

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44812
Docket No. SG-46683
23-3-NRAB-00003-210349**

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 L. Weatherall, for any mention of this matter to be 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 him a fair and impartial Investigation and without meeting its burden of proving the charges in connection with an Investigation held on December 6, 2019. Carrier’s File No. 35-20-0015. General Chairman’s File No. 19-103-BNSF-121-T. BRS File Case No. 16349-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.

The Claimant began in the Carrier’s service on August 8, 2011. On November 22, 2019, the Claimant was driving Company Vehicle 20984 and appears to have fallen asleep, causing him to collide with the back of a backhoe while traveling approximately

28 miles per hour. The incident triggered the DriveCam recorder which showed that the Claimant's vehicle did not slow down prior to the collision. The hood and front bumper of the Carrier's vehicle were damaged.

On November 25, 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 failure to safely operate a company motor vehicle resulting in a collision which caused damage to the vehicle on November 22, 2019 on the Avard Sub.

After a formal investigation on December 6, 2019, the Claimant was found in violation of MWOR 1.1.2, Alert and Attentive, and MWSR 1.2.3, Alert and Attentive, and was assessed a Level S 30 Day Record Suspension.

In a letter dated February 24, 2020, the Organization appealed the Carrier's discipline. The Carrier responded to and denied the appeal in a letter dated April 24, 2020. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Carrier contends that it has presented substantial evidence of the Claimant's violations, as the Claimant admitted to falling asleep behind the wheel of the Carrier's vehicle, which caused the collision. The Claimant's admission, when coupled with the still shots from the DriveCam footage, demonstrate the Claimant's guilt. The Claimant was neither alert nor attentive when he rear ended the vehicle in front of him. The Carrier contends that it has demonstrated that the Claimant was in violation of MSWR 1.1.2 and 1.2.3.

The Carrier contends that the Notice of Investigation was timely delivered to the Claimant, as shown by the USPS certified tracking. The tracking shows that the Claimant was notified of a delivery on November 29, 2019, but the Claimant was out of town. The Carrier contends that its obligation is to provide for timely delivery; the Claimant's failure to timely retrieve the Notice does not make it late.

The Carrier contends that it properly determined this vehicle incident to be a Serious violation, rather than a Standard one. Under the Carrier's Policy for Employee

Performance Accountability (“PEPA”), this type of violation is classified as Serious, and thus, the penalty was not excessive. The Carrier contends that the Organization has failed to prove that the Claimant was treated more harshly than others who were found guilty of the same type of violation.

The Organization contends that the Carrier did not provide the Claimant with a fair and impartial hearing, as it failed to provide the Investigation Notice five days before the Investigation. Rule 54(C) of the parties’ Agreement provides,

At least five (5) calendar days advance written notice of the investigation outlining specific offense for which the hearing is to be held shall be given the employee and appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire.

The Organization contends that while delivery was attempted on November 29, 2019, the Claimant did not receive the Notice until December 3, 2019, for a hearing on December 6, 2019. Thus, the Notice was not timely, according to the Organization. In addition, the Organization contends that the Carrier failed to identify the rule which it alleges was violated in the Notice of Investigation.

The Organization contends that the Carrier has failed to mete discipline in an even-handed manner. The Organization contends that the vast majority of employees who are involved in vehicle accidents are not issued a Level S penalty. Thus, the penalty imposed on the Claimant was excessive.

With respect to the procedural objections raised by the Organization, we find them to be without merit. The Carrier provided evidence that USPS made a timely attempt to deliver the Notice of Investigation to the Claimant. The Carrier cannot be held responsible for the Claimant’s failure to timely retrieve the Notice. The Notice of Investigation contained sufficient information for the Claimant and the Organization to prepare his defense and the Organization waived this objection by failing to raise it at the Investigation.

The Board sits as an appellate forum in discipline cases. As such, it does not weigh the evidence *de novo*. Thus, it is not our function to substitute our judgment for the Carrier’s judgment and decide the matter according to what we might have done had

the decision been ours. Rather, our inquiry is whether substantial evidence exists to sustain the finding against the Claimant.

The Claimant admitted that he fell asleep while driving the Carrier's vehicle and struck the vehicle in front of him, causing damage to the Carrier's property. Where there is an admission of guilt, there is no need for further proof. This Board finds that sufficient evidence exists to support the findings against the Claimant.

With respect to the penalty, we find that the discipline is neither excessive nor arbitrary. The record evidence falls short of showing that the Claimant was treated more harshly than others who committed similar infractions. We find no reason to disturb the penalty.

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 28th day of October 2022.