

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14148
Docket No. 14060
14-2-NRAB-00002-150024**

The Second Division consisted of the regular members and in addition Referee Joseph M. Fagnani when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood Railway Carmen-Division of TCU/IAMAW
(BNSF Railway Company

STATEMENT OF CLAIM:

- “1. That the Burlington Northern Santa Fe Railroad Company violated the terms of our controlling agreement, when on May 30, 2014, the Carrier improperly issued discipline to Guernsey, Wyoming Carman Paul Girard, Employee ID# 7427644, as a result of an investigation held on May 15, 2014.**
- 2. That accordingly, the Burlington Northern Santa Fe Railroad Company shall be required to remove the Level S-30 day record suspension with a one (1) year review period that commences on June 3, 2014, issued by letter dated June 3, 2014, and all other record of this unjust and improper discipline shall be expunged from his personal record.”**

FINDINGS:

The Second 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 was assessed a Level S-30 day record suspension with a one year review period following a formal Investigation in connection with the following:

“ . . . your alleged use of a cellular phone, when you were observed holding and talking on a cellular phone while operating a motor vehicle, while assigned as a Relief Supervisor in Guernsey, WY at approximately 27th of April at 0927 hours. The date BNSF received first knowledge of this alleged violation is May 1, 2014.”

The record indicates that some of the Carrier's company vehicles are equipped with a DriveCam device which is a digital event recorder that captures video both inside and outside the vehicle. Assistant General Foreman Krick testified at the formal Investigation that upon reviewing DriveCam footage, he observed the Claimant holding and talking on a cell phone while driving a company vehicle. Mr. Krick also entered into the record a copy of Mechanical Safety Rule S-28-10 which prohibits the use of a cellular phone for voice communication in other than in hands-free mode. When the Claimant testified at the Investigation, he acknowledged that he was holding a cellular phone in his hand while driving the company vehicle but stated that he was only holding the phone and was not talking on the phone.

This case boils down to whether the Claimant was talking on the cellular phone while driving, which would be a violation of the Safety Rule, or whether the Claimant was only holding the cellular phone in his hand, which was not prohibited by the Safety Rule. The Organization argued that the Carrier failed to sustain its burden of proof since the video was not shown at the Investigation. In addition, the Organization stated that despite the fact that the video was to be included as Exhibit 2 to the transcript, the video was never supplied to the Organization when it was sent a copy of the transcript. The Investigation record supplied by the Carrier to the Board does not contain the Exhibit 2 video.

The Carrier has cited Awards that in situations where there is a conflict of facts, the Board should defer to the Carrier in resolving such conflicts. While the Board concurs with the long line of Awards on this subject, it does not believe that they are relevant in the present dispute. While there is certainly a conflict regarding whether or not the Claimant was actually talking while holding the phone, such conflict may have been able to be resolved at the investigatory proceedings by playing the video of the Claimant while driving the company vehicle. There is no explanation

given in the record for not playing the video nor is there an explanation why the video, although entered as an Exhibit at the Investigation, was not included in the transcript sent to the Organization nor that supplied to the Board.

Under the particular facts and circumstances in this case, the Board finds that the Carrier failed to sustain its burden of proof and rules that the discipline should be removed from the Claimant's record.

AWARD

Claim sustained.

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 Second Division**

Dated at Chicago, Illinois, this 20th day of December 2016.