

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44856  
Docket No. MW-47316  
23-3-NRAB-00003-220377**

**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 (former Chicago, Milwaukee,  
(St. Paul and Pacific Railroad Company)**

**STATEMENT OF CLAIM:**

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

- (1) The discipline (dismissal) imposed upon Mr. R. Gawel, by letter dated February 24, 2021, in connection with his alleged involvement in a motor vehicle accident on February 1, 2021 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File D-11-21-390-01/2021-00021896 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above: ‘... the dismissal shall be set aside and the Claimant shall be reinstated to service with all seniority unimpaired and all entitlement to and credit for benefits restored, including vacation and health insurance benefits, and all notations of this discipline be expunged from all Carrier records, including the Claimant’s personal record. The claimant shall also be made whole for all financial losses as a result of the violation, including compensation for:**
  - 1) Straight-time pay for each regular workday 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 removal from service (this amount is not reduced by any outside earnings from alternate employment obtained by the Claimant while wrongfully removed from service);**

- 2) Any general lump sum payment or retroactive general wage increase 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 he was removed from service, or for 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) Health, dental, and vision care insurance premiums, deductibles, and co-pays that he would not have paid had he not been unjustly removed from service.””

**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 August 22, 1990 the Claimant entered service with the Carrier and established seniority in the Maintenance of Way Department where he was assigned to a Machine Operator position. On February 1, 2021 the Claimant used a backhoe to remove snow from the parking lot at the Columbus Depot. Thereafter he traveled in the backhoe to a job in Reeseville (WI), a distance of approximately ten (10) miles, on public roadway County Road BB. At approximately 1158 hours a driver in a Chevrolet Suburban (SUV), heading in the same direction as the Claimant, attempted

to pass using the left side of the roadway and, in doing so, sideswiped the backhoe resulting in a Motor Vehicle Accident. The Claimant reported the accident to the Carrier and Dodge County Sheriff's Office. The Sheriff's investigating officer cited the SUV driver for improper overtaking/passing left lane. The Claimant was not cited. The investigating officer's "Dodge County Incident Report" and "Wisconsin Motor Vehicle Crash Report" were forwarded to Carrier Police Officer Lysaght.

On February 3, 2021 Manager LaDoux - Workforce Planning & Support Group notified the Claimant to attend a formal investigation "to develop facts and circumstances and to place your responsibility, if any, in connection with your alleged involvement in a Motor Vehicle Accident that occurred while on duty February 1, 2021." The notice specifies the implicated provisions in the Engineering Safety Rule Book and General Code of Operating Rules. In another notice issued to the Claimant on the 3<sup>rd</sup> Manager LaDoux withheld the Claimant from service pending the formal investigation which the parties agreed to convene on February 9, 2021.

After considering the record established during the formal investigation, Assistant Chief Engineer Ingram notified the Claimant on February 24, 2021, that he was dismissed from service for violations of the Engineering Safety Rule Book, specifically - -

- E-2 Vehicles Used for Company Business  
("Operate all vehicles in a controlled and careful manner to prevent accidents, or collisions with other vehicles and objects.")
- E-26 Operating and Riding Track Units  
("Refer to Original Equipment Manufacturer [OEM] Operation and Maintenance manual for equipment operation specifications and safe operating requirements").

During the formal investigation the Carrier stated "E-2 Vehicles Used for Company Business" had been amended by General Order No. A-2 (January 1, 2021): "The driver of the vehicle is accountable for safe vehicle operation. The driver must take whatever actions necessary to avoid contact with other vehicles, objects or persons."

The Carrier states the Claimant violated E-2 and E-26 because he did not have the backhoe's dual brake pedals latched and locked and he was traveling in second gear of the quad-gear backhoe using the throttle to slow it. The Carrier asserts there was no operating manual in the backhoe. The Organization states these rules are not relevant as the Claimant was not cited by the Sheriff's investigating officer, thus, there is no causal nexus between the backhoe and accident. Also, the notice of formal investigation lacks specificity as it did not encompass these matters but focused solely on the Claimant's "involvement in a MVA" which was "no citation" and no culpability. In short, the Carrier improperly expanded the scope of the notice at the formal investigation.

On April 23, 2021 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 May 7, 2021 whereupon the parties proceeded to conference on September 1, 2021. With no resolution attained at conference the Organization filed its claim dated January 21, 2022. 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 as it prejudices the Claimant. The Board finds no due process violation as Rule 18 - Discipline and Grievances (Milwaukee Agreement) authorizes the Carrier to withhold an employee "out of service pending a hearing for serious rules infractions." The Carrier assessed the Claimant's involvement with the MVA as representing a "serious rules infraction" on a public roadway subject to a formal investigation.

Other concerns raised about denial of a fair and impartial hearing are without merit. The Board reviewed the transcript and finds no support for hearing officer bias. The conduct of the hearing and issuance of the decision by an official other than the hearing officer conforms is unexceptional and not prejudicial to the Claimant. The notice of formal investigation was sufficiently specific and not expanded during the formal investigation. The Dodge County Incident Report shows the Sheriff's Office assessed the accident from the perspective of jurisdiction and motor vehicle

**law whereas the Carrier assessed the accident from the industry perspective and emphasis on safety of personnel and property. No citation for the Claimant does not preclude or override the Carrier from initiating its investigation.**

**The Claimant acknowledged he did not latch and lock the dual brake pedals and was traveling in second gear using the throttle, not the brakes, to slow the backhoe. The Claimant's failure to latch and lock dual brakes is substantial evidence that he did not operate the backhoe in the safest manner when he operated the backhoe. This violates Engineering Safety Rule Book E-2 Vehicles Used for Company Business.**

**As for Engineering Safety Rule Book E-26 Operating and Riding Track Units, there is insufficient evidence in the record to sustain the Carrier's position. The Roadmaster testified there is a rule that requires a complete copy of the operator's manual in the backhoe and he "assumed" it was not in the backhoe. The evidence shows there was a manual in the backhoe and it was complete but for no front cover and no back cover. The Roadmaster could not explain how the no-covers manual resulted in the accident; he sidestepped this matter by testifying that it was not his decision to determine. This is the evidence - - an assumption and a disclaimer - - relied on by the deciding official to find the Claimant in violation of E-26. The assumption and disclaimer do not constitute substantial evidence. The Carrier's decision finding an E-26 violation is an abuse of managerial discretion.**

**Notwithstanding the Claimant's record - - six (6) incidents since 2019 and waiver executed in 2020 for two (2) discipline letters on an unrelated matter - - the abuse of managerial discretion shows that the Claimant's dismissal is a punitive penalty. On that basis, the Board rescinds his dismissal and reinstates the Claimant with seniority unimpaired but with no backpay.**

**AWARD**

Claim sustained in accordance with the Findings.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 10<sup>th</sup> day of March 2023.