

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 45544
Docket No. 48856
26-3-NRAB-00003-240381

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

(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference

PARTIES TO DISPUTE: (

(TransitAmerica Services, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline (dismissal) of Mr. G. Padilla, III, by letter dated February 24, 2023, for alleged violation of Carrier’s MOW OTS Rules 1.1.1, 1.1.2, 1.6, 1.9, 1.10, 1.13, 1.20, 2.21, Electronic Device Policy SAF-POL-404, TASI Employee Handbook, Responsibility of Individual and DGM Instruction 006 was arbitrary, capricious, unnecessary and excessive (System File NA-2315T-301 TSI).
2. As a consequence of the violation referred to in Part (1) above:

‘We, therefore, respectfully request that Claimant’s Dismissal is expunged from his personal record. Claimant be immediately reinstated to service and compensated for all wages lost, straight time and overtime, beginning with the day he was removed from service and ending with his reinstatement to service excluding all outside wage earnings. Claimant be compensated for any and all losses related to the loss of fringe benefits that can result from dismissal from service, i.e., Health benefits for himself and his dependents, Dental benefits for himself and his dependents, Vision benefits for himself and his dependents, Vacation benefits, Personal Leave benefits and all other benefits not specifically enumerated herein that are collectively bargained for him as an employee of the Union Pacific Railroad (sic) and a member of the Brotherhood of Maintenance of Way Employees Division of the International Brotherhood of

Teamsters. Claimant is to be reimbursed for all losses related to personal property that he has now which may be taken from him and his family because his income has been taken from him. Such losses can be his house, his car, his land, and any other personal items that may be garnished from his for lack of income related to dismissal.”

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 23, 2023, a Superintendent saw a CalTrain truck parked along the right-of-way, so he pulled into the right of way and parked nearby. The occupant of the truck did not acknowledge the Superintendent’s presence for some time, so the Superintendent walked up to the truck, where he saw that Claimant Gilbert Padilla III was watching some video content on his personal phone. Claimant did not acknowledge the Superintendent until the Superintendent knocked on the passenger side window. Claimant initially told the Superintendent that the device was his work phone, but when asked to provide the phone, he then conceded that it was his personal phone. Claimant’s assignment at that time was to perform watchman duties, providing protection for third-party contractor employees who were working on the track.

By letter dated January 26, 2023, Claimant was notified that the Carrier intended to impose discipline on him in connection with his allegedly watching a video on his cell phone while he was assigned to provide protection to a contractor group and his alleged dishonesty when questioned about the phone. The notice indicated possible violation of MOW OTS Rules 1.1.1 Maintaining a Safe Course; 1.1.2 Alert & Attentive; 1.6 Conduct, parts (A) 1, 2, 4, & B; 1.9 Respect of Railroad Company; 1.10 Games, Reading, or Other Media; 1.13 Reporting and Complying with Instructions; 1.20 Alert to Train

Movement; 2.21 Electronic Devices; Electronic Device Policy SAF-POL-404; TASI Employee Handbook, Responsibility of Individual; and DGM Instruction 006.

Pursuant to the applicable collective bargaining agreement, an informal hearing was conducted on February 1, 2023. Afterwards, the Carrier issued a notice of formal investigation by letter dated February 3, 2023. The formal investigation was held February 14, 2023, at which Claimant admitted that he should not have been watching video on his personal phone. After the hearing, Claimant was found to be in violation of the cited rules, and by notice dated February 24, 2023, he was dismissed from service.

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 contends that the Carrier did not provide Claimant a fair and impartial hearing. It states that this is shown by the hearing officer not allowing Claimant's representative to develop evidence relative to the affirmative defense of disparate treatment. The Organization asserts that the hearing officer's ruling on that matter demonstrated his bias against Claimant and that it deprived the record of context as to how similar rule infractions have been handled in the past, thus depriving Claimant of due process. It cites prior awards which have held that the merits of a claim cannot be considered if the Carrier is guilty of a due process violation.

The Organization also objects that the Carrier improperly entered into the record evidence of a prior waiver that Claimant had signed. It argues that the hearing officer stated that the investigation was confined to the January 23, 2023, incident, and that previous handlings or other employees' discipline was not relevant, but that he was inconsistent in permitting evidence of Claimant's prior discipline to be introduced. The Organization points to award authority which has found that it is inappropriate for a Carrier to refer to such evidence before it has been determined that the charged employee is guilty of the offense in the current case.

