

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43756  
Docket No. MW-45053  
19-3-NRAB-00003-180541**

**The Third Division consisted of the regular members and in addition Referee I. B. Helburn 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 (dismissal) imposed on Mr. A. Rutkowski, by letter dated February 21, 2017, for alleged violation of GCOR 1.15 – Reporting or Absence and GCOR 1.13 – Reporting and Complying with Instructions was without just cause, on the basis of unproven charges and in violation of the Agreement (System File RI-1734D-802/USA-BMWED\_DM&E-2017-00026 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Rutkowski shall have the charges dismissed and be returned to work and shall be made whole for all loss suffered as a result of the violation, including lost straight time, holiday pay, lump sums and overtime without deduction of outside earnings, health, dental and vision insurance premiums, deductibles and co-pays and all months restored and credited for the purposes of Railroad Retirement and vacation.”**

**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 January 12, 2017 the Claimant, a Truck Driver headquartered in Davenport, IA and residing in Fennimore, WI neither reported for his shift that began at 0700 hours nor called his Supervisor Work Equipment Ben Hand. Consequently, by letter dated January 23, 2017, the Claimant was informed of a “formal investigation and hearing” (NOI) to commence at 1300 hours at the Nahant Yard, 34220 Miller Avenue, Davenport, IA 52802 “to develop all facts and circumstances and place responsibility, if any, in connection with an alleged incident that took place on Thursday, January 12th, 2017 when you did not report to your headquarter location at Nahant Yard in Davenport, IA.” The NOI indicated a possible violation of the GCORs noted above. By letter dated February 21, 2017 the Claimant was informed of his dismissal because the Carrier had concluded that GCORs 1.15 and 1.13 had been violated. The Organization filed a claim on Mr. Rutkowski’s behalf on March 16, 2017. The claim was progressed on the property without resolution and further progressed to this Board for final adjudication.

The Carrier submits that the investigation was fair and impartial, conducted in accordance with railroad industry standards. Rule 34 – Discipline and Investigations requires that the NOI specify the conduct or incident of concern to the Carrier so that the Claimant knowledgeably may prepare his defense, but the rule does not require a listing of rules potentially violated, although two such rules were listed. Nor does Rule 34 require discovery. The Carrier obtained the required substantial evidence to prove the allegations. The Claimant admitted that he had decided to work from home that day and did not call his supervisor to inform him of the decision. Mr. Rutkowski did not have permission to work from home and his excuse that he did not have a valid medical card and therefore did not have a valid CDL was not “convincing or relevant.” Dismissal was justified for this employee with under two (2) years’ tenure and three (3) prior suspensions. The Board should not substitute its judgment for that of the Carrier.

The Organization contends that the investigation was not fair and impartial because the request for the provision of documents prior to the hearing was not

honored, because rules and policies not indicated in the NOI were introduced at the investigation and because the Conducting Officer showed extreme bias. The Carrier failed to meet its burden of proof as the Claimant was under the impression that he had permission to work at home since his January 9, 2017 absence had been authorized so that he could update his medical card and thus his CDL and the medical card had not been uploaded to Carrier records by January 12, 2017. The Claimant may not have understood the relevant rules, but worked from home so that he did not violate rules. The dismissal was excessive and unwarranted because it was punitive and not corrective and because the Claimant was found to have violated only two (2) of the many rules introduced during the investigation.

Briefly put, this is a case in which the Claimant, with a combined PDL/CDL, was required to have a valid Department of Transportation (DOT) medical card in order to operate a commercial vehicle, which included Carrier vehicles. The Organization contends that the investigation that followed the Claimant's failure to report at 0700 hours on January 12, 2017 or to call in prior to his tour of duty was not fair and impartial for several reasons, all of which the Board finds unpersuasive. A careful reading of the investigation transcript does not support the Organization's contention that the Conducting Officer showed extreme bias, or any bias that prejudiced the Claimant. Rule 34 does not call for pre-hearing discovery and cannot be said to require the Carrier to accede to the Organization's pre-hearing request for documents. Nor does Rule 34 prohibit the Carrier's introduction of rules and policies during the investigation that were not listed in the NOI. The Board notes that the only GCORs set forth in the letter of dismissal were those also included in the NOI.

The Carrier has met its burden of proof because there is the required substantial evidence in the record that the above-noted GCORs were violated. GCOR 1.15 Duty – Reporting or Absence states that “employees must report for duty at the designated time and place with the necessary equipment to perform their duties. . . . Continued failure by employees to protect their employment will be cause for dismissal.” GCOR 1.13 Reporting and Complying with Instructions states that “Employees will report to and comply with instructions from supervisors who have the proper jurisdiction. Employees will comply with instructions issued by managers of various departments when the instructions apply to their duties.” The Claimant admitted that he worked from home without permission to do so and did not call his supervisor prior to the start of his shift. While the Claimant may have been “under the impression” that he could work from home because he had previously been given an authorized absence to update his medical card, “under the impression” did not constitute an authorized absence. If

the Claimant was unsure of the proper procedure, it was his responsibility to contact his supervisor for clarification. Even assuming that the Claimant worked from home, that work would not serve to excuse the no show, no call.

Furthermore, Supervisor Hand testified that while the Claimant could not drive a Carrier vehicle with an expired DOT medical card, the Claimant had a valid personal driver's license and could have legally driven a privately-owned vehicle to work. Other than to say that the DOT medical card, valid as of January 9, 2017, was not effective because it had not been uploaded to the Canadian Pacific<sup>1</sup> computer, the Claimant has not explained to the Board's satisfaction why he could not use his own vehicle to report to his Davenport, IA work location.

Supervisor Hand characterized the Claimant as a good employee, but on the negative side of the ledger, the Claimant had been employed by the Carrier for under two years and had amassed four (4) suspensions between October 8, 2015 and his January 12, 2017 dismissal. The disciplinary record that contains a significant amount of progressive/corrective discipline is inconsistent with the Organization's contention that the dismissal was excessive.

**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 16th day of July 2019.

---

<sup>1</sup> The Dakota, Minnesota and Eastern Railroad Corporation is a wholly-owned subsidiary of the Canadian Pacific (CP) Railroad.