

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42711  
Docket No. MW-43300  
17-3-NRAB-00003-150546**

**The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division –  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(BNSF Railway Company (Former Burlington Northern  
(Railway Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The discipline (dismissal) imposed upon Foreman E. Porter by letter dated December 3, 2014 for alleged violation of ‘...MWOR 1.10 Games, Reading, or Electronic Devices.’ in connection with his alleged ‘... use of an electronic device while operating BNSF vehicle 21431, at approximately 1503 CST, October 8, 2014, at/or near Shannons Drive Road, Mitchell, NE on the Valley Subdivision which was cataloged by DriveCam event AMS86744, while assigned as a Foreman/Flagman on mobile gang TTPX0002.’ was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-15-D070-2/10-15-0061 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant E. Porter shall be reinstated to service with seniority and all other rights and benefits unimpaired, his record cleared of the charges leveled against him and he shall be made whole for all wage loss suffered.”**

**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 Carrier alleges that the DriveCam provides substantial evidence of the Claimant's cell phone use, to which he admitted. Dismissal was proper in view of the safety implications and the existence of two earlier serious violations within the 36 month review period. Should the claim be sustained, the Claimant should be returned to service with only lost seniority and wages, minus outside earnings.

The Organization insists that the dismissal was excessive because the Claimant knew his foreman was calling and he was in the process of stopping, which he did 100-200 feet after answering the call. The Claimant had not received a hands-free phone, as other employees had, and could have used a hand-held radio without violating the policy. The Claimant should be returned to service and made whole for lost seniority and wages, with outside earnings not considered.

The Claimant, with July 30, 2012 and August 15, 2012 serious violations on his record, was within a thirty-six 36 month review period when the DriveCam in the Carrier-assigned vehicle that he was driving, triggered by rough road, showed him with a hand-held phone to his ear. At the subsequent Investigation, the Claimant admitted using the cell phone. He explained that he knew his foreman was calling, probably about a new truck, and that he stopped and pulled off the road within 100-200 feet, 33-66 yards, after taking the call. Clearly the Claimant violated MOWOR 1.10 Games, Reading, or Electronic Devices, which prohibits the use of "cellular or mobile telephones . . . while driving a BNSF owned or rented vehicle . . ."

Although the Claimant would not have violated MOWOR 1.10 if he had been using a hand-held radio, the argument is unavailing, as the rule prohibiting cell phone use is clear and unambiguous. Moreover, since the Claimant knew who the call was from, he could have let the call go to voice mail, pulled off the road and then

returned the call. The matter was not urgent enough to justify the violation. And, that the Claimant had not received a hands-free phone did not excuse his non-compliance with a rule designed to minimize distractions that have led to tragic train and vehicle accidents.

The Board agrees with Referee Andrea Knapp's observation in Public Law Board No. 7602, Award No. 28 that "PEPA does not replace the terms of the Agreement, and any decision to terminate must be evaluated by the Board on the basis of the principles of just cause." The Board is also mindful of the notion in the industry that leniency is the province of the Carrier, not the Board. The Claimant could have been dismissed after the August 2012 violation, which was the second Level-S violation during the review period. However, presumably having considered the Claimant's record as a whole, dismissal was not imposed. Arguably, the Carrier chose to exercise leniency. The violation of Rule 1.10 is yet another Level-S violation within the 36 month review period. The dismissal at this juncture is not viewed as arbitrary and capricious and the Board sees no reason to substitute its judgment for that of the Carrier.

**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 31st day of August 2017.