With respect to the merits, the Organization contends that the Carrier failed to meet its burden of proving that Claimant violated each of the cited rules. It states that the Carrier did not demonstrate that Claimant was in violation of GCOR 1.6 Conduct, asserting that the Carrier has a higher burden in cases where dishonesty is charged. The Organization states that the Carrier must prove an intent to deceive to prove such a charge, and it asserts that the record does not establish that Claimant was intentionally dishonest and outright lied to the Superintendent when he was asked if the phone was a

company phone. It states that Claimant was initially flustered when he was confronted, but that moments later, he corrected himself. The Organization states that Claimant never denied he was watching a video on his cell phone, showing that he was cooperative and acknowledged his actions, and it adds that he continued to be forthright and honest during the hearing.

The Organization further asserts that Claimant was disciplined without just cause. It claims that Claimant did not comprehend the possible disciplinary consequences of dismissal for a cell phone violation, as he had never been disciplined for such an offense before. The Organization submits that if the Carrier had communicated the probable discipline of dismissal for using a personal cell phone while on duty, Claimant would have reconsidered using his personal phone.

The Organization challenges the discipline assessment as being arbitrary and excessive, arguing that the Carrier failed to properly consider mitigating circumstances. It states that the Carrier arbitrarily ignored principles of progressive discipline in assessing such a penalty. The Organization argues that the correct course of action would have been rehabilitation and guidance, such as coaching or training. It also asserts that, because all of the charges were not proven, any discipline assessment must be reduced. The Organization emphasizes that Claimant had five years of service with no prior discipline for cell phone usage or dishonesty, 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 Claimant received a fair and impartial investigation, and that the record contains substantial evidence to support the finding of guilt. It points to the testimony of the Superintendent who observed Claimant watching video on his personal electronic device when he was supposed to be providing protection for workers fouling the track, as well as to Claimant's admissions that he was improperly using his cell phone.

The Carrier states that it was Claimant's duty to ensure the safety of the individuals who were on the track by looking for approaching trains or on-track equipment and providing adequate warning to the workers, a vital role in ensuring the safe operation of passenger trains. It states that Claimant was qualified to be a RWIC and that he had been trained on all of the cited rules. The Carrier asserts that Claimant was well aware that he was not to be watching video on his personal phone, but that he abandoned his responsibility of protecting the lives of the workers he was supposed to

be watching over. It also avers that Claimant's first instinct when caught was to lie about the use of his personal phone.

With respect to the discipline assessment, the Carrier states that Claimant's irresponsible conduct cannot be tolerated. It emphasizes that this is not Claimant's first instance of failing to provide proper protection for roadway workers, pointing to the waiver Claimant signed in 2021 in connection with an incident in which a contractor work group was nearly struck by a train when Claimant stepped away from the crew and failed to provide warning. It notes that the waiver was still in effect when the instant violation occurred, less than two years later. The Carrier cites a prior award in which termination was upheld for another employee who was looking at his personal electronic device when he was supposed to be providing protection for on-track workers, and it posits that the same outcome is warranted here. The Carrier asserts that there was nothing arbitrary or capricious about the assessment here, 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. Claimant candidly admitted to violating the electronic device rule, and we do not believe that any alleged procedural violation was of such significance that he was deprived of a fair hearing. We address the Organization's disparate treatment argument below, but we note that no objection was raised during the hearing regarding introduction of the earlier waiver, so we consider the arguments on that issue to have been waived. The hearing transcript does not indicate to us that the hearing officer was biased.

We also 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 Claimant was in violation of the cited rules when he used his personal cell phone to watch videos when he was supposed to be providing protection to on-track workers. In view of Claimant's admissions, those facts are not in any real dispute. We also find sufficient evidence to support the dishonesty charge, as it was adequately proven that Claimant falsely stated that the phone was a company phone until the Superintendent asked to see it. Although the Organization contends

that there was no improper intent, as Claimant was just flustered at being caught, we believe that raises a credibility issue which was properly resolved on the property, a determination which we as an appellate board are not in position to overturn.

Having found that the rule violations were established, we turn to the level of discipline assessed. To overturn the Carrier's assessment would require the Board to find that the Carrier acted arbitrarily or capriciously so as to constitute an abuse of discretion. While this is apparently Claimant's first cell phone violation, it is not his first violation regarding failure to provide protection for roadway workers, and we believe the Carrier could rightfully consider that history of neglecting essential duties in determining the level of discipline to assess here, even if other employees have not been terminated for first time electronic device offenses. It has also been held in many prior awards that dishonesty breaks the bonds of trust necessary in the employment relationship, and that it is grounds for dismissal, even for a first-time offense. On this record, we cannot find that the Carrier's actions were an abuse of discretion. Therefore, we will not substitute our judgment for the Carrier's now.

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 27th day of January 2026.