

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42713  
Docket No. MW-43357  
17-3-NRAB-00003-160061**

**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 [Level S thirty (30) day record suspension with a one (1) year review period] imposed upon Machine Operator T. Tate by letter dated August 26, 2014 for all violation of MWOR 1.10 Games, Reading, or Electric Devices in connection with his alleged ‘ use of an electronic device when standing within four feet of the nearest rail of a track at MP 188.688 near Norwich, ND approximately 0803 hours on Wednesday, June 11, 2014 while assigned to SC30 working as a Machine Operator on the Devils Lake Subdivision.’ was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File B-M-2762-E/11-15-0039 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant’s record shall be cleared of the charges leveled against him and he shall be made whole for all wage loss suffered including loss of wages to attend the investigation.”**

**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 asserts that substantial evidence was obtained when the Claimant admitted using his cell phone. Roadmaster Bickford's testimony, found credible by the Conducting Officer, established cell phone use within four feet of the nearest rail when Claimant used his phone for personal business while he was on duty and not within a predetermined place of safety.

The Organization insists that the Investigation was not fair and impartial because the Conducting Officer had been involved in pre-investigation activities, including planning the Carrier's presentation, and because the Conducting Officer was also the charging officer. Moreover, the Carrier "cherry-picked" the evidence by refusing to call exculpatory witnesses, who the Organization called. Substantial evidence was missing because the Claimant's accuser gave uncorroborated testimony and the Roadmaster's own testimony showed that the Claimant had not fouled the track while on his cell phone.

The Board has elected to ignore for the most part the procedural concerns raised by the Organization and to consider the question of proof, if any, of the Carrier's allegation that while on his cell phone the Claimant was foul of the track. It is critical to begin the analysis with a clarification of what the allegation entailed. It is not necessary for a notice of Investigation to specify the rules or policies allegedly violated in order to meet the Rule 40.A criteria of a fair and impartial Investigation, but it is necessary to provide enough specifics so that the affected employee and his or her representative have a clear idea of what must be defended against or at least responded to. The notice informing Machine Operator Tate of the original Investigation and subsequent postponements stated the purpose of the Investigation as "ascertaining the facts and determining your responsibility, if any, in connection with your alleged use of an electronic device when standing within four feet of the nearest rail of a track . . ." The letter assessing the Level S thirty

(30) day record suspension and one (1) year review period cited the above-noted allegation, now proven in the Carrier's view, as the basis for the discipline.

The contention set forth in the Carrier's submission to this Board that even if the Claimant is found to have been more than four feet from the nearest rail, he is still in violation of MOWOR 1.10 Games, Reading, or Electronic Devices is not properly before this Board. The Claimant and his representative were not informed in the notice of Investigation that there was a concern that the Claimant was allegedly using his cell phone without permission without being in a predetermined place of safety, nor was discipline assessed at least in part on this supposed violation, thus alerting the Claimant and the Organization to address that element of MOWOR 1.10 in the on-property appeal process. The Carrier cannot claim a fair and impartial Investigation when, in essence, it added an allegation before the Board when no such allegation was made during the on-property appeal process. The process cannot be a trial by ambush.

When the reason for discipline is considered, the only possible conclusion that the Board can reach is that the allegation remains unproven, even if only the testimony of Carrier witnesses and the Claimant's admission that he called for a doctor's appointment on his cell phone is considered. Roadmaster Bickford testified that he was 450' to 500' from the switch near where the Claimant was located, with the switch stand approximately 6' from the nearest rail. In other words, Roadmaster Bickford was 150-167 yards—1 1/2 to 1 2/3 football fields—from the switch. If the claimant was 48" or less from the nearest rail, he was foul of the track. If he was 49" or more from the nearest rail, he was not foul of the track and therefore not guilty of a violation of MOWOR 1.10. The Carrier is in the impossible position of premising discipline on Roadmaster Bickford's ability to distinguish between 48" and 49" from a distance that, by his own estimation, was at a minimum the equivalent of a football field and half again. Obviously, he was not capable of making such a distinction. Moreover, under cross examination by the Claimant's representative, Roadmaster Beck acknowledged that it was possible that the Claimant was not foul of the track. And, also under cross examination, Foreman Clift testified that he was unable to tell how far from the nearest rail the Claimant was when he was using his cell phone.

Not only has the Carrier failed to prove the allegation to this Board with substantial evidence, it is difficult to understand the Conducting Officer's conclusion if he considered all of the evidence. The Board acknowledges and

accepts the general rule that in this industry, the credibility determinations of Conducting Officers are to be accepted. We agree, but an exception must be made when a credibility determination ignores reality, as it has in this case. The analysis of the record compiled in this case does not impress the Board as a fair and impartial analysis for the reasons set forth above. Rather, the decision to discipline the Claimant for this alleged violation is viewed as arbitrary and capricious and therefore, it cannot stand and must be expunged 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 Third Division**

Dated at Chicago, Illinois, this 31st day of August 2017.