

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44956  
Docket No. MW-46697  
23-3-NRAB-00003-210694**

**The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.**

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

**PARTIES TO DISPUTE: (**

**(Montana Rail Link, Inc.**

**STATEMENT OF CLAIM:**

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

- (1) The discipline (dismissal) imposed upon Mr. L. Estell, by letter dated August 27, 2020, for alleged violation of Montana Rail Link General Code of Operating Rules 1.1 and 10.3.2 in connection with an incident when you reported you were in the clear and left your boom over the main line at Mile Post 43.32 on July 29, 2020 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File MRL-307-Z MRL).**
- (2) As a consequence of the violation referred to in Part (1) above:  
‘... we are requesting that Mr. Estell be returned to service and his record be cleared of the charges and proceedings of this fact-finding session.**

**We further request that Mr. Estell be made whole for any loss of wages, loss of overtime, and fringe benefits, including but not limited to, insurance, railroad retirement credit, flex time, etc.”**

**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 has established and maintained seniority in the Carrier's Maintenance of Way Department. At the time of the incidents here, he had approximately 18 years of seniority.

On March 19, 2020, the Claimant was working as the Boom Truck Driver on a M&W crew with Foreman Don Smith and Track Laborer Ryan Buswell, assigned to tamp the cross-ties at a public road crossing near Elliston, Montana.

Foreman Smith had acquired a "Track and Time" work authority from the Dispatcher and before commencing work, provided a job briefing to the Claimant and the other crew member.

Shortly before 1:00 PM, when the crew was roughly five minutes over the time provided for in the work authority, the Foreman notified the crew that they were probably holding up a train and instructed his crew to clear the tracks in preparation for train movement. The crew member and the Foreman removed tools from the tracks and went to sit in the cab of the boom truck. The Claimant notified his Foreman that he was clear of the tracks and the Foreman released the work authority. The crew ate their lunch sitting in the cab of the boom truck.

A short time later, a passing locomotive struck the boom of the crew's truck that had not been cleared and was fouling the tracks. Both the boom truck and the locomotive were damaged. The crew members were bounced around in the boom truck but were not injured.

On March 20, 2020, the Claimant was given notice of an investigation in connection with the following charge:

Arrange to attend a fact finding hearing...for the purpose of determining your responsibility, if any, when you allegedly failed to hold a job briefing with your crew prior to fouling the track, and allegedly

left the boom out over the main line at milepost 43.34, on March 19, 2020.

The above charge may be a violation of General Code of Operating Rules 1.1 and 10.3.2, which govern Montana Rail Link employees per Item 11 in the All Subdivision Special Instructions of Timetable #19. Your past discipline record will be taken into account in assessing discipline, if any.

After a formal investigation on July 29, 2020, the Claimant was found in violation of Montana Rail Link General Code of Operating Rules 1.1 and 10.3.2, when he reported that he was in the clear without equipment being in the clear and left the boom out over the main line at milepost 43.32. The Claimant was dismissed from the Carrier's service.

In a letter dated October 23, 2020, the Organization appealed the Carrier's discipline. The Carrier responded to and denied the appeal in a letter dated December 16, 2020. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Carrier contends that it has presented substantial evidence of the Claimant's violation of two critical operating rules in that the Claimant informed the Foreman that he was clear of the track, causing the Foreman to release the work authority when the boom truck that he was responsible for was still fouling the track. A passing locomotive struck the boom on the Claimant's truck, causing serious property damage to both the truck and locomotive. The Carrier contends that it has demonstrated the Claimant's violation of GCOR 1.1 and 10.3.2 which read:

**GCOR Rule 1.1 Safety.** Safety is the most important element in performance of duties. Obeying the rules is essential to job safety and continued employment.

**GCOR Rule 10.3.2. Protection of Machines, Track Cars, or Employees.** Machines, track cars, or employees will receive track and time in the same manner as trains. Machines, track cars, or employees must be clear of the limits before the employee granted track and time releases the authority.

The Carrier contends that the Claimant admitted at the investigation that his affirmative answer to the crew Foreman's question caused the Foreman to believe,

wrongly, that the boom truck was clear of the tracks. The Carrier contends that the Claimant also admitted that he did not look up to confirm that the boom was clear before answering the Foreman. The Carrier contends that where there is an admission of guilt, there is no need for further proofs.

The Carrier contends that the Claimant was afforded a fair and impartial hearing. The Carrier contends that it timely provided the transcript of the proceedings to the Organization. The Carrier contends that the roles of the Carrier's officers did not wrongly overlap in the disciplinary process. The Carrier contends that the Organization failed to show any evidence that the Claimant's due process rights were prejudiced in any way.

The Carrier contends that dismissal was appropriate given the circumstances, as the Claimant was found to have violated two critical operating rules, and in the two years prior to the incident, the Claimant had received sixty-five days' worth of suspension from three incidents, one which involved on-track safety.

The Organization contends that the Carrier failed to provide the Claimant with a fair and impartial investigation. First, the Organization contends that it did not timely receive the transcript from the investigation, as required by Article 13, hindering the Organization's defense of its member. Second, the discipline was rendered by an individual who was not present at the fact finding and who served as the charging officer.

The Organization contends that the Carrier failed to present substantial evidence of the Claimant's violations. The Organization contends that the Claimant was rushed by the Foreman as they had already exceeded the Foreman's track authority by five minutes when he instructed them to clear the tracks. The Organization contends that the boom truck's warning system had been altered, which if left alone, could have prevented the incident.

The Organization contends that the discharge was excessive, harsh and unwarranted. The Organization contends that the Foreman rushed the Claimant in order to abandon his track authority. The Organization contends that the Carrier failed to consider Claimant's 18 years of service.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier's judgment and decide the matter according to what we might have done had

the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against the Claimant.

The Carrier has demonstrated with substantial evidence that the Claimant was responsible for the operation of the boom truck and failed to notice that the boom was still fouling the tracks when he told the Foreman that they were clear. The Claimant admitted both of these facts. Where there is an admission of guilt, there is no need for further proof. This Board finds that sufficient evidence exists to support the findings against the Claimant.

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit. The Carrier provided a complete and accurate copy of the transcript within a reasonable timeframe, as required by Article 13, § B of the parties' Agreement. The roles of the Carrier's officers did not overlap so as to deprive the Claimant of a fair and impartial hearing.

With respect to the dismissal, this Board finds no reason to disturb the penalty imposed by the Carrier. The fact that the Foreman needed the Claimant to perform his duties quickly did not excuse the Claimant's failure to perform them safely. The Claimant's disciplinary record contains recent previous serious discipline, including for on-track safety violations. The discipline was not excessive.

**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 24<sup>th</sup> day of May 2023.