

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44656
Docket No. SG-46259
22-3-NRAB-00003-200593**

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 (Former Burlington Northern
(Railroad 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 J.W. Martin, 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 February 25, 2019.” Carrier's File No. 35-19-0014. General Chairman's File No. 19-027-BNSF-154-TC. BRS File Case No. 16154-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.

At the time of the incident, the Claimant was a Signaller on crew SSCX0183, assigned to the Wilmar Headquarter Crew in Carrier's Signal Department.

On February 11, 2019, the Claimant was driving BNSF vehicle 28449, in a construction zone with stop and go traffic. The DriveCam was triggered by the Claimant hitting a bump on a rough road and recorded the Claimant in the vehicle. The DriveCam video was sent to the Claimant's Supervisor, Jared Hill, who observed the Claimant driving distracted while using his cell phone.

On February 12, 2019, 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 vehicle 28449 at approximately 1545 hours CST on February 11, 2019, on Interstate 240 in Oklahoma City, OK, while assigned to gang SSCX0183, per DriveCam Event ETWS97922. The date BNSF received first knowledge of this alleged violation is February 12, 2019.

After a formal investigation on February 25, 2019, the Claimant was found in violation of MWOR 1.10 Games, Reading, or Electronic Devices and assessed Level S 30 Day Record Suspension with a Three-Year Review Period.

By letter dated May 6, 2019, the Organization presented a claim to the Carrier which was denied by letter dated July 3, 2019. The parties were unable to resolve the claim on-property, so it is now properly before this Board for final adjudication.

The Carrier contends that it has shown with substantial evidence that the Claimant is guilty of the charged rule violations. The Carrier points out that the DriveCam video clearly shows the Claimant driving distracted with his cell phone in his right hand while driving the company vehicle. In addition, during the investigation, the Claimant admitted during his testimony that he touched his phone

while driving the Carrier's vehicle.

With respect to the procedural errors raised by the Organization, the Carrier contends that there is no evidence of prejudice to the the Claimant or the Organization. The Carrier contends that the Claimant was able to present his defense and that there is no evidence that the Hearing Officer affected the testimony or documentary evidence during the investigation hearing.

The Carrier contends that under the circumstances of this case, the assessed discipline was in accordance with the Claimant's records, arbitral precedent, and the PEPA Policy.

The Organization contends that the Carrier's Hearing Officer violated the Claimant's right to due process by meeting with the Carrier's witnesses prior to the investigation hearing and without the presence of the Claimant or his representatives. The Organization contends that the Hearing Officer's foreknowledge of the Carrier's case rendered him unable to objectively and fairly conduct the Investigation. Furthermore, the Hearing Officer and Carrier Witness conspired regarding how the Investigation was going to proceed and the Organization properly objected at the Hearing. The Organization contends that the infringement upon the Claimant's due process rights and the procedural violations committed by the Carrier should result in the Investigation being rendered improper and the discipline overturned.

With respect to the merits, the Organization contends that the Carrier omitted pertinent information such as the GPS location, the speed over the frame of the photos, and a timestamp. The Organization contends that the Carrier failed to present substantial evidence that the Claimant was in fact moving at the time of the still photos. Thus, the discipline should be overturned.

Rule 54 (A) of the parties' Agreement provides that "An employee in service sixty (60) calendar days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held" This due process right is so important that the parties also agreed, "If it is found that an employee has been unjustly disciplined or dismissed, such discipline shall be set aside and removed from the record. He shall be reinstated with his seniority rights unimpaired with pay for time lost, but any earnings in other employment will be used to offset loss of earnings."

The Organization argues that this Rule demands the removal of the

discipline assessed against the Claimant, as the Claimant was denied his right to a fair and impartial hearing in this case. There is no dispute that the Hearing Officer met separately with the Carrier's charging witness prior to the Investigation, and they discussed the exhibits and the proceedings. The witness testified to their meeting.

Previous awards make clear that it is the responsibility of the Carrier to conduct as fair a hearing as is possible. As such, the Hearing Officer must avoid even the appearance of bias or partiality. In Third Division Award 41224, an on-property award, this Board wrote,

Given that the Hearing Officer is a Carrier official, it is critical to the dispute resolution process that the investigative Hearing not only be conducted fairly, but also that it is perceived to be a fair process. The Hearing Officer must have - and be seen as having - an open mind, one that is not made up in advance of the Investigation. Anything less would render the idea of a "fair and impartial investigation" a sham.

This appearance of partiality, even without evidence of bias can be enough to overturn a disciplinary decision. In Third Division Award 13426, the Board wrote that it was immaterial whether the Hearing Officer had actually discussed the case with the witnesses while he ate lunch with them. "By engaging in an ex parte conversation and luncheon behind closed doors with one witness who was about to undergo cross-examination and a second witness who had yet to testify, the hearing officers gave an appearance of partiality that is incompatible with fundamental concepts of due process."

The Carrier asserts that the Hearing Officer was not trying to hide anything and that the Organization has failed to show how the prehearing meeting was detrimental to the Claimant's rights. The witness testified that they discussed exhibits and witnesses. No reasonable explanation has been offered as to why the Organization was not part of the discussion, or why it could not have been held on the record with all parties present. As the Board wrote in Third Division Award 471224,

A "fair and impartial" investigative process is not just language in a Collective Bargaining Agreement. It is fundamental to industrial justice.

There is no question that procedural errors are a disfavored basis for overturning discipline, but that some errors are so significant that a reversal of the employer's action is justified. We find that the Claimant was denied his right to the fair and impartial hearing guaranteed by Rule 45 and thus, the discipline cannot stand.

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 15th day of December 2021.