

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44815
Docket No. SG-46714
23-3-NRAB-00003-210488**

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 30, 2020. Carrier’s File No. 35-20-0027. General Chairman’s File No. 20-021-BNSF-129- S. BRS File Case No. 16389-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.

On January 15, 2020, at approximately 1351, the Claimant was involved in an accident wherein he was shown via DriveCam footage using a cell phone just prior to him rear ending the car in front of him at an intersection. Shortly after the incident occurred, the Claimant's vehicle broke down and he parked it on the side of the road for a tow truck to come get it.

The Claimant informed his supervisor of the cell phone use, but not the vehicle accident. The Claimant requested authorization for a rental car which was approved. The Claimant did not report for work on January 16, or the first half of January 17, 2020. The Claimant submitted his payroll as usual for both days.

On January 22, 2020, 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 unapproved absence on January 16 & 17, 2020 and falsifying payroll and Hours of Service. The date BNSF received first knowledge of this alleged violation is January 20, 2020.

After a formal investigation on January 30, 2020, the Claimant was found in violation of MWOR 1.6, Conduct, and MWOR 1.15, Duty-Reporting or Absence, and was dismissed from the Carrier's service.

In a letter dated April 8, 2020, the Organization appealed the Carrier's discipline. The Carrier responded to and denied the appeal in a letter dated June 5, 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 demonstrated with substantial evidence that the Claimant was in violation of its rules. The Carrier contends that there is no question that the Claimant entered incorrect hours into the payroll system after failing to report to work, in clear violation of MWOR 1.6, Conduct, and MWOR 1.15, Duty-Reporting or Absence. The Carrier contends that the Claimant failed to perform any of his scheduled duties on these days and did not report to work.

The Carrier contends that despite being approved for a rental car, the Claimant failed to obtain a car and return to work. The Carrier contends that the Claimant wasted the days away but charged the Carrier for his time. The Claimant told his

supervisor that no cars were available for rent, but testified that a car had been offered, but it was unacceptable to the Claimant.

The Carrier contends that the Claimant's disciplinary record justified his dismissal. Only seven months earlier, the Claimant had been assessed a Level S 30 day record suspension with a 12-month review period for handling an electronic device while operating a company vehicle, the same misconduct that led to this incident. The Carrier contends that the Claimant's violations here are classified as Standalone Dismissible under the Carrier's Policy for Employee Performance Accountability ("PEPA"). The assessed discipline was not excessive, arbitrary, or unwarranted.

The Organization contends that the Claimant is only being investigated in this instance because the Carrier knows that it committed procedural errors in the companion case. The Organization contends that the Carrier was unable to show that the Claimant failed to perform his duties, as the Carrier was aware that he was seeking a rental car to replace his damaged vehicle. The Claimant's supervisor approved a rental car for him and the Claimant was merely trying to obtain a satisfactory vehicle.

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.

Here, the Claimant is charged with failing to attend to his duties by less than diligent attempts to secure a rental car to use in place of his assigned vehicle. The Hearing Officer was in the best position to judge the sincerity of the Claimant's protestation that he was unable to find a suitable vehicle. As an appellate body, we have not seen the witnesses testify and cannot assess their credibility. Thus, in the usual case, this Board will defer to the credibility determinations made on the property. We see no reason to depart from that approach here.

With respect to the penalty, we find that the Carrier properly used progressive discipline. The Claimant was still in the review period from a previous Level S violation when this incident occurred. The penalty was neither excessive nor arbitrary.

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.