation of ES Safety Rule E-29#19 Tools with Sharp Edges/Knife Use and assessed discipline of ten (10) days without pay. The Organization appealed the Carrier's decision by letter dated December 27, 2016, and the Carrier denied the same on January 11, 2017. The Organization advanced the claim to the Highest Designated Officer by letter dated February 27, 2017, and the same was denied on April 28, 2017. A formal conference was held on September 27, 2017 with no change in the position of the Carrier. This matter is before this Board for a final resolution of the claim.

The Carrier contends that Claimant received a fair and impartial hearing in accordance with the controlling agreement and that the Organization's procedural objections are without basis. The Notice of Investigation contained sufficient information to apprise Claimant of the actions to be investigated as required by the

Agreement and to enable the Claimant and his representative to prepare a defense. There is substantial, credible evidence to support a finding that Claimant failed to properly use the knife. The Carrier further contends that the penalty of ten (10) days without pay is commensurate with the offense. Due to the nature of the offense, it was proper to remove Claimant from service. 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 hearing notice was vague and failed to apprise the Claimant of the charges leveled against him, and the Carrier failed to notify the Claimant of the hearing in accordance with Rule 34. The Claimant was unjustly removed from service prior to the hearing. Further, the Organization contends the Carrier failed to meet its burden of proof that the Claimant was guilty of the alleged rule violations. If it is determined that a violation occurred and discipline is warranted, the discipline is excessive and punitive. Lastly, it is the position of the Organization that the claim be sustained.

The Board has reviewed the record before us and finds that the Carrier failed to charge Claimant with the appropriate company rule. The Carrier charged Claimant with violation of ES Safety Rule E-29 #19 Tools with Sharp Edges/Knife Use which states "Personnel required to use knives shall adhere to the following steps before, during, and after knife use..."

It is not disputed that the Claimant utilized his pocket knife to clean under his fingernails. Claimant admitted that he regularly uses the pocket knife for such purpose. The rule cited provides safety instruction for workers who are required to use a knife in the performance of their job duties. This rule does not apply to or/govern the general conduct of an employee. It appears clear that Claimant was not performing a job or job related task in cleaning the underside of his fingernails. Therefore, the rule cited has no application to the undisputed facts stated above.

The Board finds that the Carrier has failed to properly charge Claimant with the appropriate company rule to address his behavior, and therefore has failed to meet its burden of proof. In consideration of the foregoing, the issue of improperly withholding Claimant from service is moot.

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.