

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44814
Docket No. SG-46695
23-3-NRAB-00003-210448**

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 J.E. Gray, for reinstatement to service with compensation for all time lost, including overtime pay, with all rights and benefits unimpaired, and with 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 dismissal against 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 January 23, 2020. Carrier’s File No. 35-20-0024. General Chairman’s File No. 20-015-BNSF-129- S. BRS File Case No. 16387-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 employment in the Carrier's service on March 2, 2015. The Claimant worked as a Signal Maintainer with an assigned company vehicle. On January 15, 2020, at approximately 1351, the Claimant was involved in a vehicle accident where his vehicle rear ended the car in front of him at an intersection. The resulting DriveCam footage showed him using a cell phone just before the accident.

On January 17, 2020, the Carrier drafted 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 an electronic device while operating a motor vehicle and failure to notify supervisor of vehicle accident/incident. The date BNSF received first knowledge of this alleged violation is January 16, 2020.

After a formal investigation on January 23, 2020, the Claimant was found in violation of MWOR 1.10, Games, Reading, or Electronic Devices, and MWOR 1.4, Carrying Out Rules and Reporting Violations, and was dismissed from the Carrier's service.

In a letter dated March 26, 2020, the Organization appealed the Carrier's discipline. The Carrier responded to and denied the appeal in a letter dated May 23, 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 proven the Claimant's violations with substantial evidence. The Carrier contends that it is undisputed that the Claimant was using his cell phone while driving a company vehicle and then rear ended the truck in front of him. The Carrier contends that this shows that the Claimant failed to operate his company vehicle in a "careful and safe manner" and that while driving a BNSF owned or rented vehicle that he violated the rule that he should not "handle cellular telephones or similar hand-held electronic devices."

The Carrier contends that the penalty of discharge was appropriate because only seven months earlier, the Claimant was charged with a Level S 30-day record suspension with a 12-month review period for handling an electronic device while operating a company vehicle in Tulsa, OK. The Carrier contends that the Claimant has shown a pattern of similar misconduct and thus, progressive discipline was properly

applied. Given the Claimant's disciplinary history, the Carrier contends, dismissal is neither excessive nor arbitrary.

The Carrier contends that the Claimant was provided with a fair and impartial hearing. A review of the transcript reveals that there was no evidence of prejudice to the Claimant or his ability to present a defense.

The Carrier contends that the Notice of Investigation was proper, and the Organization is simply trying to use technical objections to shield the Claimant from the consequences of his improper actions. The Carrier contends that it mailed the Investigation Notice to the Claimant, and it was returned due to no one signing for the package. The Claimant failed to appear at the investigation, but the Carrier contends, numerous boards have rules that an Investigation may proceed *in absentia*. The Carrier contends that the Claimant's failure to appear demonstrates his lack of interest in protecting his employment.

The Organization contends that the Carrier failed to fulfill its responsibility to provide a fair and impartial investigation and committed several procedural errors in the process. The Organization points to Rule 54 of the parties' Agreement:

"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..."

The Organization contends that the Carrier failed to demonstrate that it properly attempted to give notice of the investigation to the Claimant at least five calendar days prior to the hearing. There is no record evidence showing the Carrier's attempts to make delivery to the Claimant. The Organization also contends that the Carrier predetermined that the Hearing would be held *in absentia*, apparently anticipating that the Claimant would not receive the Notice of Investigation in a timely manner.

With respect to the merits, the Organization contends that the Carrier has failed to prove that any collision took place. The Organization contends that the Carrier's evidence shows only that the Claimant's vehicle was close to the vehicle in front of him. No eyewitness testimony, police report, or other information was offered to show that a collision occurred.

The Organization has raised several procedural issues that must be addressed before the merits of the claim. Firstly, the Organization objected to the Investigation continuing despite the Claimant's absence.

Board precedent makes clear that a hearing may be conducted *in absentia* if the Claimant is properly notified and does not have a sufficient reason to support his excusal. Prior awards make it clear that a claimant may not simply fail to attend a hearing without explanation and then claim a violation of due process.

Here, the Carrier failed to show that the Claimant was properly notified of the Investigation. Although statements were made regarding notice, the record before this Board contains no evidence whether or when the Notice of Investigation was sent or delivered to the Claimant's place of residence. Thus, the Carrier cannot show that it complied with Rule 54 of the parties' Agreement. Due to this procedural violation, the discipline cannot stand, and the dismissal should be removed from his record.

While reinstatement and backpay would be the usual remedy following such a finding, we note that this matter is rendered moot by a separate dismissal action involving an incident which took place on January 17, 2020. This Board upheld the Carrier's decision to dismiss the Claimant for this second incident which occurred in the same time period. Thus, no further remedy is required.

AWARD

Claim dismissed as moot.

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.