

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43514
Docket No. MW-44662
19-3-NRAB-00003-180125**

The Third Division consisted of the regular members and in addition Referee Meeta A. Bass when award was rendered.

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

PARTIES TO DISPUTE: (

**(The Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The discipline [thirty (30) day unpaid suspension] imposed upon Ms. L. Brisbois by letter dated February 19, 2016 for alleged violation of OTS Rule 29.0 E Electronic Device and GCOR Rule 1.10 Games, Reading and Other Media in connection with alleged use of a personal cell phone while on duty without permission on September 15, 2015 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File D-92-15-445-16/08-00559 CMP).

(2) As a consequence of the violation referred to in Part (1) above, the discipline imposed upon Claimant L. Brisbois shall:

‘... be set aside and claimant shall be made whole for any time and/or benefits lost as a result of this suspension. Any benefits lost, including vacation and health insurance benefits (including coverage under the railroad industry National Plan), shall be restored. Restitution for financial losses as a result of the violation shall include compensation for:

1) straight time pay for each regular work day lost and holiday pay for each holiday lost, to be paid at the rate of the position assigned

to the claimant at the time of suspension from service (this amount is not reduced by any outside earnings obtained by the claimant while wrongfully suspended);

- 2) any general lump sum payment or retroactive general wage increase provided in any applicable agreement for the time claimant was out of service;**
- 3) overtime pay for lost overtime opportunities based on overtime for any position claimant could have held during the time she was suspended from service, or for overtime paid to any junior employee for work the claimant could have bid on and performed had the claimant not been suspended from service;**
- 4) health, dental, and vision care insurance premiums, deductibles, and co-pays that claimant may not have paid had she not been unjustly suspended.**

In addition, all notations of this 30-day actual suspension should be removed from all Carrier records, including claimant's personal record.'"

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.

On September 15, 2015 Claimant was assigned as an Assistant Foreman. During the course of her duties, two (2) different Carrier employees, on two (2) separate occasions throughout the workday witnessed claimant using her personal cell phone while on duty. The first time Claimant was witnessed using the phone was when claimant was on Company machinery fouling the track. The second incident occurred when she was in a Company vehicle being transported to her vehicle.

The Carrier issued a Notice of Investigation letter dated September 16, 2015, which stated as follows: “The purpose of this investigation/hearing is to determine the facts and circumstances and to place responsibility, if any, in connection with your alleged use of your personal cell phone while on duty without permission from your immediate Supervisor on September 15, 2015. This indicates a possible violation of, but is not limited to, the following rules: OTS 29.0 E Electronic Devices, GCOR Rule 1.10 Games, Reading, or Other Media OTS 31.3 Resolving Challenges to On Track Safety.” Carrier subsequently removed possible violation of OTS 31.3 Resolving Challenges to On Track Safety from the Notice of Investigation.

After several postponements, the investigation hearing was held on February 5, 2016. Following the investigation hearing, Claimant received a Discipline Notice dated February 19, 2016, finding a violation of OTS Rule 29.1 E Electronic Device and GCOR Rule 1.10 Games, Reading and Other Media and assessed discipline of thirty (30) days without pay. The Organization appealed the Carrier’s decision by letter dated April 22, 2016 and the Carrier denied the same on July 11, 2016. The Organization advanced the claim to the Highest Designated Officer by letter dated February 27, 2017, and the same was denied on April 28, 2017. A formal conference was held on October 20, 2016 with no change in the position of the Carrier. This matter is before this Board for a final resolution of the claim.

The Board has reviewed the record developed by the parties during their handling of the claim on the property, and considered evidence related to the following to make its determination of this claim:

- “1) Did Claimant receive a full and fair investigation with due notice of charges, opportunity to defend and representation?**

- 2) If so, did the Carrier establish by substantial evidence that Claimant was culpable of the charged misconduct or dereliction of duty?
- 3) If so, was the penalty imposed arbitrary, capricious, discriminatory or unreasonably harsh in the facts and circumstances of the case?"

