

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44644
Docket No. MW-45968
22-3-NRAB-00003-200529**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

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

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railroad)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline [Level S thirty (30) day record suspension and a one (1) year review period] imposed upon Mr. J. Merrier, by letter dated December 18, 2018, for violation of MWOR 1.10 Games, Reading, or Electronic Devices was on the basis of unproven charges, arbitrary, excessive and in violation of the Agreement (System File T-D-5775-M/11-19-0224 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Merrier shall now ‘... be immediately paid for his lost time on the day he attended the investigation, including any and all lost overtime paid to the position he was assigned to work, any expenses lost, difference in pay. We also request that Mr. Merrier be made whole for any and all benefits and his record cleared of any reference to any of the discipline set forth in the letter.”**

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.

Claimant J. Merrier has established and holds seniority within the Maintenance of Way Department. At the time of the incident resulting in discipline he had approximately eleven and one-half (11 ½) years of service and a clean disciplinary record and was assigned as a Track Inspector. On October 25, 2018 while hy-railing on the Lakes Sub near MP 62.7 the Claimant hit a tree that had fallen across the tracks, activating the DriveCam in his vehicle. The still shots taken from the DriveCam video showed the Claimant looking down at what he acknowledged was his cell phone. A few minutes later when he was in an area with adequate cell phone coverage, the Claimant phoned Roadmaster Chris Emerson and reported the incident. Minor damaged resulted to the plastic license plate mount. An investigation followed with the Carrier concluding that the Claimant had violated MWOR 1.10 Games, Reading, or Electronic Devices and assessing the above-noted discipline. A timely and properly processed claim was filed, not resolved on the property and progressed to this Board for final and binding resolution.

The Carrier insists that the investigation was fair and impartial and that the discipline is justified. The Claimant was traveling at 41 MPH when he hit the downed tree. The DriveCam shows that the Claimant was handling his cell phone. The Organization's assertion that the change in MWOR 1.10 was not communicated is unproven and reference to the lytx view on the DriveCam is improper. The Organization is asking for leniency, which is the prerogative of the Carrier, not the Board, and which has been given with a one (1) year rather than a three (3) year review period.

The Organization contends that the investigation was not fair and impartial, that the Claimant was prejudged and that the discipline was excessive. The Claimant simply tried to press the silence button on his phone to indicate to his wife that he had received her message about her father's heart attack. He was not holding the phone. The DriveCam literature indicates that Coaching and Counseling is appropriate for the infraction and Roadmaster Emerson told the Claimant several times that he would

receive Coaching and Counseling before changing his mind. The Claimant could have lied about the incident and avoided discipline. The change in the rule about cell phone use had not been properly communicated to the Claimant as his supervisor was unaware of the change.

The Board finds that the Claimant received a fair and impartial investigation and that the contention of prejudice is not supported by evidence. The Board also finds no reason to discount or disbelieve Roadmaster Emerson's testimony that, in response to Mr. Mozinski's question about whether the Roadmaster had spoken "about the rule change to everybody" he responded "Multiple times" TR, p. 19, ll. 11-12).

MWOR 1.10 prohibits the use of electronic devices, including cellular phones, while on duty "for other than business purposes except when located in a predetermined place of safety during break periods and not performing duties." The rule also does not allow employees to "handle or touch cellular telephones when the equipment is in motion," the reference to equipment being "on track equipment including hi-rail vehicles (on rail)"

There is no dispute that the Claimant was operating hi-rail equipment when he attempted to press the silence button on his cell phone. Whether the phone was in the Claimant's lap or being held by the Claimant is irrelevant. The Carrier has provided substantial evidence of a violation of MWOR 1.10. Under the circumstances, the Board would have fully understood a Carrier decision to coach and counsel the Claimant, but the Board must look to PEPA, not to the DriveCam, guidance, when considering the discipline. The Board also considers three guidelines. First, the discipline must be issued for just cause. See on-property Public Law Board 7602, Award No. 28. Without an extended discussion of what just cause entails, suffice it to say that discipline should not be found to be arbitrary, capricious or unreasonable. Second, recognizing that some infractions justify summary dismissal even when there is possible mitigation, if at all possible, within the general disciplinary framework on the property, discipline should be progressive. See on-property Third Division Award No. 42378. Third, there is strong decisional evidence that leniency is the prerogative of the Carrier and not the Board. Third Division Award No. 30429 and on-property Public Law Boards 3139, Award No. 101 and 4340, Award No. 20.

The Carrier has established the Claimant's violation. That the Claimant's momentary attention to his cell phone and not the track ahead resulted in an accident, even if very minor, is testament to the wisdom of and the necessity for MWOR 1.10.

The Board, in a general sense, is acutely aware of tragic accidents on the rails that have been attributed to “cellular inattention.” The discipline was a response to behavior that must be eliminated for the safety of Carrier employees and the public in general. It is progressive in that it gives the Claimant the opportunity to learn from the incident so that the infraction s never repeated.

While the Board denies the claim, consistent with recent on-property awards, the Claimant is to be made whole for hours lost, including any overtime that more likely than not the Claimant would have performed, as a result of the investigation. See Third Division Awards No. 42967, No. 42976, No. 42977 and First Division Award No. 28628.

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 15th day of December 2021.