

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44858
Docket No. MW-47045
23-3-NRAB-00003-220125**

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: (

(Dakota, Minnesota & Eastern Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed on Ms. B. Nelson, by letter dated July 14, 2020, for alleged violation of CP Policy HR#202 - Social Media Policy, Policy 1300 - Workplace Harassment, GCOR 1.6 - Conduct and GCOR 1.9 - Respect for Railroad Company was excessive, unduly harsh and in abuse of discretion (System File B-2034D-201/2020-00019293 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Nelson shall ‘... now be made whole by compensating her for all wage and benefit loss suffered, any and all expenses incurred or lost as a result of Round trip Travel not paid for the scheduled Hearing on June 15, 2020, and the alleged charge(s) be expunged from her personal employment record. Claimant must also be made whole for any and all other loss and this event be expunged from the Charged employees (sic) employment record.’”**

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.

CP Policy # HR 202 - Social Media Policy (March 7, 2018), Section 3.10., Monitoring Social Media states that “[t]he Company monitors social media for, among other reasons, the purpose of ensuring compliance with the Policy.”

Section 3.2., Acting as a Representative advises employees to include a disclaimer with their posts such as “[t]he postings on this site are my own and do not represent the views of Canadian Pacific.’ Posting of such a disclaimer does not, however, take away from the other obligations of an employee under the Policy.” In this regard, Section 3.3., Prohibited Content states that “[e]mployees using Social Media are prohibited from posting or sharing any content that could have a detrimental impact on the business, image or reputation . . . or that otherwise contravenes applicable Company policies and procedures[.]”

Other prohibitions appear in Section 3.6., Photographs, Video and Audio: “Employees are prohibited from posting, sharing, selling, or otherwise distributing on Social Media, any photographs . . . taken of, or on, CP property or otherwise connected to CP, that could reasonably be expected to have a detrimental impact on CP’s business, image, or reputation of CP, or any of its management, staff . . .” and “employees must obtain approval from Media Relations . . . prior to posting . . . on Social Media.”

The Claimant’s date of hire is May 7, 2018. On that date she established seniority in the Maintenance of Way and Structures Department. The Claimant occupied a Track Inspector position for approximately one (1) year when events giving rise to this claim occurred.

On May 29, 2020 the Claimant posted the following comment on her Facebook account page and a member of the public reported it to the Carrier's marketing and media group "Community Connect":

. . . just because he signed up to protect and serve doesn't mean it's still acceptable for him to be murdered in cold blood? What pisses me off is white kills black 'black lives matter.' Let's steal, burn people's livelihoods, and cause chaos and act like brainless monkeys. But black kills white, nothing happens, no media, no one cares. It's just what a cop signs up to do. What about black kills black DAILY . . . eh it's okay, right? Why don't ya put the weed down and open up ya eyes man.

In addition to the comment, there was a photograph on the Claimant's Facebook account page of a male wearing a vest with Carrier lettering.

On June 2, 2020 a representative of Human Resources (HR) shared the Claimant's posted comment with Chief Engineer Paradise whereupon the Chief Engineer and Roadmaster Workman met with the Claimant that afternoon. She acknowledged posting the comment. They provided her with the Social Media Policy (SMP) and discussed how her comment could possibly violate SMP Sections 3.2, 3.3 and 3.6 and reflect negatively upon the Carrier. A cautionary letter would be placed in her file. The Claimant acknowledged their concerns and agreed to delete her post. When she deleted the post, she also deleted the photograph. When the meeting concluded, Claimant returned to work.

After the meeting on the 2nd the Roadmaster reviewed the Claimant's Facebook account page and discovered two (2) comments she posted in response to East San Jose protestors:

RUN THEM OVER! They are trying to destroy your property and assaulting you[.]

Fuck this! I hope they meet the front of the train!

On the evening of the 2nd the Roadmaster contacted the Claimant and requested that she delete posts with comments and photographs that could associate her with the Carrier and portray it negatively. The Claimant deleted the comments

and her photographs of Carrier locomotives and a decal of the Carrier's logo on her personal vehicle (truck).

On June 8, 2020 Director of Track Pimentel notified the Claimant to attend a formal investigation and hearing - -

. . . for the purpose of [developing] the facts and circumstances and to place your responsibility, if any, in connection with your alleged misconduct, discourteous behavior and which may have subjected the Company to criticism while posting on Social Media (Facebook) on May 29, 2020. This indicates a possible violation of, but not limited to, the following rules:

- CP Policy HR # 202 - Social Media Policy
- GCOR 1.6 - Conduct
- GCOR 1.9 - Respect for Railroad Company

On June 9, 2020 Director Pimentel notified the Claimant that she was withheld from service "until the facts of this circumstance can be determined through a hearing."

On June 11, 2020 Director Pimentel issued an amended notice with a revised hearing date and, to the list of rules and policy possibly violated, added - -

- Policy 1300 - Workplace Harassment - Including Sexual Harassment

The formal investigation and hearing convened on June 15, 2020. After considering the record established during the hearing, Assistant Chief Engineer Ingram notified the Claimant on July 14, 2020 that she was dismissed from service based on the charged conduct which violated the specified rules and policies.

