

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43494  
Docket No. SG-44454  
19-3-NRAB-00003-170596**

**The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens 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 AC. Munson, for 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 Level S, 30-day Record Suspension with a 1-year Review Period to 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 January 13, 2016. Carrier’s File No. 35-16-0033. General Chairman’s File No. 16-014-BNSF-188-SP. BRS File Case No. 15691-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.**

**At the time of his discipline, the Claimant was a CTC Signal Maintainer in the Carrier's service. On December 9, 2015, the Claimant was given notice of an investigation in connection with the following charge:**

**"An investigation has been scheduled...for the purpose of ascertaining the facts and determining your responsibility, if any, in connection with alleged violations that occurred while you were assigned as CTC Maintainer (SMTR0414), leading to DriveCam exception event EWX28123, recorded at approximately 2024 hours, Central Time, December 7, 2015, at or near 1324 Saddlerock Drive, Wenatchee, Washington, showing the driver of BNSF vehicle 25986 using a cell phone while the vehicle was in motion. Alleged violations include but are not limited manually entering or reading text from cellular mobile telephone or similar device while driving; using a hand-held mobile telephone for voice communication while driving; failure to obey local, state and federal laws; and failure to comply with BNSF Company Vehicle Policy. The date BNSF received first knowledge of this alleged violation is December 8, 2015."**

**After a formal Investigation on January 13, 2016, the Claimant received this discipline:**

**"As a result of investigation held on Wednesday, January 13, 2016,... you are hereby assessed a Level S 30 Day Record Suspension for manually entering and reading text from a cellular mobile telephone while driving BNSF vehicle 25986 at or near 1324 Saddlerock Drive, Wenatchee, Washington, as recorded in DriveCam event EWX28123, at approximately 2024 hours, Central Time, December 7, 2015 while you were assigned as CTC Maintainer (SMTR0414).**

**In addition, you are being assessed a One (1) Year Review Period that commences on February 10, 2016. Any rules violation during this review period could result in further disciplinary action."**

**On December 7, 2015, the Claimant was operating BNSF vehicle 25986 while traveling to a trouble call. While driving, the Claimant braked hard at 6:24 pm local time which triggered the DriveCam to begin video recording. The supervisor testified that the video showed the Claimant holding his cell phone while the vehicle was in**

motion and tapping on the screen several times and then stopping abruptly at a stop sign. The screen shot entered into the record shows the Claimant behind the wheel of the vehicle looking down at the cell phone in his hand.

The Claimant's supervisor testified that when he first questioned the Claimant, he admitted using a cell phone to "retrieve a voice mail or... a missed call...". The Claimant denied telling his supervisor that he was retrieving his voice mail. The Claimant testified that he used his phone to call his wife to let her know that he was going to be delayed due to responding to the trouble call. He said that he was retrieving his wife's contact number to call her when the DriveCam recorded him. The Claimant denied braking abruptly because of the stop sign but said that he purposely stepped hard on the brake to stop the rear alarm from malfunctioning. The Organization entered the Claimant's cell phone records, which show an outgoing phone call at 6:25 P.M. local time. The evidentiary record contains no evidence that text messages were sent from or received by the Claimant's phone.

The Carrier contends that it has shown with substantial evidence that the Claimant was using his phone in other than hand-free mode while the vehicle was in motion, resulting in distracted driving. The Carrier contends that the Claimant violated MWOR 1.10, Games, Reading, or Electronic Devices:

**"While on duty, do not:**

- **Use cellular telephones for voice communications, emailing, performing any electronic text retrieval or entry, or accessing a web page when:**
  - **On the ground within four feet of the nearest rail of a track.**
  - **On, under or while involved with the operation or movement of equipment or machinery (e.g. cranes, loaders, forklifts, intermodal hostlers, etc.).**

\*\*\*

**While driving a BNSF owned or rented vehicle (off rail), do not:**

- **Use cellular or mobile telephones, or similar handheld electronic devices for voice communications in other than hands-free mode.**
- **Manually enter or read text from cellular or mobile telephones, or similar hand-held electronic devices (e.g. emailing, performing any electronic text retrieval or entry, accessing a web page, etc.).**

- **Dial or answer cellular or mobile telephones by pressing more than a single button when operating a commercial motor vehicle.**
- **Use notebook computers, laptops or similar devices. Display screen of such devices capable of being closed must be closed. Devices not capable of closing the screen must be turned off.**

**Employees must be aware of and comply with any local, state or federal laws governing use of wireless equipment while driving (e.g. laws banning use of wireless phone while driving)."**

**The Carrier further contends that the Claimant violated Washington State Law RCW 46.61.668, which states,**

**(1)(a) Except as provided in subsection (2)(a) of this section, a person operating a moving noncommercial motor vehicle who, by means of an electronic wireless communications device, sends, reads, or writes a text message is guilty of a traffic infraction.**

**The Carrier contends that the Claimant admitted to using his phone in other than hands-free mode to retrieve his wife's contact information to call her while the vehicle was in motion, a clear violation of MWOR 1.10. The Carrier contends that where there is an admission of guilt, no further proof is needed.**

**The Organization contends that the Carrier has failed to show that the Claimant was in violation of MWOR 1.10. The Organization contends that the cell phone log corroborated the Claimant's testimony that he was retrieving his wife's contact information to make a phone call, which did not violate the Rule, according to a November 1, 2015, a Rule Change Briefing that clarified which functions are considered texting, as follows:**

**"Texting is manually entering alphanumeric text into, or reading text from, an electronic communication device such as a cellular telephone. This action includes emailing, performing any electronic text retrieval or entry, accessing a website, etc. Texting does not include reading, selecting, or entering a telephone number, an extension number, or a voicemail retrieval code into an electronic device to initiate or receive a telephone call."**

The Organization contends that the Carrier has failed to show that the Claimant was texting, and the Rule Change Briefing confirms that the Claimant's conduct was not texting, as defined in the briefing.

The Board recognizes that the burden of proof in a disciplinary proceeding rests on the Carrier. The Carrier asserts that where there is an admission of guilt, no further proof is needed. However, the record shows that the Claimant was disciplined "for manually entering and reading text from a cellular mobile telephone while driving," and the Claimant only admitted that he was using his cell phone to retrieve his wife's contact information to call her. He denied manually entering or reading text.

The Carrier asks that this Board conclude from this evidence that the Claimant was manually and reading text, which is not what the Claimant admitted to. The Board finds that the conduct admitted to by the Claimant is specifically excluded from the definition of texting by the Carrier's Rule Change Briefing. When asked, the Claimant's supervisor stated that he did not have any record of the Claimant receiving or sending a text. The Board finds that the Carrier has failed to present substantial evidence that the Claimant manually entered or read text, the charge that formed the basis of discipline against him. The Claim must be sustained.

### **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 1st day of March 2019.