

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44737  
Docket No. MW-46226  
22-3-NRAB-00003-200926**

**The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division –  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(The Kansas City Southern Railway Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline (dismissal) imposed upon Mr. P. Humphrey, by letter dated June 21, 2019, for alleged violation of General Code of Operating Rules (GCOR) 1.6 - Conduct, Item 7 - Discourteous, GCOR Rule 1.9 - Respect of Railroad Company and the Kansas City Southern Railway Company’s Social Media Policy in connection with alleged conduct unbecoming of an employe regarding his on-line activity with Carrier’s first knowledge of incident on May 31, 2019 was excessive and without just and sufficient cause (System File KCS453DRR19/2019-0308 KCS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant P. Humphrey shall now have the discipline removed from his personal record, be compensated for all lost time, straight and overtime and be returned to his assigned position.”**

**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.**

**After investigation held June 13, 2019 and by letter dated June 21, 2019, the Claimant – an employee since 2011 – was dismissed for conduct unbecoming regarding his online activity.**

**At the relevant time, the Claimant held a Machine Operator's position.**

**The record shows that on May 31, 2019, an Oil City official contacted the Carrier concerning an online news article involving a fatality of a teenage girl struck by a train. Tr. 8.**

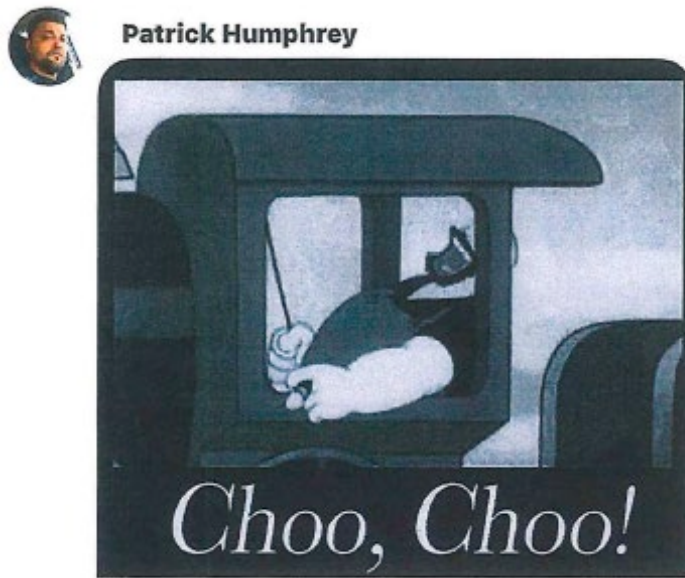
**The News article stated (Carrier Investigation Exhibit 4 at 2):**

**VIVIAN, La. (KSLA) - A teenager has died as a result of being struck by a train in Vivian, town police confirm.**

**The accident happened at 6:35 p.m. Thursday on the section of railroad tracks that parallels South Pine Street between Camp Road and Williamson Road, Caddo 911 dispatch records show.**

**That's immediately south of North Caddo Medical Center.**

**A Facebook posting from the Claimant's Facebook account appeared online in the comments section of the article with the Claimant's name and picture showing a laughing engineer and the words "Choo, Choo" (id. at 3):**



Underneath that posting is the following comment (id.):

**“Patrick Humphrey I am sure your employer would find your gif about one of their trains hitting someone unbecoming of the image they would like portrayed during such an incident.”**

Investigation conducted by the Carrier after receiving the call from the Oil City official determined that a Carrier train hit the teenager as she committed suicide on May 30, 2019. Tr. 8.

The Claimant denies that he made the posting. Tr. 18, 23-24. The Claimant asserted that his Facebook account must have been hacked and that after he was removed from service he changed his Facebook information and password and made his page private. Tr. 18-19, 22. The Claimant also testified that he was not aware of the suicide incident prior to the posting. Tr. 22.

Substantial evidence supports the Carrier’s determination that the Claimant engaged in misconduct – specifically, conduct unbecoming as charged. Aside from Rule 1.6 which prohibits “[a]ny act of hostility, misconduct, or willful disregard or negligence affecting the interests of the Company or its employees” and Rule 1.9 which requires that “[e]mployees must behave in such a way that the railroad will not be criticized for their actions”, the Carrier’s Social Media Policy provides:

**Guidelines 7.01**

- A. Use Good Judgment, Be Responsible and Be Respectful:**  
Employees must use good judgment and be respectful of the Company, its employees, customers, affiliates, and business partners at all times. Employees must avoid postings that are contrary to the best interest of the Company.

If the Claimant made that posting while on duty, the violation of the above cited rules is clear. If the Claimant made that posting while off duty, the record shows a nexus between the Claimant, his conduct and his relationship to the Carrier as an employee (the news article followed by the posting of the cartoon under Claimant's name and the call to the Carrier from the Oil City official). Under well-established authority, the Claimant can be disciplined for off-duty misconduct because there is a sufficient nexus between the Claimant's actions, his job and the Carrier's interests as the Claimant's conduct was detrimental to the ability of the Carrier to perform its functions and was also detrimental to the Carrier's interests and the ability of the Carrier to trust the Claimant's integrity and judgment as an employee. See Second Division Award 14213:

Over the years, different tests have been applied for cases involving discipline of employees for off-duty misconduct with the focus of looking for a "nexus" – i.e., a "connection" – either between the misconduct and the employee's job or the misconduct and the ability of a carrier to perform its functions or being detrimental to a carrier's interests. See e.g., Third Division Award 30554 ("[i]t is well-established that the Carrier's right to discipline employees for off-duty conduct is dependent upon the establishment of a connection between the conduct and the employer's interest"); Third Division Award 26583 ("[t]he rule is that employees can be held accountable for conduct during off duty hours if that conduct causes a negative and detrimental impact on the employer-employee relationship"); Second Division Award 7570 ("[w]hile there are Awards which have at times held that Carrier's rules do not properly extend to off-duty misconduct; situations that, as here, involve acts of misconduct which are of such a character as to destroy confidence in an employee's integrity, self-control and judgment, a different application must obtain"); Third Division Award 11052 ("[i]t is a generally recognized rule that an employee may be disciplined for acts done off property ...

[t]he test is whether the outside conduct affects the employer-employee relations"); Fourth Division Award 2127 (“[g]enerally it is true that Carrier’s rules and discipline cannot properly extend to off-duty misconduct ... [w]here, however, the acts, even though they occur on an employee’s rest day and at his home, are of such a character as to destroy confidence in his basic integrity, self-control and judgement, a different rule will obtain”).

By dismissing the Claimant, the Carrier’s taking such disciplinary action carried with it a determination that the Claimant’s contentions that his Facebook account was hacked and that he did not post the cartoon were not credible assertions. There is no basis in this record for the Board to disturb that determination.

Given the gravity of the misconduct, dismissal was not arbitrary.

**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 6<sup>th</sup> day of May 2022.