

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43689
Docket No. MW-45094
19-3-NRAB-00003-180588**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

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

PARTIES TO DISPUTE: (

(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. J. Herzog by letter dated March 15, 2017 for violation of MWOR 1.10 in connection with his alleged use of an electronic device while operating a company vehicle on January 13, 2017 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-1 7-D070-4/10-1 7-0183 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Herzog shall be reinstated to service with seniority and all other rights and benefits unimpaired, have his record cleared of the charges leveled against him and he shall be compensated for all wage loss suffered including lost overtime, expenses and benefits."**

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, a track inspector, was caught on DriveCam holding his cell phone. The Carrier points out that at the time, he was traveling at 62 mph on a two-lane highway. Screen shots show him holding a cell in his hand when he looks down, looks up, sees the car in front of him, slams on the brakes and swerves. During the investigation, the Claimant admitted he checked to see if the phone was ringing or if he had received a call. In the Carrier's assessment, this constitutes a serious violation. He was already under review for a Level S offense. As the Carrier sees it, any time a cell phone is on, it is in use. It cites arbitral support for this broad definition, arguing it could save lives. (Public Law Board 7564, Award 46).

The Organization acknowledges the Claimant was under a Level S review period but notes he only had three months left. It references decisions by Arbitrator Klaus which note that the Carrier allows one touch activation. Using this avenue, it defines impermissible "use" narrowly, allowing the employee to look at the phone and touch the hands-free activation button while driving. The Organization maintains the Claimant cannot be guilty of 'use' when all he did was look down without touching buttons. In its view, he was merely holding it in his hand, a static physical position which cannot reasonably be deemed 'use.' The Organization further protests the Carrier's admission into evidence of still shots drawn from the DriveCam video as opposed to the video itself.

The applicable rule states as follows in pertinent part:

"1.10 Games, Reading, or Electronic Devices

While on duty, do not:

- Play games.**
- Read magazines, newspapers or other literature not related to duties.**
- Use cellular or mobile telephones, or similar hand-held electronic devices 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 of movement of equipment or machinery (e.g. cranes, loaders, forklifts, intermodal hostlers, etc.).**

Exception – Mechanical employees not involved with the operation or movement of equipment or machinery and within four feet of the nearest rail or a track may use cellular phones for business-related voice communications when Blue Signal Protection is established on that track.

- **Use personal electronic devices (cellular telephones, notebook computers, laptops, e-books, etc.) for other than business purposes, except when located in a predetermined place of safety during break periods and not performing duties.**

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

- **Use cellular or mobile telephones, or similar hand-held 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 must be closed or 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 Board finds no flaw in the Carrier's use of still shots in lieu of video. Insofar as the Carrier bears the burden of proof, it can elect the evidence to use in attempting to meet this burden. If it does not use its best evidence, it bears the consequences. If it can establish its case with the evidence submitted, more evidence is not needed and will not disprove established facts.

As has been shown by on property awards on this rule, neutral umpires interpreting "use" have slid along a scale between a broad view that "use" means simply having the phone, to a more stringent, "one size fits all" interpretation that allows the

employee to pick up the phone and push a button - period. In the opinion of this Board, cases such as the one at hand should not be decided by simplistic reference to “use” in a sterile sense, devoid of context. Implicit in the very existence of any safety rule is the obligation to avoid action or inaction that unreasonably compromises safety. This Board believes common sense and context must be blended with the language of applicable rules to arrive at the proper interpretation: employees do not engage in prohibited “use” if they are within the single touch, hands free limitations specified in the rule, and if that handling of the phone is otherwise reasonable and safe under the circumstances. This interpretation harmonizes the permitted hands-free touching of phones with the universal, overshadowing obligation to conduct company business in a manner that is both reasonable and safe. This is not an addition or modification of any Carrier rule: it is implicit within the rule itself and every employee knows or should know (s)he needs to stay within the parameters of reasonable safety or consequences will follow.

The Claimant did not recall what he was doing. Hence, we look to the DriveCam still shots as the evidence of consequence in the case. In looking down at his phone while driving 62 miles an hour down a highway, the Claimant took a safety risk that Rule 1.10 was specifically designed to avoid. Had the other lane of the two-lane highway not been free, he could have been in a head on collision when he swerved to avoid impacting the vehicle in from of him. The Board is persuaded that the Claimant was clearly distracted, that this distraction was caused by looking down at his phone, and that the distraction constituted abdication of the Claimant’s fundamental obligation to drive and handle his cell phone in a safe and reasonable manner. The Claimant knew or should have known that looking down to handle his phone while driving 62 miles an hour down a two-lane highway constituted improper phone use under MWOR 1.10. The Carrier has provided substantial evidence of the alleged rule violation. In making this ruling, it is not the intent of the Board to negate the permitted uses under Rule 1.10 when reasonable and safe under the circumstances.

AWARD

Claim denied.

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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 18th day of June 2019.