On September 8, 2020 the Organization appealed the dismissal stating the Carrier denied the Claimant a fair and impartial hearing, failed to prove the charges and imposed harsh and excessive discipline. The Carrier denied the appeal on November 6, 2020 whereupon the parties proceeded to conference on July 21, 2021.

With no resolution attained at conference the Organization filed its claim dated October 29, 2021. The claim is before the Board for final adjudication as it was handled timely and properly at all stages of appeal up to and including the Carrier's highest appellate officer. The Board's findings are drawn from the on-property record and each party's position and argument in its submission including awards submitted in support thereof.

The Organization asserts that the Carrier violated Rule 34 - Discipline and Investigations by not providing the Claimant a fair and impartial hearing. This assertion is without merit. The charging official not testifying is unexceptional in this forum and not established as prejudicial to the Claimant. The initial hearing notice referenced the Claimant's possible violations of "but not limited to" rules and a policy; prior to the hearing the Carrier added to the notice a possible violation of Policy 1300 - Workplace Harassment. The transcript establishes no coaching or collaborating among witnesses while sequestered prior to and during the hearing. When the hearing convened, the conducting officer instructed witnesses that they were "prohibited from discussing testimony . . . or conducting any other conversation regarding these proceedings while sequestered." Finally, the conducting officer possessing typed questions prior to the start of the hearing is not shown to be a product of discussions with witnesses about the claim.

The Organization asserts that the Roadmaster's and Chief Engineer's meeting with the Claimant on June 2, 2020 constituted coaching that was documented with a letter of caution placed in the Claimant's personnel record, thus, imposing dismissal based on the same discussion is double jeopardy. The Board finds no double jeopardy; a letter of caution is not discipline under Hybrid Discipline and Accountability Guidelines.

In this forum, the Carrier's decision that the Claimant's conduct violated the charged rules and policies is assessed for substantial evidence. When there is substantial evidence, the Board's authority is limited and does not second guess the decision including penalty unless it involves an abuse of managerial discretion, arbitrary and capricious or the penalty imposed is punitive as in harsh and excessive.

The Board finds that the Claimant posted the comment dated May 29, 2020 as well as two (2) comments about East San Jose protestors. The Carrier asserts that the Claimant's comments and the photograph on the Claimant's Facebook page with a

male wearing a vest with Carrier lettering as well as photographs of the Claimant with Carrier locomotives are sufficient to establish the Claimant as an employee and associate her comments with the Carrier causing a detrimental impact on the Carrier's business, image or reputation.

Undisputed is that the photograph of the male wearing the vest with Carrier lettering is dated January 2018 which pre-dates the Claimant's hire date (May 2018) with the Carrier, therefore, the Claimant would not have been aware of or subject to the SMP when she posted the photograph. The Claimant does not appear in the picture, thus, by itself, the picture does not establish the Claimant as a Carrier employee. As for photographs of the Claimant standing next to or in the vicinity of Carrier locomotives and a decal with the Carrier logo on her truck, there is no nexus showing a detrimental impact on the Carrier's business, image or reputation. The Claimant testified the photographs were taken off-property during off-duty hours.

HR Business Partner Cobb testified to explain Policy 1300 - Workplace Harassment and the SMP whereas the Roadmaster testified as a percipient fact witness. The Roadmaster stated that the Claimant's posted comments resulted in a detrimental effect on the Carrier's reputation, image or business but he could not identify that effect other than framing it as a negative portrayal of the Carrier. He also testified the posted comments are open to interpretation. The Roadmaster and HR Business Partner referred to other comments, as well as photographs, that identify or establish the Claimant as a Carrier employee; however, those comments and photographs are not in the record of this proceeding. The Board finds, based on the testimony and evidence in the record of this proceeding, that the Claimant did not link or associate her comments to the Carrier.

The Claimant did not violate the SMP as charged; however, her comments "hoping" for harm or violence to protesters is problematic in the context of Policy 1300 - Workplace Harassment. Unlike the comment of May 2019 reported to the Carrier's media group "Community Connect" these comments were not reported by the public but discovered by the Roadmaster after the meeting on June 2, 2019 when he searched the Claimant's Facebook account page. As requested by the Roadmaster on the evening of the 2nd the Claimant agreed to delete posts that could be construed adversely towards her and the Carrier.

Regarding the June 2 meeting the Board notes the Chief Engineer and Roadmaster articulated their concerns to the Claimant; she acknowledged their concerns and deleted the comment (May 2019). She recognized the Roadmaster's concerns about posts and photographs when he contacted her on the evening of the 2nd whereupon she deleted posts and photographs that could establish her as a Carrier employee and negatively reflect on the Carrier.

The Claimant corrected her posts to conform her conduct with the Carrier's expectations as to policies and rules. This is a mitigating consideration construed favorably for the Claimant. In the circumstances of this claim, the Claimant's dismissal is a harsh and punitive penalty. The implicated policies and rules do not mandate dismissal. In lieu of dismissal, an appropriate measure is a letter of caution addressing the posts and photographs as possibly violating the SMP, Policy 1300, GCOR 1.6 - Conduct and GCOR 1.9 - Respect for Railroad Company. The cautionary letter reinforces corrective behavior and serves to document this situation.

The Board directs the Carrier to rescind the Claimant's dismissal, issue the letter of caution and reinstate Claimant with back pay.

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 10th day of March 2023.