

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42378  
Docket No. MW-42633  
16-3-NRAB-00003-140323**

**The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
PARTIES TO DISPUTE: (  
(BNSF Railway Company (former Burlington  
( Railroad Company)**

**STATEMENT OF CLAIM:**

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

- (1) The discipline [Level S thirty (30) day record suspension and three (3) year review period] imposed upon Mr. D. Anderson by letter dated March 22, 2013, for alleged violation of MOWSR 12.5 Seat Belts and MOWSR S-12.1.1 Operation of Motor Vehicles in connection with charges of alleged ‘. . . failure to wear your seatbelt while operating BNSF vehicle 22521 on February 3, 2013 at approximately 09:34 hours, February 4, 2013 at approximately 05:43 hours, and February 7, 2013 at approximately 5:59 hours, at/or near miles posts 133 to 166, while assigned as a Track Inspector, on gang TINIS1450. \*\*\*’was without just cause, excessive and in violation of the Agreement (System File C-13-D040-17/10-13-0367 BNR).**
- (2) The discipline (Dismissal) imposed upon Mr. D. Anderson by letter dated March 22, 2013 for alleged violation of MOWSR 12.6 Passengers and MOWSR S-12.1.1 General Requirements in connection with charges of alleged ‘. . . transporting of unauthorized persons in BNSF company vehicle 22521 on February 12, 2013, at approximately 05:33 hours, while assigned as a Track Inspector on TINS1450. \*\*\*’ was without just cause, excessive and in violation of the Agreement (System File C-13-D070-8/10-13-0365).**

- (3) The discipline (Dismissal) imposed upon Mr. D. Anderson by letter dated March 22, 2013 for alleged violation of MOWOR 1.10 Games, Reading, or Electronic Devices, MOWSR S-12.1.1 Operation of Motor Vehicles and MOWSR S-12.5 Seat Belts in connection with charges of alleged ‘. . . use of electronic devices while operating BNSF vehicle 22521 at/or near mile post 136 on February 7, 2013 at approximately 5:59 AM, while assigned as a Track Inspector, on gang TINS1450. \*\*\*’ was without just cause, excessive, on the basis of unproven charges and in violation of the Agreement (System File C-13-D070-9/10-13-0366).
- (4) The discipline (Dismissal) imposed upon Mr. D. Anderson by letter dated March 22, 2013, for alleged ‘. . . failure for you and your unauthorized passenger to wear seat belts while operating BNSF vehicle 22521 at approximately 0533 AM, Tuesday, February 12, 2013, while assigned as a Track Inspector on gang TINS1450.’ was without just cause, excessive, on the basis of unproven charges and in violation of the Agreement (System File C-13-D070-10/10-13-0368).
- (5) The discipline (Dismissal) imposed upon Mr. D. Anderson by letter dated March 22, 2013 for alleged violation of MOWOR 1.10 Games, Reading, or Electronic Devices and MOWSR S-12.1.1 Operation of Motor Vehicles in connection with charges of alleged ‘. . . use of electronic devices while operating BNSF vehicle 22521 at approximately 08:19 hours as indicated by DriveCam Event 26489 on February 10, 2013, while assigned as a Track Inspector on Gang TINS1450.’ was without just cause, excessive, on the basis of unproven charges and in violation of the Agreement (System File C-13-D070-11/10-13-0369).
- (6) As a consequence of the violation referred to in Part (1) above, the Carrier shall ‘. . . take the actions necessary to have this discipline removed from Mr. Anderson’s record immediately.’
- (7) As a consequence of the violation referred to in Part (2) above, the Carrier shall ‘. . . immediately take the actions to remove this Dismissal from Mr. Anderson’s record in accordance with Rule 40 of the current Agreement.

- (8) As a consequence of the violation referred to in Part (3) above, the Claimant's dismissal shall ' . . . be removed immediately in accordance with Rule 40 of the current Agreement. \*\*\*'
- (9) As a consequence of the violation referred to in Part (4) above, the Carrier shall ' . . . immediately take the actions necessary to remove this Dismissal from the record of Mr. Anderson in accordance with Rule 40 of the current Agreement.'
- (10) As a consequence of the violation referred to in Part (5) above, the Carrier shall ' . . . immediately take the actions necessary to remove this Dismissal from Mr. Anderson's record in accordance with Rule 40 of the current Agreement.'"

