

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44871
Docket No. SG-47269
23-3-NRAB-00003-220371**

The Third Division consisted of the regular members and in addition Referee Michael D. Phillips when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Canadian Pacific Railway**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Canadian Pacific Railway (formerly Soo Line):

Claim on behalf of T. L. Ferguson, for compensation of all lost time, expenses incurred, and any reference of the matter removed from the Claimant’s personal record; account Carrier violated the current Signalmen’s Agreement, particularly Rule 32, when Carrier failed to provide the Claimant with a fair and impartial investigation on February 18, 2021, failed in its burden of proof, and assessed the Claimant with a 20-day suspension on November 23, 2020, through January 7, 2021(sic), resulting in a loss of wages to the Claimant. Carrier’s File No. 2021-00021253. General Chairman’s File No. 2021-00021253. BRS File Case No. 5392. NMB Code No. 204 – Minor Discipline: Miscellaneous/Other Not Specified Above.”

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 27, 2021, Claimant T. L. Ferguson was assigned as a Signal Maintainer in the vicinity of Madison, Wisconsin. A company manager was sitting in his vehicle in a depot parking lot, participating in a conference call, when he noticed another company truck approaching. He observed that the person driving the truck had a cell phone in his hand, up in front of his field of vision, and it appeared to him that the person was manipulating the phone while operating the vehicle. The manager was not initially aware of who the driver was, but he received information that it could be the Claimant, and he called the Claimant to arrange to meet. When the manager met with the Claimant, the Claimant denied texting while driving, but he did indicate that he was using the GPS function of the cell phone to confirm that he had proper directions to his next work location.

By letter dated January 28, 2021, the Claimant was notified to attend a hearing to develop the facts and place responsibility, if any, in connection with his allegedly operating the GPS function on his company cell phone while driving a company vehicle on the date in question. The notice indicated possible violations of US Rulebook for Engineering Employees 29.1(E) Electronic Devices, and the Company Policy on the Use of Electronic Devices. The hearing was held February 18, 2021, at which the manager testified via video conference regarding his observations of the Claimant using the electronic device. Following the hearing, the Claimant was found to be in violation of the cited rules, and by notice dated March 9, 2021, he was assessed a 20-day suspension.

The Organization submitted the instant claim, which the parties handled on the property according to the applicable agreement. The matter now comes to us for resolution.

The Organization challenges the discipline assessment on both procedural and substantive grounds. It first contends that the Claimant was denied a fair and impartial hearing when the hearing officer held a private meeting prior to the hearing to discuss the investigation. The Organization notes that hearing officers are required to remain objective, and it asserts that hearing officer in this case prejudged the Claimant and failed to remain objective, as evidenced by a discussion he had with the Claimant in which he said we was going over ways to fire the Claimant.

The Organization also objects that the Carrier witness did not appear in person at the hearing, but rather he appeared via remote video conference. It states that the Claimant had the right to face his accuser, but that the process employed inhibited that

right. The Organization states that no valid reason was presented to warrant the witness appearing virtually instead of in person, and it claims that the process made it impossible to confirm that the witness was properly sequestered. It adds that the hearing officer had the evidence the witness intended to submit ahead of time, and it argues that the hearing transcript was incomplete due to instances where testimony was inaudible to the transcriber.

With respect to the merits, the Organization contends that the Carrier did not meet its burden of establishing with substantial evidence that the Claimant was in violation of the cited rules. It notes the Claimant's testimony that he was only observing the GPS feature on his phone, and that he was doing so with the intention of providing expeditious service to the Carrier. The Organization also asserts that the Carrier's decision to issue a 20-day suspension for such an act is harsh, excessive and unwarranted on the facts of this case. It states that the Carrier arbitrarily ignored principles of progressive discipline in assessing such a suspension, and it argues that the correct course of action would have been much lesser discipline, such as coaching, and it urges that the claim be sustained.

