

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 45545  
Docket No. 49087  
26-3-NRAB-00003-240855

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. E. Esparza, by letter dated October 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; 6.3.3; 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-302 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 August 31, 2023, Claimant Eduardo Esparza was assigned to perform watchman duties, providing protection for third-party contractor employees who were working at Bayshore Station. At approximately 1:10 p.m., a Carrier manager saw that Claimant was sitting in his truck watching video content on his personal phone while the contractors were working.

By letter dated September 13, 2023, Claimant was notified that the Carrier intended to impose discipline on him in connection with his allegedly sitting in his truck watching a movie on his cell phone while he was assigned to provide protection to a contractor group, neglecting the safety of the contractors. 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 1, 2 ; 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; 6.3.3 Visual Detection of Trains, C. Watchman, 1G; 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 September 25, 2023. Afterwards, the Carrier issued a notice of formal investigation by letter dated October 3, 2023. The formal investigation was held October

11, 2023, at which the Carrier withdrew Rules 1.1.1, 1.1.2, 1.20, and 6.3.3. Claimant admitted that his personal phone was not stowed and that he had it on his person. After the hearing, Claimant was found to be in violation of the remaining cited rules, and by notice dated October 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 as required by Rule 15 of the applicable collective bargaining agreement. It states that this is shown by the final reviewing officer's alleged statement prior to the initiation of the proceedings that the case could only end in resignation or dismissal of the Claimant. The Organization posits that the hearing therefore was merely a formality, and that it was not held to fairly gather all of the relevant facts. It cites numerous prior awards which have held that overlapping of prosecutorial and judgment roles is improper, and 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 enforced conflicting and ambiguous rules, thereby further depriving Claimant of due process. It states that Claimant was charged with violating both a rule, which was established in 2019, and a policy about electronic devices, which was established in 2018, and it argues that the language of the two is not consistent. The Organization asserts that the rule should be the governing document, and it contends that holding Claimant accountable for the older policy as well is unfair.

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 not on his lunch break, which it asserts would negate any electronic device rule or policy application. The Organization states that the Carrier did not ask Claimant about the timeline, nor did Claimant volunteer it, and it asserts that it therefore is plausible that Claimant was on an off-duty lunch at the time he was approached by the manager. It adds that Claimant took proactive measures to ensure the safety of the contractors before beginning his break. The Organization states that Claimant's testimony could lead to the conclusion that his lunch break did not begin at 11:45 a.m., as the Carrier witness alleged.

Regarding Claimant's use of his personal electronic device, the Organization argues that it was not proven that Claimant was watching a movie, citing Claimant's testimony that the device was on his lap charging when the manager approached him. It also questions the manager's testimony that he approached Claimant at 1:10 p.m., stating that he was unsure of the exact time during the informal hearing. The Organization posits that it could have been closer to 1:00 p.m. when Claimant started his off-duty meal period per the CBA, and that the Carrier has failed to prove otherwise.

The Organization further asserts that Claimant was not negligent in any of his safety-related duties. It states that he took proactive measures to ensure all members of the work group were accounted for and safely protected, thus reflecting a commitment to safety. The Organization asserts that there is no evidence to the contrary.

The Organization also reiterates its stance regarding the difference between the electronic device policy and Rule 2.21. It avers that the differences could cause confusion, and it contends that the burden of proof cannot be met if the newer rule in effect does not support the charge. The Organization says that the rule only restricts electronic device use if it would compromise safety-related tasks, and it argues that Claimant being on break would negate any alleged violation of the rule.

The Organization further asserts that Claimant was disciplined without just cause. It states that the Carrier failed to provide evidence proving that violations of a similar nature rise to the level of a dismissible offense, and 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 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 four years of service with no prior discipline for cell phone usage, 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 there is no evidence of record to indicate that Claimant was prejudged. It states that the only support for the Organization's claim to the contrary is found in unsupported assertions in the claim letter.

The Carrier also asserts that the record contains substantial evidence to support the finding of guilt, stating that the essential facts are not in dispute. It points to the testimony of the manager 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, both at the hearing and in his written statement, that he was "on personal electronic device."

The Carrier denies that the electronic device policy and Rule 2.21 are inconsistent, as both prohibit personal electronic devices. It notes that Claimant had received training on the use of personal electronic devices while on duty, and that he knew the importance of being alert and attentive while performing safety sensitive duties. It cites evidence that Claimant had received Roadway Worker Protection training on August 23, 2023, just eight days before the incident in question, which included material stating, "Personal cell phones and electronic devices are NEVER allowed on the right of way, at all, ever!" The Carrier avers that Claimant knew the rules, but that he chose to ignore them.

Regarding the Organization's argument that Claimant was on a lunch break, the Carrier points out that Claimant never asserted that was the case when he was approached by the manager. It also notes the manager's testimony that Claimant had said he had gone to lunch over an hour before being found with his electronic device, and it submits that the subsequent claim that he was on break is simply not credible. It adds that regardless of whether Claimant was on a lunch break, his actions were still in violation of the cited rules.

With respect to the discipline assessment, the Carrier states that Claimant's irresponsible conduct cannot be tolerated. The Carrier states that it was Claimant's duty to ensure the safety of the individuals who were on the track by paying close attention and 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. 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. The hearing transcript does not indicate to us that the hearing officer was biased, prejudiced or unfair toward Claimant. To the contrary, the transcript confirms that the hearing was conducted professionally and fairly.

With respect to the Organization's argument that the multiple roles of the reviewing officer deprived Claimant of due process, we note that the reviewing officer was not the officer who initiated the charges, she was not a witness, and she did not conduct the hearing. The awards cited by the Organization stand for the principle that the fairness of a hearing is jeopardized when a single Carrier officer plays multiple roles in the discipline process, such as when one officer initiates charges, holds the hearing while acting as a witness, and renders the decision. We do not find such improper overlapping to have occurred here.

Although the Organization asserts that the Carrier representatives at the informal meeting indicated the reviewing officer had said no agreement short of termination of employment could be reached there, we do not believe that Claimant was thereby deprived of a subsequent fair and impartial hearing. As noted above, we found the hearing to have been conducted scrupulously. In view of the very serious allegations at issue, we do not believe that the Carrier's apparent unwillingness to compromise on lesser discipline at the early stage rendered the formal hearing to be inconsequential, or that it prevented an objective review of the evidenced adduced at that proceeding.

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 video content when he was supposed to be providing protection to on-track workers. The fact that Claimant was using his

personal electronic device is not in any real dispute. We also find sufficient evidence to support the Carrier's position that Claimant was not on a break at the time and that he was subject to the restrictions of the electronic device policy and rule regardless. We find no support for the notion that Claimant was not required to abide by those restrictions or that he was relieved of his obligation to provide protection for the contractors at the time he was discovered with his cell phone. Even if only GCOR 2.21 is applied as urged by the Organization, the evidence clearly establishes a violation thereof, as it requires personal electronic devices to be turned off and stowed ("out of site, not easily accessible, and not on their person") at all times. Moreover, we do not believe the rule and policy provide inconsistent guidance to employees.

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, the record contains his written acknowledgement of having received the electronic device policy and the warning that failure to abide by it could result in possible termination. There is nothing inconsequential about failing to provide proper protection for on-track workers, and we believe the Carrier could rightfully consider the significance of the violation and Claimant's apparent disregard of the recent training which emphasized that personal electronic devices are prohibited at all times. 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.