

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41450
Docket No. SG-41610
12-3-NRAB-00003-100290

The Third Division consisted of the regular members and in addition Referee Roger K. MacDougall when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of T. H. Brown, for compensation for all time lost, including skill pay, with all rights and benefits unimpaired and any mention of this matter removed from his personal record, account Carrier violated the current Signalmen's Agreement, particularly Rule 54, when it issued the harsh and excessive discipline of a 30-day suspension against the Claimant without providing a fair and impartial investigation and without meeting its burden of proving the charges in connection with an investigation held on February 4, 2009. Carrier's File No. 35-09-0010. General Chairman's File No. 09-012-BNSF-33-K. BRS File Case No. 14361-BNSF.”

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.

This case involves personal use of a Carrier-issued cellular telephone. At the time of this dispute, the Claimant was assigned to the position of Lead Signalman.

During audits of the Carrier's cell phone bills in January 2009, charges for the Claimant's usage for December 2008 were examined. The Carrier contends that its Sprint bill reflected more than 600 calls made or received by the Claimant and more than \$200.00 of text messaging fees for a total charge of \$301.22. At the time, the Claimant was off on scheduled vacation for the entire month.

An Investigation was scheduled to determine the Claimant's responsibility, if any, in connection with his alleged failure to comply with Maintenance of Way Operating Rule (MWOR) 1.6 – Conduct and 1.19 – Care of Property by his unauthorized use of company property to conduct personal business. Evidence and testimony compiled during the Investigation, which was held on February 4, 2009, resulted in the Claimant being assessed, in a letter dated March 4, 2009, a Level S 30-day actual suspension for his violation of the cited Rules.

The Carrier maintains a number of policies and directives dealing with cell phone usage.

A Travel and Entertainment Policy dated October 20, 2003, states:

"1. Cellular phone requirements

- Employees using Travel eX need to provide at a minimum the summary page of the bill, plus the first two pages of detail as required documentation for reimbursement.
- Employees must self-report the percent of business and personal usage before reimbursement will be made, regardless of whether the base plan minutes are exceeded (handwritten on the summary page of the bill).
- Each approver must be fully aware of the employees' base plan amounts and at their discretion may choose to have the employee submit the entire original bill."

An email dated November 5, 2003, which appears to have been sent to all exempt and non-exempt signal employees by Carrier Officer Dennis Bell states that “. . . a supervisor may determine if a cell phone is truly needed for the job. With proper approval, the supervisor may decide to approve a cell phone with direct bill to the BNSF supervisor. If a cell phone is provided and paid directly by BNSF, no personal calls will be allowed (except for emergency and those deemed necessary as a part of company business); it will be considered like any other tool that is to be used for company business.” This directive purports, on its face, to have been agreed-upon with General Chairman M. Dake.

A Carrier policy effective August 1, 2008 states, in pertinent part:

- “7.3 BNSF Wireless Equipment and Services are to be used only for matters relating directly to Company business or otherwise approved by management. Use for personal profit or soliciting for non-BNSF business enterprises is prohibited.
- 7.4 Limited personal use of BNSF Wireless equipment may be permissible provided that such use is consistent with standards established by local management and that it does not interfere with job performance, hinder BNSF business communications, or violate the standards set forth in this policy, BNSF's Code of Conduct, and Vision and Values.”

In a company-wide Travel and Entertainment Expense Policy, dated January 1, 2009, cell phone usage is addressed as follows:

“4.6 Cellular Phone Policy

Refer to the BNSF Cellular Phone Policy located on the BNSF Intranet site under the heading ‘Policies’ for information on obtaining a company cell phone. Policy CP0004 can be viewed at the following link:

* * *

- 4.6.A. Reimbursement of company cell phone expenses:
Employees must attach an original detailed bill to the

Employee Expense Account Form when using the paper expense account form.

- 4.6.B. An employee using Travel eX needs to provide the summary page of the bill, plus all pages of call detail as required documentation for reimbursement. Further, cell phone expenses should be billed directly to the BNSF Corporate Travel Card.
- 4.6.C Employees are solely responsible for self-reporting business and personal cell phone usage before reimbursement will be made. The percentage split between personal and business use should be written on the summary cell phone bill page that is submitted whether using a paper expense report or faxing receipt documentation into Travel eX. Appropriate and reasonable personal use of BNSF wireless telecommunications devices are permitted at your supervisors' discretion, with a maximum of \$10 worth of personal use per billing cycle. Once personal use reaches that threshold, all personal use will be paid for by the employee. . . .”

The Claimant admits that a number of the telephone calls and text messages were personal in nature. He asserts, however, that even though he was on vacation during the time in question, he was receiving a number of work-related calls from coworkers seeking his assistance. The Carrier takes issue with a number of these calls, contending that they were union-related business.

Ultimately, however, the Organization asserts that the Claimant had no ability to know the quantum of the charges in question. Even his supervisor did not receive a copy of the bill. Once presented with the bill, the Claimant offered to pay the Carrier for the personal portion of the charges. The Carrier contends that reimbursement for illegitimate use does not correct the original illegitimacy.

The Board carefully reviewed all of the exhibits in question. There is no doubt that the Claimant's use of the Carrier – issued cellular telephone was rather extensive during his vacation. There is some question as to which of the calls were personal

versus business. The Claimant admitted that a significant number were personal. However, that is not sufficient to uphold discipline in this case. The Board recognizes that there are many cellular telephone plans in existence. Some plans provide for unlimited text messaging for a flat monthly fee. Some plans have significant numbers of telephone calls allowed prior to any additional charges for usage. Without either the Claimant or his supervisor ever seeing the bill or, indeed, ever knowing what the plan terms were, it becomes impossible for an employee to know if they have exceeded the \$10.00 per month permitted usage. Indeed, during the course of the Investigation, the Carrier indicated that it had since changed its practice so that supervisors of employees with cellular telephones would, now, start receiving bills to review.

In view of all of these circumstances, the Board concludes that the Carrier failed to meet its burden of proof to assess discipline in this case. As a result, the Board sustains the claim, with the proviso that the Claimant shall reimburse the Carrier for all personal usage of this cellular telephone during the period in question, if he has not already done so.

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 16th day of October 2012.