The Carrier contends that Claimant was afforded a fair and impartial investigation in accordance with the governing Collective Bargaining Agreement. The Carrier argues that substantial, probative evidence supports Claimants guilt for the charged offenses. During the investigation two (2) separate Carrier witnesses testified to Claimant using her personal cell phone on (2) two separate occasions. The one occurrence involved the Claimant using her cell phone to call a member of management while she was fouling the tracks on company equipment. Further, the Carrier asserts that the Organization failed to show the other alleged examples of calls between Claimant and members of management were in fact not for emergency situations, or that she was on a meal break. The Company does not agree that the twenty (20) minute payment for not scheduling a meal period, grants any permission for cell phone use or other liberties as an employee would receive during an uninterrupted meal period. Finally, the discipline of thirty (30) days suspension assessed to the Claimant was justified based on multiple events in the same day of duty and the seriousness of the offenses. The Carrier argues that employees have been dismissed from this Carrier for like events of using a cell phone while on Company equipment and while occupying track.

The Organization contends that the Carrier failed to meet its burden of proof that the Claimant was guilty of the alleged rule violations. The Organization argues that Claimant was not issued a company cell phone, and instead used her personal cell phone for company business with the consent of her supervisor. It is not disputed that her supervisor called Claimant on her personal cell phone during working hours, and vice versa. The Organization asserted that Claimant had not been afforded the thirty (30) minutes paid uninterrupted lunch, and Claimant's first opportunity to take twenty (20) minutes paid lunch in accordance with the agreement was while she was a passenger in the company vehicle. On the date in question, Claimant used her cell phone to obtain and release track protection, to communicate with the dispatcher due to the

radio tower being down, and in accordance with the exceptions, emergency and breaks, noted in the rule. The Organization further contends that the disciplined imposed was arbitrary, unwarranted and excessive. Lastly, it is the position of the Organization that the claim be sustained.

Having reviewed the evidence, the Board finds that the Carrier afforded Claimant a fair and impartial hearing. Carrier charged Claimant with violation of OTS Rule 29.1 E Electronic Device and GCOR Rule 1.10 Games, Reading and Other Media and assessed discipline of thirty (30) days without pay. Rule 29.1 prohibits the use of cell phones, and requires cell phones to be stowed. The Rule provides for exceptions, emergency, in lieu of radio during railroad radio failure, break or meal periods, or for minimal voice communication when the movement/track unit/work activities are stopped, the employee is not foul of any track and a job briefing unless all involved employee confirms such use will not interfere with any safety-related duty. It is not disputed that Claimant was not issued a company cell phone to perform her job duties. Claimant did not dispute that her charging supervisor did not actually give her permission to use her cell phone but suggests that his consent should be implied.

The Board finds that Claimant used her phone contrary to the directives of the Rule. However, of particular concern to the Board as a mitigating factor is the fact that her supervisor would call Claimant on her cell phone prior to the incident, and vice versa, with no evidence in the record establishing that an exception applied or any admonishment given concerning the use of her cell phone.

The Board finds that both charges are based on the Claimant's personal use of her cell phone. GCOR Rule 10 states that:

"Employees on duty must not: Play games, use personal electronic devices or other provided for the Rule 2.21, Electronic Devices; or read magazines, newspapers, or other literature not related to their duties when: On a train or engine, performing safety-related activities, or it would delay or interfere with required duties..."

The Carrier sustained its burden that Claimant fouled the track while using her cell phone. Claimant was not questioned whether or not she was using the device for reading magazine, newspapers or other literature. As a passenger in the vehicle,

Claimant denied that she was playing games on her cell phone and maintained that the use of her cell phone was for work purposes. This charge, therefore, is not factually distinct from OTS 29.0 E Electronic Devices and is based on the same set of facts as the related charge, and therefore is duplicative. The Board finds that since the charges were based on the same act the Carrier should have assigned only one charge, OTS 29.0 E Electronic Devices.

The Board finds the Carrier has met its burden of proof, and Claimant is guilty of violation of OTS 29.0 E Electronic Devices. The Organization asserts that the discipline of the thirty (30) day suspension is arbitrary, capricious, discriminatory or unreasonably harsh. While the Board finds that discipline is warranted, inconsideration of the Claimant's record, and the facts and circumstances of this case, the Board finds that the appropriate discipline is a ten (10) day unpaid suspension.

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 27th day of March 2019.