

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44738
Docket No. MW-46303
22-3-NRAB-00003-201004**

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. J. Tovar, by letter dated November 18, 2019, for alleged violation of General Code of Operating (GCOR) Rules 1. 6 - Conduct, GCOR Rule 1.19 - Care of Property and GCOR Rule 1.25 - Credit or Property in connection with allegedly loading company material into his personal truck at or around Mile Post 941.3 in Louise, Texas on the Rosenberg Subdivision on October 8, 2019 was arbitrary, excessive and without just and sufficient cause (System File TEXMEX959PA19/2019-0662 TMR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Tovar shall now ‘... be allowed to return to his former position with all vacation and seniority rights unimpaired, that the charges and discipline be removed from his personal record, and that he be compensated for any lost time such as straight time, overtime, holidays, travel expenses and any mileage for attending this hearing at the rate of .58 cents per mile and any other benefits that he might have lost due to discipline issued in connection with these charges that would have normally been covered by the Carrier benefits.’”**

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 November 8, 2019 and by letter dated November 18, 2019, the Claimant – an employee in the Carrier's service since April 2013 – was dismissed for loading Carrier material (two cut-out angle bars) in his personal truck on October 8, 2013.

Testimony at the investigation from the Carrier's Roadmaster was as follows (Tr. 10):

A: My involvement is I received a call from a concerned citizen on October the 8th around 5:05, stating that a subject in a white vehicle was removing Company property from our location at Louise, Texas. Upon further investigation by myself the next morning, he sent me – the concerned citizen sent me a text message with the license plate number of the vehicle that was removing the property. So it was a white vehicle. Next morning, upon my own investigation, I matched the license plate number that was given to me in a text message to Mr. Tovar's truck. Upon that, I called the Division Engineer. He told me to contact Special Agent Flores. We contacted Special Agent Flores. We set up a date to interview Mr. Tovar.

Upon interviewing Mr. Tovar, he admitted to removing the property without permission. He signed a letter admitting to his guilt of removing the Company property. Upon our interview, it was myself, [Special Agent] Mr. Flores was doing the

interviewing. [Division Engineer] Tony Rogers was on the phone because he was out of town. And all three of us heard Mr. Tovar admit to taking the material without Company permission. And we decided, upon speaking with Mr. Rogers, after we confirmed everything, we decided that it'd be best not to proceed with criminal charges to go – proceed with rules' violations instead to not further damage Mr. Tovar's reputation in future, you know, employment.

In a signed statement, the Claimant stated that he removed joint bars without permission. Carrier Investigation Exhibit 7. According to the Claimant, "I just wanted to use them for weight on the back of my skid steer that I have ... [f]or weight to keep it from tipping up to ... loading round bales" Tr. 58. The Claimant also stated at the investigation that "I thought I had permission ... I was assuming that it was okay." Tr. 62. The Claimant further testified (Tr. 59):

Q: Make certain I understood correctly. Even though you didn't feel like you took them without permission –

A: Right.

Q: – you – you – you never actually got anybody to tell you yes you could have those or no you can't.

A: No, you can't have them, no.

Q: There was no – no respond – you asked the question.

A: Yeah.

Q: You never got an answer.

A: Never.

Q: Is that – is that a true statement?

A: Yeah. Yes, sir.

Substantial evidence shows that the Claimant took Carrier property without permission as charged.

According to the Carrier, the Claimant had a 30-day suspension on his record from October 3, 2018. Carrier Exhibit F at 3. Under the circumstances, dismissal was not arbitrary.

The Organization's procedural arguments have been considered and do not change the result.

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 6th day of May 2022.