

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44852  
Docket No. MW-46496  
23-3-NRAB-00003-210422**

**The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.**

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

**PARTIES TO DISPUTE: (**

**(Soo Line Railroad Company**

**STATEMENT OF CLAIM:**

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

- (1) The discipline (dismissal) imposed upon Mr. R. Hagen, by letter dated December 30, 2019, in connection with alleged involvement with property damage to the overhead garage door while on duty in Superior, Wisconsin on November 18, 2019 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File D-69-19-390-09/2020-00012931 SOO).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Hagen ‘\*\*\* shall be reinstated to service with seniority unimpaired and shall be made whole for all financial losses as a result of the violation including compensation for: 1) straight time for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned to the claimant at the time of his removal from service (this amount is not reduced by earnings from alternate employment obtained by the claimant while wrongfully removed from service); 2) any general lump sum payment or retroactive and/or periodic general wage increases provided in any applicable agreement that became effective while the claimant was out of service; 3) overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time claimant was removed from service, or on overtime paid to any junior employee for work the claimant could have bid on and performed had the claimant not been removed from service; 4) vacation, holidays, and personal leave**

days lost while claimant was removed from service; 5) health & welfare, dental, vision, and supplemental insurance premiums, deductibles, and co-pays that he would not have paid had he not been unjustly removed from service; 6) all notations of the dismissal should be removed from all Carrier records; and 7) any and all other benefits to which entitled, but lost as a result of Carrier's arbitrary, capricious, and excessive discipline in removing claimant from service prior to the investigation and subsequent termination of claimant's employment and seniority under the date of December 30, 2019. In other words, this appeal seeks to make claimant whole and expunge his record the same as if he was never affected by his removal from service and this subsequent discipline. A simple joint inspection of Carrier's records can determine the extent of loss.'"

**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 entered service with the Carrier on June 15, 2015. On that date he established seniority in the Maintenance of Way Department. The Claimant occupied a Machine Operator position for approximately four (4) years when events giving rise to this claim occurred.

While on assignment in Superior, Wisconsin on November 18, 2019 the Claimant operated a tractor backhoe into an overhead garage door causing damage to the building structure. The next day (November 19) Assistant Chief Engineer Duffy notified the Claimant to attend a formal investigation and hearing for developing facts and circumstances in connection with the Claimant's alleged involvement with this incident.

The notice specified a possible violation of, but not limited to, Engineering Safety Book E-2 Vehicles Used for Company Business. The formal investigation and hearing convened on December 16, 2019.

After considering the record established during the investigation, Chief Engineer Paradise notified the Claimant on December 30, 2019 that he was dismissed from service for violation of the specified rule. Discipline assessed was based on the severity of the Claimant's infraction and his disciplinary history.

On February 25, 2020 the Organization appealed the dismissal stating the Carrier did not provide a fair and impartial hearing, failed to prove the charges and imposed harsh and excessive discipline. The Carrier denied the appeal on April 24, 2020 whereupon the parties proceeded to conference on April 29, 2020. Remaining at impasse after conference and post-conference exchanges, the Organization filed its claim dated February 11, 2021. The claim is before the Board for final adjudication as it was timely and properly presented and handled at all stages of appeal up to and including the Carrier's highest appellate officer. The Board is fully informed of the on-property record and each party's position and argument in its submission including awards submitted in support thereof.

The Organization asserts that withholding the Claimant from service violates his right to due process and shows prejudgment. The Board finds no due process violation as the parties agreed in Rule 20 - Discipline and Grievances that a fair and impartial hearing prior to assessing discipline "will not preclude an employee from being removed from the position, pending final outcome of the hearing." The Carrier did not pre-judge the Claimant.

Other concerns raised about denying the Claimant a fair and impartial hearing are without merit. For example, introducing GCOR 1.1.1 - Maintaining a Safe Course at the hearing was not prejudicial to the Claimant. It was within the scope of the notice of hearing which does not require an all-inclusive list of rules in the notice of charges. Engineering Safety Rule Book E-2 Vehicles Used for Company Business and GCOR 1.1.1 - Maintaining a Safe Course are related to the incident as they address safety. The record does not establish that the Organization's ability to represent the Claimant and present its case was prejudice by the introduction of a rule at the hearing that did not appear in the notice of formal investigation.

The Board reviews the record for substantial evidence supporting the Carrier's decision on the charged misconduct, rules violations and discipline assessed. Substantial

evidence resides at the lower, if not lowest, level on the evidentiary spectrum. It is not an onerous level to achieve. The Board finds there is substantial evidence that on November 18, 2019 at approximately 0800 hours, the Claimant operated the backhoe tractor in a manner causing damage to the building structure. The Claimant did not check for clearance of the this heavy equipment vehicle with the garage door. This violates Engineering Safety Rule Book E-2 as amended by General Order No. A-2 (January 1, 2019):

5. Prior to operation of a vehicle, the driver must conduct a walk around of the vehicle to identify an obstacles, clearance restrictions or adjacent vehicles that may interfere with executing a safe movement.

The Claimant acknowledged he is aware of Engineering Safety Rule Book E-2 and General Order No. A-2 and its requirement to conduct a check for clearance of his heavy equipment vehicle and, failing to do so, is a rule violation as charged.

The Claimant has incurred multiple suspensions since 2017. Multiple infractions in less than two (2) years before the incident in this claim is not construed favorably for the Claimant. In the circumstances of this claim, the dismissal is not harsh and excessive but appropriate, thus, the claim will be denied.

**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 10<sup>th</sup> day of March 2023.