

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 14169
Docket No. 14040
16-2-NRAB-00002-150003

The Second Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

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

STATEMENT OF CLAIM:

- “1. That the Burlington Northern Santa Fe violated the terms of the February 1, 2006 Agreement, specifically Rule 35, when on July 26, 2013, Carman Jason Ritzko was issued a Notice of Investigation and was subsequently dismissed from service on October 16, 2013 for usage of electronic devices while performing a FRA air test and inspection while working as a Carman at the Northtown Terminal on July 17, 2013 and July 6, 2013.
2. That accordingly, the Carrier be ordered to reinstate the Claimant and compensate him eight (8) hours pay at the pro-rata rate for each workday he is withheld from service commencing October 16, 2013 and continuing until he is returned to active duty.
3. Additionally, the Carrier is ordered to make the Claimant whole as follows:
 1. Returned to service with seniority rights unimpaired;
 2. Made whole for all vacation rights;
 3. Made whole for all health, welfare and insurance benefits and doctor expenses for him and his family during the time he was held out of service;
 4. Made whole for pension benefits including Railroad Retirement and unemployment insurance;

5. Made whole for any other benefits he would have earned during the time he is out of service;
6. Made whole for all wages, overtime he could have worked, lump sum payments, general wage increases and cost-of-living adjustments;
7. Removal of all record of this unjust discipline from his personal records.”

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.

At the time of the events leading to this dispute, Claimant Jason Ritzko was a Carman at the Carrier's Northtown Car Shop in Minneapolis, Minnesota. On or about July 22, 2013, it came to the attention of the Claimant's supervisors that the Claimant may have used an electronic device to make several Facebook posts on July 6 and July 17, 2013, while the Claimant was on duty and assigned to inspect trains.

Consequently, on July 26, 2013 the Carrier notified the Claimant in writing to attend an Investigation on August 5, 2013, for the purpose of ascertaining the facts concerning his responsibility, if any, for the improper usage of electronic devices on July 6 and 17, 2013. The Investigation was postponed, however, on three successive occasions, because the Claimant was on a medical leave of absence and reportedly unable to attend. The Investigation eventually was rescheduled for Monday, September 23, 2013, that being the date when the Claimant's medical leave was

scheduled to end. On September 23, 2013, the Claimant and his Organization representative appeared for the Investigation, but learned that the Carrier had postponed the Investigation once again on Friday, September 20, 2013 when the Claimant extended his medical leave for another two weeks until October 7, 2013.

The Investigation was held on October 7, 2013 with the Claimant and the Organization present. Thereafter, on October 16, 2013, the Carrier informed the Claimant that the Claimant was dismissed from the Carrier's service for violating BNSF Mechanical Safety Rule S-28.10 regarding the use of electronic devices while on duty.

Evidence at the Investigation revealed that, on July 6, 2013, the Claimant had made four Facebook posts between 8:27 A.M. and 8:57 A.M. while he was assigned to inspect train M-NTWGFD2-06A, and three Facebook posts while he was inspecting train M-NTWWIL1-06A. The evidence further established that, on July 17, 2013, the Claimant made at least four Facebook posts while inspecting train M-NTWSUP1-17A. At the Investigation the Claimant acknowledged using his personal cellphone to make those Facebook posts at the times stated. The Claimant offered no justification except to suggest that he might have been taking a break from his duties at the time of some of the posts. The Claimant also stated that, although he knew that the Carrier's rules forbade the use of cellphones while on duty, the Claimant believed that some foremen would allow it while an employee was taking a break.

The Carrier's Mechanical Safety Rule S-28.10 provides as follows, in pertinent part:

S-28.10 Games, Reading, or Electronic Devices

Unless permitted by the railroad, employees on duty must not:

...

A. Use electronic devices not related to their duties.

Cellular phones may be used for voice communication purposes only

...

Note: Cellular phones may be used in case of emergencies in the event of radio or other communication failure.

Despite the suggestions by the Claimant that (1) some of the Carrier's foremen might permit employees to use their cell phones while on breaks, and that (2) the Claimant might have been taking a break at the times he made his Facebook posts on July 6 and 17, 2013, the record lacks evidence that the Claimant in fact was permitted by any foreman to use his cellphone at the times and on the dates when he was charged with violating Rule S-28.10.

The record also fails to establish that there was any emergency involving the failure of radio communications at those times. More important, the Claimant did not use his cellphone "for voice communication" at the cited times, and voice communication is the only purpose for which the Rule permits employees to use their cellphones on duty. The Claimant acknowledges that he used his cellphone not to make phone calls but to make posts on the social network Facebook, a use that appears to be absolutely prohibited by the Rule. See, e.g., Public Law Board 6764, Award No. 159.

Therefore, the Board concludes that, the Claimant having acknowledged using his cellphone to make several Facebook posts while on duty on the dates cited, the Carrier had ample basis to find the Claimant in violation of Rule S-28.10, as charged.

The Organization, however, contends that the Carrier violated Rule 35 by conducting a biased Investigation, and by failing to proceed with the Investigation on September 23, 2013. The Board finds no basis to sustain that contention. There is no evidence in the record of bias on the part of the Carrier in conducting the Investigation. The Claimant and the Organization were afforded the opportunity to question witnesses, offer evidence and argue their positions at the Investigation that ultimately was convened on October 7, 2013. The postponement of the Investigation from September 23, 2013 to October 7, 2013 does not appear to have prejudiced the Claimant in any way. That postponement delayed the Investigation for only two weeks, after it previously had been postponed for more than six weeks due to the Claimant's medical leave. The postponement from September 23, 2013 to October 7, 2013 was consistent with the previous postponements, having apparently been prompted once again by the last minute extension by Claimant of his leave, from September 23, 2013 to October 7, 2013. Thus, the record does not establish a violation of Rule 35 by the Carrier.

Accordingly, the Board finds that the Carrier did not violate the Agreement in conducting the Investigation of the Claimant's violation of Rule S-28.10 or in terminating his service for violating that Rule. Therefore, the Claim must be denied.

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 Second Division

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