

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43606
Docket No. MW- 44467
19-3-NRAB-00003-170591**

The Third Division consisted of the regular members and in addition Referee Michael Capone when award was rendered.

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

PARTIES TO DISPUTE: (

(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. T. Burke by letter dated December 1, 2016 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File NEC-BMWE-SD-5487D AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall rescind the aforesaid dismissal decision and Claimant T. Burke shall be reinstated to service immediately with full seniority unimpaired and made whole for all lost wages and benefits resulting from his improper termination.”**

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 Claimant, Tony Burke, has been employed by the Carrier for approximately 17 months and held the position of Trackman. A hearing and investigation was held on November 22, 2016 for violating the Carrier's Standards of Excellence governing Amtrak Rules Alert No. 2011-01 New Federal Regulations Governing the Use of Electronic Devices effective March 28, 2011; Amtrak's Policy on Use of Portable Electronic Devices P/I 3.23.1; and Amtrak's Cardinal Rule #4 restricting use of electronic devices. The charges include the Specification:

"On the morning of October 25, 2016, Amtrak Trackman Tony Burke was observed using an electronic device while performing the duties of a Watchman at MP 92.8 in Baltimore, Maryland.

At approximately 7:45 a.m., when Mr. Burke was asked about the use of the electronic device by his Supervisor Mark Jenifer, Mr. Burke pulled out [sic] an iPod out of his Watchman Bag and stated that he was using it to check the time.

Mr. Burke's use of an electronic device while performing Watchman duties is not only a violation of Amtrak's Standards of Excellence, but also a violation of Amtrak's Electronic Device Policy and Cardinal Rules."

The Carrier dismissed the Claimant on December 1, 2016. The on-property record of the dispute reveals that subsequent appeals by the Organization were denied and the Carrier rendered its final written decision sustaining the dismissal on March 6, 2017. The Organization rejected the Carrier's decision and filed its notice of intent with the Third Division. The claim is now properly before the Board for adjudication.

The Carrier maintains that the Claimant's use of his iPod while performing watchman duties violated the express prohibition against use of personal electronic devices in the Carrier's Cardinal Rule #4, and Amtrak's policies set forth in its Standards of Excellence as well as in federal regulations. It argues that such conduct is a serious violation of its safety rules and poses a high risk of injury to employees and damage to its operation.

In discipline cases, the burden of proof is upon the Carrier to prove its case with substantial evidence and, where it does establish such evidence, the penalty

imposed is not an abuse of discretion. The Board has reviewed the record and finds substantial evidence that the Claimant violated the Carrier's rules and applicable regulations regarding the use of a personal electronic device while on duty.

The record supports the Carrier's decision to impose discipline for the Claimant's serious misconduct. The Carrier's witness, Engineering Supervisor Mark Jenifer provides credible testimony that the Claimant told him on October 25, 2016 that he was using the iPod as a watch while performing watchman duties. Mr. Jenifer's testimony is supported by his written statement of October 25, submitted contemporaneous with his discussion with the Claimant regarding the incident. There is no dispute in the record that the Claimant's iPod is an audio music device and that it has a watch function.

The Claimant provides inconsistent and contradictory testimony. He testified that he uses the iPod to check the time he has been working, as he stated previously to Mr. Jenifer. However, he contradicts his own testimony and Mr. Jenifer's written statement where he states he check the iPod only before beginning his watchman duties. The Claimant asserts that he was using a flashlight to look through his bag and was not looking at his iPod. However, the witness testimony from the other trackmen at the work site confirms that they saw the Claimant using something in his bag that lit up while he was looking at it and holding it in his hand.

The Board finds the Claimant's testimony unreliable and sees no basis to set aside the Carrier's credibility determinations from which it concluded that he used the iPod while performing watchman duties in violation of its rules. The Claimant's conflicting statements undermine the veracity of his testimony. The Carrier's credibility determinations of witnesses who testified during the hearing and investigation are not to be disturbed absent substantial evidence that its conclusions are arbitrary. A review of the documentary evidence and testimony does not provide a basis to ignore the Carrier's assessment of the witnesses' testimony. It is well established by arbitral precedent that the Board sits in review of the Carrier's findings made on the property and does not make *de novo* findings. Here, there is no basis to replace the Carrier's credibility determinations with our own.

Once the Board has determined that there is substantial evidence in the record to support the charges, we must decide if the discipline imposed is unreasonable, arbitrary, or capricious. A review of the record indicates that the dismissal from service is not excessive.

It is well established in the industry that leniency is reserved to the Carrier where there is no abuse of discretion. Here, we find that the Claimant knew that the use of electronic devices was prohibited and ignored the applicable rules. The Claimant's lack of trustworthiness is confirmed through his own inconsistent statements and undermines the assertion that he did not know the iPod was an electronic device. The Carrier cannot be considered arbitrary in dismissing an employee who ignores important safety rules related to the sole function of a watchman, which is to insure the safety of his fellow workers.

In summary, we have reviewed and carefully weighed all the arguments and evidence in the record and have found that it is not necessary to address each facet in these Findings. We find that the Carrier has established with substantial evidence that the Claimant violated the Carrier's rules and there is no basis to set aside the discipline imposed.

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 17th day of May 2019.