

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41530
Docket No. MW-41450
13-3-NRAB-00003-110007**

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(Montana Rail Link, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [twenty (20) working days’ suspension beginning November 30, 2009 through and including December 29, 2009] imposed upon Mr. M. Remmick for alleged violation of Montana Rail Link On-Track Safety Rule 1.10 and General Code of Operating Rule 1.13 in connection with charges of alleged use of an electronic device (cellular phone) without permission while on duty at approximately 15:22 on October 22, 2009 at the Laurel Yard in Laurel, Montana was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File MRL-248-M).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. M. Remmick shall now have the discipline removed from his record and he shall be compensated for all lost wages, as well as receive all rights and benefits, that were lost to him as a result of this discipline.’”

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.

The facts in this case are substantially undisputed. The Claimant established, and currently holds, seniority as a Laborer. When events giving rise to the instant complaint occurred, the Claimant was assigned as a Laborer on the section crew at Laurel, Montana, with scheduled on-duty hours of 7:30 A.M. to 4:00 P.M. The record establishes that at approximately 3:22 P.M. on October 22, 2009, Assistant Roadmaster K. Heggie observed the Claimant using his cell phone while on duty and seated in a company-owned section truck parked near the Laurel yard office. According to Heggie, the Claimant was holding his telephone in front of him and was looking at it. At the time, Heggie believed that the Claimant was texting, and thus confronted the Claimant with that suspicion. The Claimant denied that he had been texting, and instead asserted that he had merely been looking at his phone when Heggie happened to observe him. Heggie nevertheless concluded that the Claimant had used his cell phone while on duty in some manner, which, absent proper authority to do so, constituted a violation of the Operating Rules cited above.

The Claimant was consequently directed to attend a formal Investigation on October 30, 2009, at which he was charged with using an electronic device without proper authority. At the Investigation, Assistant Roadmaster Heggie explained that the Claimant had not been authorized to use a cell phone while on duty, and had, in fact, been previously instructed to leave it at home "so that he would not be tempted to use it at work." Heggie further testified that he had specifically instructed the Claimant not to bring his cell phone to work on at least six separate occasions.

At the Investigation, the Claimant admitted that he had used his cell phone at work on the date in question, but he asserted that he had done so only to check the time. Therefore, we cannot, as a matter of fact, draw any conclusion other than that the Claimant was guilty of the charges at hand. The Claimant used his cellular telephone while on duty without proper authority, and we do not find his alleged reason for doing so exculpatory. According to cited Rule 1.10, when permission for use of

cellular telephones on duty is granted, which was not the case here, it is authorized only for purposes of voice communication. Furthermore, the Claimant acknowledged at the Investigation that on more than one prior occasion, Assistant Roadmaster Heggie had, in fact, instructed him to leave his cell phone at home. We find in favor of the Carrier that Heggie's order to that end constituted more than a mere "suggestion," and the Claimant's failure to adhere to the clear directive constituted a proven violation of Rule 1.13.

As to the suitability of a 20-day suspension under these particular circumstances, we find nothing unreasonable in the Carrier's response to the Claimant's proven Rule violations. The record evidence clearly shows that the Claimant was given fair warning concerning the use of his cellular telephone while on duty. The Claimant obviously failed to heed the Carrier's previous cautions, and he did so at his own peril. Furthermore, the record also establishes that the Claimant was suspended for 15 days in 2008 for failing to follow instructions. Thus, we find no basis for disturbing the instant discipline. The charges were proven and the amount of discipline was appropriate.

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 19th day of February 2013.