

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43889
Docket No. SG-45384
19-3-NRAB-00003-190103**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel 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 D.C. Shirley, 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 1-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 September 14, 2017. Carrier's File No. 35-17-0043. General Chairman's File No. 17-066-BNSF-121-T. BRS File Case No. 15958-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.

On August 1, 2017, the Claimant, a signal maintainer, was driving BNSF vehicle 23070 when he hit a rough road, triggering the vehicle's DriveCam function. The DriveCam video was sent to Claimant's Supervisor, Ryan Johnson, who determined that the Claimant was driving distracted while using his cell phone. Screenshots from the video clearly show the Claimant holding his phone and looking down at it. Based on this evidence, the Carrier determined that the Claimant violated its rule prohibiting phone use while operating a vehicle.

The Organization points out that the Carrier failed to enter a copy of the rule regarding cell phone use into the on-property record. It maintains that without the rule in evidence, the Board is unable to make a determination regarding violation of its terms.

The Board has reviewed the transcript and agrees that although the rule in question, MOWOR 1.10, was referred to multiple times, the rule itself was not identified as an exhibit during the investigation and is not part of the on-property record. Without the rule in evidence, the Board lacks the necessary evidentiary basis for concluding that it has been violated. The Organization raised a factual issue, arguing that the Claimant was not texting or phoning, but was accessing his GPS in order to find his destination. The language of the rule must be in evidence before the Board can make a determination as to whether such conduct stands in violation of the rule.

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 28th day of January 2020.