

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44957  
Docket No. MW-47086  
23-3-NRAB-00003-210632**

**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. J. Miller, by letter dated July 28, 2020, for alleged violation of Montana Rail Link On-Track Safety Rules (OTS) 1.52.8, 1.52.1, 6.0 and 6.3A in connection with an incident when the conveyor belt on the undercutter struck a Boeing Fuselage in Weeksville, Montana, Mile Post 13.4 on May 27, 2020 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File MRL-304-Z MRL).**

**(2) As a consequence of the violation referred to in Part (1) above:**

**‘... we are requesting that Mr. Miller be returned to service and his record be cleared of the charges and proceedings of this fact-finding session.**

**We further request that Mr. Miller 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 was employed in the Carrier's Maintenance of Way Department and had eleven years of seniority at the time of the incident. On May 27, 2020, the Claimant was assigned as a Machine Operator and was operating an undercutter on the Mainline between Plains and Eddy.**

**At the end of the workday, the crew cleared the Mainline. The Claimant operated his undercutter onto the back track at Weeksville, MP 13.4. The Claimant failed to stow and lock the undercutter conveyor belt boom but told the Foreman that he was clear. The Foreman released his track authority and train traffic resumed. When a train carrying a Boeing fuselage passed, the fuselage was struck by the undercutter's conveyor belt boom, causing the train to stop. An inspection revealed that the undercutter conveyor belt boom had scraped the front of the fuselage and became wedged into the wider portion of the fuselage. When questioned, the Claimant admitted that he had not fully retracted and locked the conveyor belt.**

**On June 2, 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, on May 27, 2020 at 1615 hours you allegedly failed to retract the conveyor belt back into the undercutter and lock the belt, resulting in fouling the main line and side swiping the H-LAUPAS826a Boeing Fuselage in Weekville, Mile Post 13.4.**

**The above charge may be a violation of On-Track Safety Rules (OTS) 1.52.8, 1.52.1, 6.0, and 6.3A.**

**After a formal investigation on July 8, 2020, the Claimant was found in violation of Montana Rail Link On-Track Safety Rules (OTS) 1.52.8, 1.52.1, 6.0, and 6.3A, and was dismissed from the Carrier's service.**

**In a letter dated September 17, 2020, the Organization appealed the Carrier's discipline. The Carrier responded to and denied the appeal in a letter dated November 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 major operating rules. The Carrier presented photos of the damages caused by the collision between the undercutter and the fuselage on the passing train. In addition, the Claimant admitted that he told the Foreman that the undercutter was clear of the Main track, causing the Foreman to release his Track and Time authority. The Carrier contends that once the Claimant admitted his guilt, it had satisfied its burden of proof.**

**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 in the disciplinary process did not excessively overlap. The Carrier contends that the Organization failed to present evidence that the Claimant's due process rights were prejudiced in any way.**

**The Carrier contends that the discharge was not excessive, arbitrary, or unwarranted. The Carrier contends that the Claimant was sufficiently trained on the undercutter and although he was not fully qualified on the undercutter, he was well aware of the need to place his equipment fully clear of adjacent tracks. The Carrier contends that any investigation done into the cause of the collision and steps taken to avoid a similar one in the future do not excuse the Claimant's failure to attend to his responsibilities. Finally, the Claimant's disciplinary record is poor.**

**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 prove the charges leveled against the Claimant with substantial evidence. The Organization contends that the Carrier failed to show that the undercutter was too close to the tracks, which caused the collision. Further, the Organization contends that the undercutter did not have a warning system to alert when the conveyor belt boom was not fully retracted. The Organization contends that the Carrier failed to prove that the Claimant was fully responsible for the incident or in violation of the Carrier's rules.

The Organization contends that the discharge is excessive, arbitrary, and unwarranted. The Organization contends that the Carrier failed to consider the mitigating factors of the Claimant's lack of training at the time of the incident. Furthermore, the Claimant was honest and forthright throughout the process.

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 Claimant admitted that he did not notice the conveyor belt boom was still fouling the tracks when he told the Foreman that his equipment was clear. The collision caused the undercutter conveyor belt boom to become wedged into the fuselage, proving that the Claimant's oversight caused the damage. Thus, the Carrier has demonstrated that the Claimant violated its rules.

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 in such a way 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 Claimant performed his duties in an unsafe manner, causing substantial damage to the Boeing's fuselage and the Carrier's equipment. The Claimant's disciplinary record does not justify a lesser penalty. 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.