**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.

During February 2013 Claimant Anderson worked as a track inspector and operated a BNSF vehicle. The Carrier alleges that on February 3, 4 and 7 he was seen driving at excessive speed without wearing a safety belt. As a result of these violations he was issued a Level S 30-day record suspension. On February 7, DriveCam technology captured an image of him driving at 61 mph while using an electronic device. When questioned, he could not recall whether he was using an electronic device. On February 10, the DriveCam showed him using an electronic device while travelling at 57 mph on snow and ice covered roads. When questioned, he did not recall what was in his hand. On February 12, the Drive Cam recorded his vehicle moving at 17 mph with a young child as an unauthorized passenger. Neither

the Claimant nor the child were wearing seatbelts. The Claimant admitted neither he nor his child had their seatbelts on.

Following the Hearing and Investigation he was found guilty of “multiple serious violations committed during the same tour of duty” and received both his Level S suspension and dismissal on March 22, 2013.

It is the Carrier’s position that under certain circumstances, people can be transported in company vehicles if safety rules are met. In this case, the child was not wearing a seat belt so the transport was not authorized. During the investigation, the Claimant admitted to multiple safety violations.

At the outset, the Organization argues Claimant did not admit to any rules violation involving cell phone use or transporting an unauthorized passenger. The photographs submitted by the Carrier at the hearing do not establish that he was holding a cell phone. Indeed, his manager admitted he could not tell from the picture what the Claimant was holding. The Organization asserts the Carrier is relying on a screen shot from a video and the Organization has been denied the video.

The Organization also claims there was no fair and impartial investigation in this case. The Organization requested all information to be used at the hearing including video clips, but they were not provided. This failure was prejudicial because the video may have shown what the Claimant held in his hand. Holding five separate investigations denied him due process because there was no avenue for progressive discipline. Third Division Award 41871 was a similar case where the Carrier issued a series of record suspensions and had four investigations. The piling on was found to constitute a denial of progressive discipline in that there was no opportunity to learn from mistakes. The situation was identical to the one here. There should have been one investigation with an opportunity for progressive discipline. Because the Carrier did not meet its burden regarding cell phone usage and transporting the child, the only charge left involves seat belts, an offense that would hardly require dismissal.

The Board has carefully reviewed all the evidence. The failure of the Carrier to provide the Organization with a copy of the video clip for analysis undermined any opportunity the Organization might have had to establish that the Claimant was not holding a phone. The appropriate result is for the Board to interpret the

evidence against the Carrier and find that there is no showing that the Claimant was driving while holding an electronic device.

The evidence shows that the Carrier issued four separate disciplinary actions on March 22, 2013. Clearly, the Claimant was denied any opportunity to learn from his first disciplinary action before the next one landed. This constitutes a denial of progressive discipline. Progressive discipline is essential to disciplinary fairness; it recognizes both the value of a trained and qualified employee and the importance of learning from mistakes and complying with an employer's rules. The Claimant's violations were small in nature, involving the wearing of seat belts. None of the violations, standing alone, would warrant treatment as a serious offense. It is only when the Carrier piles on the violations without any opportunity for improvement that it is able to argue in favor of a cumulatively serious violation.

The Board is not persuaded by the Carrier's position. Employees must be given the opportunity to correct their mistakes and continue employment. Allowing an employee to violate a minor rule without sanction or advisement sends a message that such behavior will be tolerated. If, while allowing such a message to be digested, the Carrier is affirmatively accumulating evidence of violations and withholding action until it has enough for serious violation, it acts in an arbitrary, capricious, discriminatory and unreasonable fashion. Dismissal cannot be justified under the parties' agreement if, as here, there has been a blatant denial of progressive discipline.

Accordingly, the claim is granted in part. The Carrier shall reinstate the Claimant to service, subject to its return to work policies, with seniority, vacation and all other rights unimpaired and make him whole for all time lost as a result of this incident. Lost overtime shall be compensated at the overtime rate. His compensation shall be reduced by any interim earnings he may have had from outside employment. The Claimant shall be reimbursed for medical benefits to the extent that he provides the Carrier and the Organization with receipts of medical expenditures that would have been covered but for the lapse in his Health and Welfare Benefits. The Parties shall then jointly determine what co-pays, premiums and other medical costs would otherwise have been covered by his insurance had he continued in the Carrier's employ uninterrupted by dismissal. Any other claims to compensation not specifically granted in this award are hereby denied.

The discipline taken by the Carrier shall be replaced with a Standard Formal Reprimand with a 1-year review period.

**AWARD**

Claim sustained in accordance of 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 30th day of August 2016.