

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43848
Docket No. SG-44961
19-3-NRAB-00003-180400**

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

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of J.R. Loudermilk, for reinstatement to service with compensation for all time lost, including overtime pay, with all rights and benefits unimpaired, and with any mention of this matter removed from his personal record, account Carrier violated the current Signalmen’s Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of dismissal against the Claimant, without providing a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on January 24, 2017. Carrier’s File No. 35-17-0007. General Chairman’s File No. 17-012-BNSF-121-T. BRS File Case No. 15785-BNSF. NMB Code No. 173.”

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 held the position of Signal Maintainer in the Carrier's service. On December 21, 2016, the Claimant was given notice of an investigation in connection with the following charge:

"An investigation has been scheduled...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with your alleged use of a hand-held electronic device while vehicle number 26628 was in motion. This incident occurred on December 16, 2016 at approximately 1442 hours. DriveCam event number ESHZ20271. The date BNSF received first knowledge of this alleged violation is December 19, 2016."

After a formal investigation on January 24, 2017, Claimant was found in violation of MWOR 1.10 Games, Reading, or Electronic Devices and MWOR 1.6 Conduct, and was dismissed from the Carrier's service.

On December 19, 2016, Signal Supervisor Marco Delgado received an email that on December 16, 2016, the Claimant's DriveCam had been triggered by the Claimant hitting his brakes abruptly to steer his vehicle away from the stopped traffic in front of him. The DriveCam video recorded the Claimant driving BNSF vehicle 26628 while looking down at his right thigh and then suddenly looking up. The Carrier concluded that the Claimant was using his cell phone while driving. The Claimant was dismissed from service for his second serious (Level S) violation during an existing review period.

The Carrier contends that Claimant was provided a fair and impartial hearing, despite the video not being made part of the record, as the video was played at the hearing for the Hearing Officer and the Carrier cannot legally release copies of the full video.

The Carrier contends that it has provided substantial evidence of Claimant's violation of MWOR 1.10, Games, Reading, or Electronic Devices, which reads,

MWOR 1.10 Games, Reading, or Electronic Devices

While driving a BNSF owned or rented vehicle (off rail), do not:

- **Use cellular or mobile telephones, or similar hand-held electronic devices for voice communications in other than hands-free mode.**
- **Manually enter or read text from cellular or mobile telephones, or similar hand-held electronic devices (e.g. emailing, performing any electronic text retrieval or entry, accessing a web page, etc.).**

- **Employees must be aware of and comply with any local, state or federal laws governing use of wireless equipment while driving (e.g. laws banning use of wireless phone while driving)."**

The Carrier contends that the DriveCam video shows the Claimant looking down at his right thigh, which he admitted was where he was holding his phone, and entering text while driving a BNSF vehicle. The Carrier contends that because of the Claimant's distracted driving, he was forced to abruptly brake and steer sharply away from stopped traffic to avoid a collision. The Carrier contends that the Hearing Officer who observed the Claimant's testimony was in the best position to judge his credibility when denying this conduct.

The Carrier contends that the penalty of dismissal is not harsh or excessive, because the Claimant already had a serious violation in the review period.

The Organization contends that the Carrier's case was fatally flawed when it failed to provide the Organization with a complete record of the evidence adduced at the Investigation. The Organization contends that since the Claimant was dismissed solely on the basis of what the video shows, it was essential to provide access to the entire video throughout the appellate process. The Organization contends that the Claimant's due process rights were violated and the discipline cannot stand.

The Organization contends that the Carrier has failed to demonstrate with substantial evidence that the Claimant violated MWOR 1.10. The Organization contends that the Claimant testified that he was not using his cell phone, but that he was holding it in his hand because it had fallen earlier and he was afraid it would do so

again. The Organization contends that the Claimant testified that he looked down because he noticed his HLCS system was not operating properly. The Claimant said that he braked suddenly because the car in front of him stopped abruptly just as he looked up from checking the HLCS system.

The Organization contends that merely holding a cell phone while driving did not violate MWOR 1.10 as it was written at the time. The Organization contends that dismissal for this infraction is harsh and excessive and must be overturned.

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. If the question is decided in the affirmative, we are not warranted in disturbing the penalty absent a showing that the Carrier's actions were an abuse of discretion.

Here, the Hearing Officer assessed the exculpatory evidence presented by the Claimant's testimony that he was merely holding his cell phone without using it in any manner that would violate MWOR 1.10. Resolution of credibility questions and conflicting testimony is the province of the Hearing Officer, who has heard the testimony and observed the witnesses first-hand. As an appellate tribunal, the Board must defer to such judgments so long as there is substantial evidence to support the Hearing Officer's findings. This Board finds that the Carrier presented substantial evidence to support the charges against the Claimant.

This Board has reviewed the procedural arguments raised by the Organization, and we find them to be without merit. Numerous boards have found that a Claimant's right to a fair and impartial hearing is not *per se* infringed by the Carrier's failure to make the entire DriveCam video part of the appellate record. First Division Award 27098. PLB 6721, Award 198. Those rulings need not be re-examined here.

AWARD

Claim denied.

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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 4th day of September 2019.