

SPECIAL BOARD OF ADJUSTMENT NO. 7564

Case No.: 32/Award No.: 32
Carrier File No.: 10-13-0130
Organization File No.: C-13-D040-7
Claimant: Eric E. Thornton

BNSF RAILWAY COMPANY)
)
-and-)
)
BROTHERHOOD OF MAINTENANCE)
OF WAY EMPLOYEES DIVISION)

Statement of Claim:

The Carrier violated the Agreement when on December 20, 2012 Claimant Eric E. Thornton was issued a Level S thirty (30) day record suspension and a one (1) year review period for violation of MOWOR 1.10 Games, Reading or Electronic Devices and MOWOR 1.6 Conduct.

As a consequence of the violation, the Carrier should expunge the discipline from the Claimant's personnel record.

Facts:

By letter dated October 19, 2012 the Claimant was directed to attend an investigation on October 26, 2012 "for the purpose of determining your responsibility, if any, in conjunction with your alleged carelessness of the safety of yourself and others when you allegedly used your personal cellular phone improperly while working as a machine operator, operating a tie crane on TUCX0006, near mile post 378.4 on the Seligman Subdivision at approximately 1000 hours on Friday, October 12, 2012." After a mutually agreed to postponement, the investigation was held on November 28, 2012.

Carrier Position:

The investigation was fair and impartial with no showing of prejudice toward the Claimant. If anybody was argumentative, it was BMWED Representative Anderson, not Roadmaster Baptista. Because there is no contractual requirement for discovery, Roadmaster Baptista was not obligated to share evidence with the Organization prior to the hearing. MOWOR 1.10 is explicit in restricting private cell phone use. The Claimant used his phone to call his family, according to Roadmaster Baptista. Use of the phone is not disputed. Even though the tie crane was stopped at the time of the cell phone use, it was still running and in a production mode. The Claimant was not in a place of safety or

on break. The tie crane was in a row of machines waiting to move ahead. Furthermore, the Claimant admitted that he should have left the tie crane and gone to a place of safety to make the call. The Carrier disputes the Organization's contentions that the use of the phone was in response to an emergency and that the tie crane was not running at the time. The words "operating" and "running" have the same meaning, as MOWOR 1.10 must be read as a whole. There is substantial evidence of a violation even without the Claimant's admission of guilt, although the admission removes the need for further proof. The Claimant was obligated to maintain a safe working environment, particularly after the recent death related to cell phone use. The Board cannot dispute the Conducting Officer's credibility determinations and cannot consider BMWED Representative Anderson's discussion with Supervisor McConnell because that constitutes new evidence that was not a part of the investigation. The Organization asks for leniency, which is the prerogative of the Carrier and not the Board. However, if the Board awards in the Claimant's favor, because no pay was lost, the discipline should simply be expunged from the Claimant's personnel record.

Organization Position:

The investigation was not fair and impartial because it was a formality following preconceived judgment of the Claimant and because Baptista refused the Organization's request to review evidence prior to the hearing. The Carrier did not meet its burden of proof. The tie crane was not in motion when the Claimant used his cell phone to procure a hotel room, which was Carrier business. He was far from other machines at the time; thus there was no danger. Because the tie crane was not in motion, the Claimant was not required to leave the machine. Supervisor McConnell told BMWED Representative Anderson that use of the cell phone was permissible because the crane was not moving. The Claimant followed General Order No. 27 and MOWOR 1.10 "to a tee" and therefore no rules were violated.

Findings:

The investigation was fair and impartial. As this Board has noted in many prior awards, the parties' Agreement contains no mandated discovery and therefore no requirement that the Organization be made aware of the Carrier's anticipated witnesses prior to the investigation. Even if Roadmaster Baptista had been identified as a witness, she would not have been obligated to speak with the Claimant or his representative prior to the investigation. Furthermore, the Board is highly dubious as to the Organization's surprise at Roadmaster Baptista's appearance as a witness since she observed the Claimant using his cell phone.

There is no dispute that the Claimant used his cell phone while in the cab of the tie crane, which was not in motion at the time. Conducting Officer Matthews has found credible Roadmaster Baptista's testimony that the Claimant told her that the call was about family matters. In accordance with long-standing industry practice, the Board accepts the credibility findings of the Conducting Officer. Furthermore, had the Organization found it advantageous to do so, it surely could have produced the

Claimant's cell phone records as an exhibit to support his testimony that he called to obtain a motel room for the weekend.

Additionally, the Board accepts the Conducting Officer's finding that Baptista testified credibly when she said that the then stationary tie crane was running but was not locked out or tagged out and that there were machines in front and in back of it. Also, the Claimant was on duty rather than on a break and others in the gang were working. The Claimant was stopped waiting for the machine in front of him to move so that he could continue working. In view of the circumstances, the question for the Board is whether the Claimant complied with the meaning of the relevant rules when he used his phone to make a personal call while on the stationary tie crane.

The Organization stresses the language in MOWOR 1.10 and related identically worded documents that state that cell phones may not be used "when the equipment is in motion." This language, standing alone, supports the Organization's position. And, while the Board understands that there could be some confusion, there is additional language to consider. The third bullet point under MOWOR 1.10 prohibits use of a cell phone for personal business by an on-duty employee who is "On the ground within four feet of the nearest rail of a track" or who is "involved with the operation or movement of equipment or machinery." If a cell phone could be used in compliance with MOWOR 1.10 while the employee is seated in the cab of a running but stationary piece of machinery, then there would be no need for the language quoted above. It is particularly instructive that the language includes the phrase "operation or movement," as this refers to two possibilities: 1) running and not in motion and 2) running and in motion. MOWOR 1.10 must be read as a whole. Doing so makes clear that the intent is to prohibit cell phone use while in the cab of a running but idle piece of machinery. The Claimant seemingly was well aware of the meaning and intent of MOWOR 1.10 because he testified that "It was an emergency phone call. Sure enough. I should have got on the ground, but it is what it is." The Claimant has admitted the violation.


When the inherently dangerous nature of the industry is considered, the need to read MOWOR 1.10 as a whole should become more obvious. All cell phone use distracts from the business at hand. Even when equipment is not moving, machine operators must be vigilant and alert to the environment in which they are operating. Rules governing cell phone use help to ensure safe operations that do not result in injury or death, as had recently happened.

Award:

Claim denied.

Order:

The Board, after consideration of the above-noted dispute, hereby orders that no award favorable to the Claimant be entered.



Gary Hart, Organization Member



Zahn Reuther, Carrier Member



I. B. Helburn, Neutral Referee

Austin, Texas
February 12, 2014