

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43853  
Docket No. SG-45028  
19-3-NRAB-00003-180443**

**The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when 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 K.L. Smith, for 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 a Level S, 30-day record suspension with a 3-year review period to 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 March 21, 2017. Carrier’s File No. 35-17-0017. General Chairman’s File No. 17-036-BNSF-20-C. BRS File Case No. 15814-BNSF. NMB Code No. 106.”**

**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 Signaller in the Carrier's service. On March 1, 2017, 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 driving company vehicle 23489 at approximately 12:28 PM Central Time on February 22, 2017, near Indian Road in Shabbona, IL., while assigned to SSCX0147. The date BNSF received first knowledge of this alleged violation is February 23, 2017."**

After a formal investigation on March 15, 2017, the Claimant was found in violation of MWOR 1.10 Games, Reading, or Electronic Devices and was assessed a 30-day record suspension with a three-year review period.

This Board has reviewed the record as presented and determined that the transcript of the March 21, 2017, investigation hearing was not included in the record presented to this Board. Circular 1 makes clear that the submission by the Carrier must include all evidence and data in support of its position. The Carrier in a discipline case bears the burden of proof and that burden cannot be met when evidence is not presented. The record before this Board is insufficient to determine that the Carrier had substantial evidence of the Claimant's violation.

Therefore, the claim must be sustained in light of the fatal procedural flaw, and the Board reaches no decision as to the merits of the claim.

**AWARD**

**Claim sustained.**

**Form 1  
Page 3**

**Award No. 43853  
Docket No. SG-45028  
19-3-NRAB-00003-180443**

**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 4th day of September 2019.**