

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43857
Docket No. SG-45116
19-3-NRAB-00003-180584**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (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 P.J. Benton, 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 May 31, 2017. Carrier’s File No. 35-17-0026. General Chairman’s File No. 17-050-BNSF-188-SP. BRS File Case No. 15847-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 Construction Foreman in the Carrier's service. On April 12, 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 alleged violations that occurred while you were assigned as Signal Construction Foreman (SSCX0113), leading to damage to BNSF Vehicle 21850, and DriveCam Event ESUE17925, recorded at approximately 1553 hours Pacific Daylight Time, April 6, 2017, showing BNSF Vehicle 21850 involved in a collision with a private vehicle at or near 17136 Highway 410, Sumner, Washington. Alleged violations include but are not limited to failure to operate the vehicle in a careful and safe manner."

After a formal investigation on May 31, 2017, the Claimant was found in violation of MWSR 12.1.1 General Requirements and was dismissed from the Carrier's service.

On April 6, 2017, the Claimant had finished his tour of duty for that day and was heading back from the job site and was involved in a motor vehicle accident. No citations were issued and the Claimant contacted Carrier's management.

This accident triggered the DriveCam video, which showed the Claimant driving with no decline in speed for a full eight seconds prior to the collision. There is no evidence that Claimant applied his brake before rear-ending the car in front of his vehicle.

The Carrier denies any procedural violations because the charged Rules were read into the record at the hearing.

The Carrier further contends that it provided substantial evidence of the Claimant's violation because the video clearly shows the Claimant driving his vehicle for eight seconds with another car close in front of him and the Claimant failing to apply his brakes even after the vehicle in front of him stopped. The Carrier contends that it has demonstrated that the Claimant failed to operate the Carrier's vehicle in a safe and careful manner, by failing to keep a safe distance between his vehicle and the one in front of him. The Carrier contends that the evidence shows that the Claimant

dозе off or briefly fell asleep while at the wheel, causing a collision with another vehicle.

The Carrier contends that the penalty of dismissal was appropriate because the Claimant's failure to operate his Company vehicle in a safe and careful manner could have resulted in his or another's serious injury or death. The fact that neither happened does not excuse the Claimant's serious violations.

The Organization contends that although the dismissal letter stated that the Claimant had been found in violation of MWSR 12.1.1, the notice of Investigation did not identify this Rule, it was not introduced during the Investigation Hearing, and it was not mentioned during the Investigation. The Organization contends that the Claimant was dismissed for violation of a Rule that was never made known to the Claimant or his representatives.

The Organization contends that the charge letter reveals only that Claimant was in a minor accident. The Organization contends that the first mention of MWSR 12.1.1 was in the Claimant's dismissal letter.

The Organization contends that the Carrier failed to meet its burden of proving the Claimant's alleged violation with substantial evidence. The Organization contends that the record contains only self-serving testimony on the Carrier's part, to support discipline in the instant case.

This Board need not address the merits of the claim because it must be sustained because the Claimant was not given a fair and impartial hearing as contemplated by Rule 54 of the current Signalman's Agreement. The Organization promptly notified the Carrier of its objection, writing,

“After a close review of the transcript, it is obvious the Carrier failed to enter a rule or policy it alleges the Claimant violated. The purpose of an investigation is to examine the facts and determine if rules were violated. As a result of the Carrier's failure to provide a rule or policy allegedly violated, the Claimant and his representative were denied the opportunity to refute the charge(s).”

The Carrier deprived the Claimant of a fair and impartial hearing by its failure to identify or introduce the allegedly violated Rules during the investigation. As stated

in Third Division Award 42832, "A fair hearing must not involve a guessing game in which the Claimant and/or the Organization must anticipate which rules the Carrier is likely to rely on and which must be addressed in the hearing." See also, Third Division Award 42699, in which the Board stated, "The investigation cannot be considered 'fair and impartial' when the claimant and his Organization have not had an opportunity to address the rules that might thereafter form the bases for discipline or dismissal." When the Rules were neither quoted during the hearing nor attached to the Transcript, this Board is unable to determine whether a violation of the rule has been proven with substantial evidence. In light of the fatal procedural flaw, the claim must be sustained in full.

AWARD

Claim sustained.

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.