

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45247
Docket No. MW-47391
24-3-NRAB-00003-220439**

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

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

PARTIES TO DISPUTE: (

(Dakota, Minnesota & Eastern Railroad Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissed from CP effective immediately) imposed on Mr. K. Sewell, by letter dated September 11, 2020, for alleged violation of CP Personal Travel Under COVID-19 Policy HR 207, effective June 10, 2020, US Rulebook for Engineering Employees: 1.6 Conduct and US Rulebook for Engineering Employees: 1.13 Reporting and Complying with Instructions was in violation of his express due process rights, not pursuant to a fair and impartial hearing, and imposed even as the carrier failed to provide adequate evidence to apply such harsh discipline (System File Z-2034D-702/2021-00020332 DME)**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant K. Sewell shall now *** have his personal record cleaned of the excessive charges and dismissal, as well be made whole for all loss incurred as a result, such as, but not limited to wages, retirement, months of service under RRB, reimbursement for loss of health and welfare benefits, or expenses incurred throughout the discipline process and subsequent excessive discipline. This includes travel time and mileage to and from the hearing location and any additional expenses involved.”**

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.

Claimant K. Sewell established and maintained seniority in the Carrier's Maintenance of Way and Structures Department. On the date giving rise to this dispute, Claimant was assigned as a carpenter. The Claimant began service with the Carrier on March 18, 2019.

As noted in Part (1) of the Statement of Claim, Carrier developed a Covid-19 Personal Travel Policy identified as HR 207. That policy was amended two times in March of 2020 and amended for a third time effective as of June 10, 2020. Provisions set forth on June 10, 2020 of the amended policy are applicable to the instant dispute, and most relevant to the factual background here are the following sections of the policy:

1.0 Purpose

CP continues to monitor developments in the impact and transmission of coronavirus (COVID-19) and strives to follow the available best practices recommended by governing health authorities.

In the interest of employee health and safety, CP is implementing the following precautions, which will restrict employees' return to work following personal travel, as may be updated from time to time.

4.0 Obligations Relating to Personal Travel for U.S. Employees

4.1.4 Employees are required to provide prompt pre-disclosure to their Immediate manager/supervisor of any plans for personal travel if:

- Intending to travel to a Level 3 zone;
- Currently travelling in a Level 3 zone;
- Returning from a Level 3 zone or if they have returned from a Level 3 zone within the last fourteen (14) days; or

- Travel plans involve interstate travel that will require a period of self-isolation upon return.

4.1.5 Upon disclosure of personal travel under Section 4.1.4, the Manager/supervisor shall advise their Human Resources Business Partner, who will collect and document the following information to Ensure appropriate actions are taken under this policy.

- ***
- Travel Destination, Situation and Status including stop/layover
- Reason for Travel
- Date Returning/Returned to U.S. or state of residence

5.0 Return to Work Upon Expiration of Self-Isolation Period

Employees are required to obtain clearance from Disability Management, Health Services or Human Resources, as applicable and as directed, prior to returning to the workplace.

6.0 Approval Process

Exemptions for extenuating circumstances will be subject to approval by the Chief Risk Officer or Vice President, Human Resources, and will be determined on a case-by-case basis.

7.0 Compliance

Non-compliance with this policy may result in discipline up to and including termination for just cause.

In an Initial Incident Report filed by the Claimant at Carrier's Chillicothe Depot, Kansas City subdivision dated August 4, 2020, the Claimant stated that on Friday, July 10, 2020, he attended a family dinner along with his sister who, three (3) days later, Monday, July 13, 2020, tested positive for Covid-19. The Claimant asserted he was never within six (6) feet of his sister during the family dinner the evening of July 10, 2020, nor was he exposed to a cough. The Claimant further stated that after learning his sister tested positive for Covid-19, he contacted Carrier's Pandemic Team the evening of July 13th and was advised by the team to self-isolate for fourteen (14) days, a period the Claimant noted that started July 14 and ended July 28, 2020. However, the Claimant explained that within this fourteen (14) day self-isolation period, fell his

wedding that had been pre-planned since January of 2020 and vacation days between the dates of July 19 through July 22, 2020 had been approved by Roadmaster, Ben Harter in February of 2020. The Claimant further explained the wedding was to take place in Destin, Florida which required his traveling out-of-state and that he would be leaving on July 16 and returning sometime the following week.

