

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43972  
Docket No. MW-45297  
20-3-NRAB-00003-190048**

**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**

**STATEMENT OF CLAIM:**

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

- (1) The discipline (dismissal) imposed upon Mr. C. Oliver, by letter dated July 27, 2017, for violation of MWOR 1.10 in connection with his alleged use of an electronic device while operating a Company vehicle was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-17-D070-14/10-17-0340 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Oliver shall have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime, expenses and benefits.”**

**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.

In June of 2017, Roadmaster Jonathan Meyer received notice to review an incident captured by DriveCam. His review showed the Claimant stopped at a red light, using his cell phone. When the light turned green, the surrounding vehicles started moving, but the Claimant, still looking at his cell phone, did not. When the Claimant's vehicle started moving forward, the Claimant was still looking down at his phone. It was not until he almost struck the vehicle in front of him that he set his phone down and paid attention to his surroundings. In the Carrier's view, this incident more than justifies the discipline taken.

The Organization first argues the Carrier failed to hold a timely investigation. It points to the transcript, page 10, where the Carrier's witness admitted to having first knowledge on June 24, 2017, which would make the investigation untimely. The Carrier acknowledges that the witness attempted to change this testimony, but asserts this maneuver is illegitimate and cannot be credited.

The Organization maintains that in accordance with precedent and the clear language of Rule 40J, the charges must be dismissed and the instant claim must be sustained. The applicable Rule states as follows:

**“RULE 40. INVESTIGATIONS AND APPEALS**

- A. An employe in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held. Such investigation shall be set promptly to be held not later than fifteen (15) days from the date of the occurrence, except that personal conduct cases will be subject to the fifteen (15) day limit from the date information is obtained by an officer of the Company (excluding employes of the Security Department) and except as provided in Section B of this rule. \* \* \*
- G. If it is found that an employe has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from

record. He shall be reinstated with his seniority rights unimpaired, and be compensated for wage loss, if any, suffered by him, resulting from such discipline or suspension. \* \* \*

J. If investigation is not held or decision rendered within the time limits herein specified, or as extended by agreed-to postponement, the charges against the employee shall be considered as having been dismissed.”

We are not persuaded by the Organization’s argument about the timeliness of the investigation. Roadmaster R. Anderson received the email notifying him of the DriveCam video on June 26. He testified that first notice was on June 26 and the Notice itself identifies June 26 as the date the Carrier became aware of the incident. The investigation was on July 10 and it was not postponed. We find the investigation was timely.

The DriveCam pictures confirm the Carrier’s conclusion that the Claimant violated the rule. Though he is wearing sunglasses and you cannot see his eyes, his head is tilted down toward the phone in his hand. The Carrier was reasonable in its determination that the Claimant was looking at his phone as he moved forward and suddenly stopped.

The Claimant worked for the Carrier for fully 23 years, a mitigating circumstance which the Carrier failed to give adequate consideration. Accordingly, the Claimant shall be reinstated without backpay, and will, upon reinstatement, be subject to a 36-month review period and last chance agreement, running concurrently. His dismissal shall be converted to a long-term suspension.

### **AWARD**

Claim sustained in accordance with the Findings.

### **ORDER**

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**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 5th day of March 2020.**