The Carrier, on the other hand, maintains that there is no reason to disturb the discipline assessment. It states that the Claimant received a fair and impartial investigation, and that he was afforded all applicable rights during that process. The Carrier asserts that there is no requirement that a witness be physically present, and it points out that the hearing was held during the height of the pandemic. It avers that the process employed assisted with the safety of all the participants during a surge of COVID-19 cases. The Carrier adds that the hearing officer entering the exhibits was consistent with what would have happened if the witness had been present.

The Carrier also states that there is no indication that the hearing officer was biased or had prejudged the Claimant, or that his actions prior to the hearing were improper. It notes that the Claimant referred to the hearing officer joking around the day before the hearing, but it states that the contention he said he was going to fire the Claimant is unsubstantiated. Regarding the quality of the transcript, the Carrier maintains that it is accurate and that any instances where words were inaudible are minor, and that such transcriptions notations are commonplace.

With respect to the merits, the Carrier states that the record contains substantial evidence to support the finding of guilt. It points to the testimony of the manager who observed the Claimant driving the company vehicle while holding the cell phone up in front of him. The Carrier also notes the Claimant's own testimony in which he conceded

he had picked up the cell phone while driving so he could observe the GPS function, and it asserts that such actions clearly violate the rules regarding use of electronic devices while operating vehicles.

With respect to the discipline assessment, the Carrier states that the Claimant's improper use of an electronic device constituted a Major offense under its Hybrid Discipline and Accountability Guidelines. It asserts that the Claimant driving with one hand, while holding his cell phone in the other and looking at it, is an unsafe activity which cannot be condoned. The Carrier states that there was nothing arbitrary or capricious about the assessment here, as the 20-day suspension was the minimum under the guidelines for such an infraction, and it requests that the claim be denied.

We have carefully reviewed the record, including the correspondence, attachments, and citations of authority, and we find no procedural barrier to our consideration of the merits. The use of remote appearances in many aspects of the workplace has become increasingly common since the onset of the pandemic, and we find no indication that the witness's appearance in that format was prejudicial to the Claimant or the Organization in this case. The awards cited by the Organization involved telephone testimony in which witnesses were unable view documents, or the hearing officer was unable to observe the witnesses for credibility determination purposes, but none of those factors are apparent here. With respect to the quality of the transcript, we find no deficiency which impacted our review of the case or which would have impacted the Organization's ability to progress its claim on the Claimant's behalf.

We also find no indication that the hearing officer was biased or that the Claimant's guilt was prejudged. We do not believe the alleged comments by the hearing officer the day before the hearing were indicative that he was unfair or had already determined the Claimant's guilt. Although he denied making any reference to firing the Claimant, we note that the Claimant referred to the alleged comments as joking. While joking about potential discipline is certainly unwise, we do not believe the alleged comments here indicate that the process was compromised, especially in light of the essentially undisputed evidence that the Claimant was holding and looking at his cell phone while driving. We have reviewed the arbitral authority submitted by the Organization on this point, and we do not believe it requires a different conclusion.

Turning to the merits of the case, we find that the record contains sufficient evidence to support the finding of guilt in this matter. The Carrier's burden in matters such as this is not proof beyond a reasonable doubt, but merely the production of substantial evidence to support the discipline assessment, which has been defined in

prior awards as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

Here, we believe the evidence was such that a reasonable mind could accept the conclusion urged by the Carrier that the Claimant was in violation of the cited rules when he was holding his cell phone and observing the GPS feature while driving the company vehicle. The admitted that conduct, and such activity is clearly prohibited by the rules in question.

Having found that the rule violations were established, we turn to the level of discipline assessed. The Carrier has every right to expect strict compliance with rules regarding usage of electronic devices, as the potential safety concerns related to the distractions associated with such devices cannot be denied. In this case, however, we do find that there are mitigating circumstances which warrant a lesser sanction, including the use of the device to obtain directions needed for the Claimant's job performance. Moreover, the Claimant's record, while not spotless, indicates that he has worked safely for the majority of his career. In these specific circumstances, we find that a 10-day suspension would be more than sufficient to impress upon the Claimant the necessity of compliance with the rules pertaining to electronic devices. Therefore, we conclude that the Claimant should be paid for time lost in excess of ten days.

AWARD

Claim sustained in accordance with the findings.

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 10th day of March 2023.