The Claimant explained in the Incident Report that he and others left for Florida on July 15th, drove to Birmingham, Alabama where they stayed over in a hotel that night and the next day, they resumed driving, arriving at Destin midday on July 16th. According to the Claimant that since the evening of July 10th, he had not been in a room or a building with anyone that had tested positive for Covid-19. However, on July 20th the Claimant related he had been near someone while on the beach that tested positive for Covid-19 but, averred he not been exposed to any symptoms. The Claimant related he and others left Florida the next day, July 21st, drove for fifteen (15) hours and returned home. The Claimant asserted he had not driven in a car with anyone that tested positive for Covid-19, either going to or leaving Florida nor, for that matter, he had not been with anyone that tested positive for Covid-19 for the entirety of the duration of his self-isolation.

The Claimant further explained that on July 28th, marking the end of his self-isolation, he returned to work. However, after talking with the Pandemic Team on this day, and relating to them his encounter on the Florida beach with someone who had tested positive for Covid-19 on July 20th, he was ordered by the team to self-isolate for a second time for another period of fourteen (14) days. The Claimant complied with this order and returned to work at the end of this fourteen (14) day period on August 4, 2020.

By letter dated August 17, 2020, the Claimant was notified by Carrier of a Formal Investigation and hearing the purpose of which is to develop all facts and circumstances in connection with your time off in isolation and personal travel during the timeframe from Monday, July 13, 2020 through Tuesday, August 3, 2020. The Claimant was apprised the investigation was related to alleged violations he committed, but not limited to the following rules:

- CP Personal Travel Under COVID-19 Policy HR 202 (sic), effective June 10, 2020
- US Rulebook for Engineering Employees: 1.6 Conduct
- US Rulebook for Engineering Employees 1.13 Reporting and Complying with Instructions

By letter dated September 11, 2020, Carrier informed the Claimant that upon its review of the investigation transcript, it determined the hearing record contains substantial evidence and proof that he violated all three (3) rules specified in the charge letter dated August 17, 2020. As a result of its determination, Carrier dismissed the Claimant from its employ effective immediately.

In general, the period of time encompassing the events that occurred which led to the Claimant's dismissal was a period approximately four (4) months after the start of the pandemic for the country and continued for the next two (2) years, well past the time the Claimant was dismissed from service in September, 2020. There is no dispute that this entire period of the pandemic was one of great uncertainty and one in which authorities at the highest level of public health were stymied as to the best way to proceed in order to stem severe sickness and death among all inhabitants comprising the country's population. The Carrier followed the then perceived best practices as set forth by guidelines established by the Center for Disease Control and the World Health Organization, and like other business enterprises, promulgated policies to protect all employees comprising its workforce. The Board perceives that Carrier's Pandemic Policy, which lies at the heart of this claim, was overall reasonable and just but, finds its implementation in the instant case, not to have considered relevant extenuating circumstances which would have resulted in less severe disciplinary action. Primary among such relevant extenuating circumstances is the fact that prior to the onset of the Pandemic which, in general by consensus began in and around March of 2020, Carrier in February, 2020 approved the Claimant's request for vacation days from July 19 through July 22, 2020, days that were planned in advance to accommodate the Claimant's wedding. As this approval occurred approximately one month prior to the onset of the pandemic and notwithstanding the pandemic's occurrence, Carrier did not withdraw this approval even after it promulgated the first iteration of its Pandemic Travel Policy in March of 2020, applicable to its United States Employees. By not withdrawing said approval whether as a result of oversight on its part or some other reason, it tacitly agreed to the Claimant's travel plans which involved travel to Florida which geographic location in July, 2020 was deemed a Level 3 zone. Even after the Claimant complied with Carrier's Pandemic Travel Policy in reporting to its Pandemic Team he had been in the presence of his sister who had tested positive for COVID-19 and ordered him to self-isolate, Carrier did not withdraw its approval of the Claimant's vacation days nor did it explicitly order him not to travel during this self-isolation period of fourteen (14) days that encompassed the Claimant's vacation days. The Board finds the only valid violation by the Claimant of Carrier's Pandemic Policy, HR 207, is the fact that he failed compliance with the policy when he did not timely report to Carrier his second encounter with a person that tested positive for COVID-19 until eight (8) days later when he reported to work at the end of his first ordered self-isolation period.

Based on the foregoing analysis, the Board finds the discipline of dismissal to be excessive under the circumstances and therefore orders Carrier to reinstate the the Claimant to his position of Carpenter. However, due to the Claimant's failure to comply with HR 207 by failing to timely report his second encounter with a person that tested positive for COVID-19, the Claimant shall be returned to duty without back pay or such other benefits he would have received had he not been dismissed from service.

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 28th day of March 2024.