

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43760
Docket No. MW-45139
19-3-NRAB-00003-180653**

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 Carrier’s discipline [twenty (20) day suspension with ten (10) days actual suspension without pay and ten (10) days deferred] of Mr. B. Hatcher, issued by letter dated April 27, 2017, in connection with allegations that he failed to wear proper hearing protection when performing work on company property on March 24, 2017 was unjust and in violation of the Agreement (System File J-1734D-405/USA-BMWED_DM&E-2017-00038 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Hatcher shall have the discipline removed from his record and be compensated for all time lost which includes any days and overtime missed as a result of the improper 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.

The Claimant, an Assistant Foreman in the Bridge and Building Department, was working on a Herzog MPM machine, which is a production machine estimated to be 600' in length with a crane that crawls back and forth on the machine itself. The machine has an A cab that supplies the power and at the other end a B cab that the Claimant testified is insulated against noise. On March 24, 2017 Roadmaster Jeffrey Chalich, the Claimant's supervisor, summoned him from the B cab to check on paperwork. The two had a conversation 10'-20' from the machine according to the Roadmaster, who also said that he had to raise his voice to talk over the noise. The Claimant estimated that they were 100'-150' from production when he and Roadmaster Chalich spoke. Mr. Hatcher was not wearing hearing protection at the time and was given protection by his supervisor. This led to a March 28, 2017 letter giving the Claimant "notice of a formal investigation and hearing" (NOI) to be convened at 0900 hours on April 7, 2017 at the Chillicothe Depot, 25 3rd St., Chillicothe, MO 64601. The NOI indicated a possible violation of ES Safety Rule E-23 – Personal Protective Equipment and Clothing – Hearing Protection, CP Hearing Conservation Policy 2.1.2 and GCOR 1.1.2 – Alert and Attentive. Roadmaster Chalich was listed as the sole Carrier witness. Thereafter, by letter dated April 27, 2017 the Claimant was informed that the Carrier found that he had violated the above-noted policies/rules and was being assessed a twenty (20) day suspension with ten (10) days to be served without pay and ten (10) days to be deferred. On May 22, 2017 the Organization responded with a claim on Mr. Hatcher's behalf. The claim was properly progressed on the property without resolution and further progressed to this Board for final adjudication.

The Carrier avers that the investigation was fair and impartial, conducted in accordance with industry procedural standards, and that the Claimant's due process rights were respected. The required substantial evidence was established by Roadmaster Chalich's observations. The Herzog MPM is a production machine. The Claimant, trained on hearing protection, did not provide credible testimony. He was not baited by Roadmaster Chalich. It is noted that the Claimant had not worn protection in the MPM cab. The suspension assessed was lenient in view of the Claimant's prior suspensions. The Board should not substitute its judgement for that of the Carrier.

The Organization contends that the Carrier has not met the burden of proving a violation. The Claimant did not need to wear his PPE because he was not within 100' of production. He had not worn PPE while in the B cab of the MPM because the cab was insulated. There are no placards that require hearing protection on the MPM. The discipline was arbitrary and capricious as it was punitive, not corrective. There had been no attempt to enforce the hearing protection policy, as it had not been distributed. Because not all of the rules were shown to have been violated, at a minimum the discipline should be reduced.

No due process issues were raised and none have been considered. The Claimant allegedly has violated three (3) rules. E-23 Personal Protective Equipment and Clothing, Hearing Protection requires that hearing protection used on CP property must meet ANSI S12.6 in the United States and must be used in accordance with CP Hearing Conservation Prevention and E-24 Personal Protection and Clothing Charts.¹ CP Hearing Conservation Procedures – United States, Procedures #H&S 5450 states in relevant part that appropriate hearing protection must be used “in any area in which ambient noise would require an employee to raise his/her voice in order to clearly communicate or converse at arm’s length.” GCOR 1.1.2 Alert and Attentive states that “Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.” While these rules are not posted in the B cab of the Herzog MPM according to the Claimant and are not distributed to employees according to Roadmaster Chalich, the Claimant acknowledged that he has been trained in hearing protection.

The Board acknowledges the discrepancy in the testimony of Roadmaster Chalich that he and the Claimant were 10'-20' apart when they spoke after the Claimant came out of the B cab and Foreman Hatcher's testimony that the two were 100'-150' from the machine when they spoke, but this seeming contradiction is not determinative. Rather, Roadmaster Chalich's unrebutted testimony that he had to raise his voice in order to converse with the Claimant indicates that Foreman Hatcher was in violation of the above-noted Hearing Conservation Procedure. The Claimant stated that he had left his hearing protection in the B cab and the Roadmaster stated that he provided the Claimant with protection. This constitutes substantial evidence of the rules and procedures set forth in the NOI and the notice of discipline.

¹ CP is the abbreviation for Canadian Pacific Railway. The Dakota, Minnesota & Eastern Railroad Corporation is a wholly owned subsidiary of CP and operates under CP rules and policies.

Roadmaster Chalich's directive to the Claimant to emerge from the B cab for a discussion was neither baiting nor a "gotcha" moment. The record contains nothing that would indicate bad blood between the two that would motivate the Roadmaster to try to entrap the Claimant nor has the Organization advanced a reason why Roadmaster Chalich would assume that the Claimant would leave his hearing protection in the cab. Particularly in view of the Claimant's four prior suspensions, three (3) involving failure to wear PPE, including one (1) for failure to wear hearing protection, the discipline under review herein can hardly be viewed as arbitrary and capricious.

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.