

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44576
Docket No. MW-46150
22-3-NRAB-00003-200222**

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. P. Haugen, by letter dated September 21, 2018, for alleged violation of MWOR 1.10 Games, Reading or Electronic Devices for an alleged use of an electronic device while operating Company Vehicle 27736 at approximately 1149 hours on July 30, 2018 near 40th Street South in Fargo, North Dakota as observed by Drive Cam Event ETQR30329 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-5694-M/11-19-0083 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant P. Haugen shall be reinstated to service, have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime, expenses, benefits and 401K.”**

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.

Factual Background:

On July 30, 2018, the Carrier reviewed a DriveCam video which purported to show the Claimant holding a cell phone. The Carrier deemed this to be a serious safety violation. In view of the Claimant's prior discipline, the Carrier determined that dismissal was the appropriate penalty.

Position of Organization:

The Organization maintains that the Claimant was not afforded a fair and impartial hearing as required by Rule 40. Further, it notes that the decision to impose discipline upon the Claimant was not made by Hearing Officer J. Randash. Rather, R. Jouppi was the Carrier officer who rendered the disciplinary decision. In the Organization's view, this fact alone requires that the claim be granted in full. It quotes Award 13240, which states as follows in pertinent part:

*** Worse, still, the Hearing Officer made no finding of credibility and made no decision. It is offensive to the concepts of fairness and impartially (sic) that credibility was determined and decision made by Superintendent Brewer who had issued the charge and was not present at the hearing. In the absence of a finding of credibility by a qualified hearing officer the statements of Complainants have no probative value. Consequently, the decision made on the property is not supported by substantial evidence. We will sustain the Claim.

The Organization also quotes Award 31774: "... we find that the failure of the hearing officer to find the facts and evaluate the relative credibility of the various witnesses deprived the Claimant Pool of a fair investigation."

The Organization also argues that the Carrier failed to present all relevant witnesses. During the course of the investigation, it was noted that there were at least 2

other passengers/employees in the vehicle with the Claimant at the time of the alleged incident, yet they were not called to testify.

The Organization contends it is the Carrier's responsibility to present all witnesses with pertinent information and to develop all facts relevant to the incident(s) under investigation. It cites First Division Award 19910, Second Division Award 2923, Third Division Awards 23097, 20014, 31547, 33609, 33628, 41785, Award 40 of PLB No. 4081, Award 23 of PLB No. 5606, Award 2 of PLB No. 5681 and Award 43 of PLB No. 5942 in support of this argument. Rule 40 requires the Carrier to provide information made a matter of record. The Organization maintains the Carrier's failure to provide the DriveCam video violated this requirement.

The Claimant believed that he was complying with Carrier's rule regarding the use of a cell phone while operating a vehicle. The Carrier made changes to MWOR 1.10 on July 1, 2018 and the Claimant was unaware of these changes. At the investigatory hearing, the Claimant explained that he did not feel he was doing anything unsafe or breaking any rules and was unaware of the specific language of the charged rule which was changed less than a month prior to the incident.

JOHN MOZINSKI: Okay. And so, you guys thought that that the rule allowed you to hold your phone and one touch it?

PAUL HAUGEN: Yeah."

The Claimant further testified that there were others in vehicle, and he thought they would say something if he was violating a rule.

Position of Carrier:

On July 30, 2018, at approximately 1149 hours, the DriveCam recorder in a company truck operated by the Claimant was triggered. The recording and still shot photos from that event show the Claimant holding and talking on his cell phone while traveling on a public thoroughfare. His supervisor reviewed the DriveCam footage and determined that the Claimant was using his cell phone in violation of Carrier rules. It maintains employees are responsible for knowing the rules. At the time, the Claimant was under review for a safety violation. As a result, he was dismissed.

Analysis:

The Organization protests the procedural unfairness of having R. Jouppi, who did not attend the investigation, determine the outcome of that investigation instead of Hearing Officer J. Randash. It is true that credibility determinations cannot be effectively be made by anyone other than the hearing officer. However, in this case we do not find that any significant credibility decisions were necessary to a decision regarding the discipline. The Claimant acknowledged he had his phone in his hand. There were multiple pictures of it. Additional witnesses were not needed to clarify the Claimant's actions. The questions to be decided, then, was whether the Claimant's actions constituted a rule violation, and whether the Claimant had adequate notice of the applicable rule. There was no contested testimony regarding whether the rule had been communicated to the Claimant. The Claimant said it was news to him and the Carrier had no rebuttal. We are not persuaded that the Claimant was prejudiced by the role of R. Jouppi.

The fact that the Roadmaster did not know of the rule change here concerned establishes that the rule change was not clearly and universally communicated or well known. The Claimant flatly denied that he knew of the rule change, and contended he had not been briefed about it. There was no rebuttal to this testimony.

Employees cannot be expected to comply with rules they have not heard of. For this reason, it is incumbent upon the Carrier to make employees aware of rule changes. The change in question was made less than a month before the Claimant's alleged infraction. Had there been a briefing, the Carrier could have provided evidence of it; there was none. As a result, the facts must be juxtaposed against the rule as it was prior to the change.

Prior to the change, the applicable rule stated: "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." The pictures show the Claimant holding the phone with one hand while driving with the other. In the first still shot, he has the phone held up against his mouth. In the second, he is holding it against his ear. In the third, it is against his mouth again. These still shots are more than adequate to establish what is going on; no video is needed. The Claimant was using the phone and it was not in a hands-free mode. It follows that he violated the safety rule prohibiting such use.

The Claimant had received a Record Suspension with a 36-month review period in July of 2016 for a violation involving working limits. As a result, he was under a review period at the time of the incident here concerned. As a result, he was properly deemed subject to termination.

AWARD

Claim denied.

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 29th day of October 2021.