

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 44245
Docket No. MW-45558
20-3-NRAB-00003-190343

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

(Brotherhood of Maintenance of Way Employes Division
(IBT Rail Conference

PARTIES TO DISPUTE: (

(BNSF Railway Company (Former Burlington Northern
(Railroad 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 three (3) year review period] imposed upon Mr. M. Joseph, by letter dated January 30, 2018, for violation of MWOR 1.10, Games, Reading, or Electronic Devices in connection with his alleged use of an electronic device while operating a Company vehicle on December 13, 2017 was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File C-18-D040-14/10-18-0103 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Joseph shall 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 as described in the initial claim.”

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's Roadmaster, J. Blydenburgh, was notified that he needed to review an incident captured by DriveCam. He determined the video showed the Claimant using his cell phone while making a left-hand turn in violation of MWOR 1.10 – Games, Reading, or Electronic Devices. After reviewing the Claimant's personnel record, which contained a prior Level S violation, with a 12-month review period, BNSF chose not to pursue dismissal, but assessed a Level S 30-day record suspension.

The Rule in question prohibits "use" of "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" "while driving a BNSF owned or rented vehicle." The Rule specifically prohibits employees from doing any of the following:

- “● 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).”

During investigation the Claimant admitted he was on the phone at the time of the DriveCam recording, and that his lips were moving. (TR 11) The Carrier contends that such an admission of guilt constitutes the substantial evidence it is required to

produce. It notes that in PLB 7564, Award 46, the Board upheld discipline for a Maintenance of Way employee who used a cell phone while crossing tracks, holding that the mere act of having a cell phone on while performing duties constitutes "use" of the device.

The Organization argues merely holding a cell phone does not constitute "use" within the meaning of the applicable rule. It maintains the Claimant was talking on his phone through Bluetooth, and was holding the phone only to keep it from sliding or falling. The Carrier counters that by holding the phone, he has limited the use of his hands, which is a serious safety concern.

We agree with the Carrier in this case. Though use of Bluetooth might have been permitted, the Claimant restricted his capacity to respond to vehicular incidents by holding his phone. He was holding it in order to use it, that is to make a call and communicate over the device. We find this conduct was not hands free and therefore does violate the requisites of MWOR 1.10.

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 23rd day of October 2020.