

**P.L.B. No. 7585
Case No. 25
Award No. 25**

PUBLIC LAW BOARD NO. 7585

CARRIER FILE NO. 10-13-0223

ORGANIZATION FILE NO. C-13-D040-12

CLAIMANT: Brandon K. Fresquez

Parties To Dispute:

**Brotherhood of Maintenance of Way Employees Division – IBT
& BNSF Railway Company**

Statement of Claim: *The Carrier violated the Agreement on February 11, 2013 when it assessed Claimant Brandon K Fresquez a Level S 30-day record suspension, with a 3 year review period for alleged violation of Maintenance of Way Operating Rule 1.10- Games, Reading, or Electronic Devices, for alleged use of hand-held electronic device while operating a motor vehicle on November 16, 2012.*

Background Facts:

On Friday, November 16, 2012 between 8:30 and 8:35 am, Denver Superintendent of Operating practices P. L. Kreger left the Globeville Road facility and made his way to I-25. Traffic was heavy and slow. According to Kreger, about a mile from the facility near 20th street, he saw a BNSF truck driver using a hand held device. He said he honked and when the driver looked over, he held up his own cell phone to communicate his concern. However, he said the driver kept talking. He identified the vehicle as #20197.

In his assessment, driving while using a hand-held device constitutes a violation of MOWOR 1.10 which prohibits use of electronic devices while on duty. The rule goes on to specify that employees driving a BNSF vehicle are not to use cellular or mobile telephones or similar hand-held electronic devices other than in a hands-free mode. This rule was implemented on October 1, 2012.

Kreger inquired and was initially told the car was assigned to a driver named Savala. Based on this information, Kreger sent out an email at 10:30 am reporting the incident to several members of management. He was later advised that vehicle #20197 was assigned to Claimant Fresquez.

Roadmaster Michael Paz's testimony was taken subject to the Organization's objection because he was not identified as a witness on the Notice of Investigation. Further, at the time of investigation, he had only been on the job 30 days. Hence, when the rule changed, he was not working in Denver.

The Board is not persuaded that Claimant was denied a full and fair hearing. The Organization has a right to request postponement in order to prepare rebuttal for surprise evidence, and certainly denial of such an opportunity could impact the fairness of the proceeding. However, there was no such request in this case.

Paz had no record of a briefing in Denver regarding the rule change. He supplied fuel and GPS records showing that Claimant purchased fuel for the identified vehicle on the day in question, and that the vehicle traveled along I-25.

Claimant denies neither of these facts. He stated he normally operates vehicle #20197, though he did not recall the day in question. He said he gets a substantial volume of work-related phone calls, but does not answer them while operating his vehicle. He claimed he has a Bluetooth headset but said he prefers not to use it. He did not recall anyone honking or showing him a cell phone from an adjacent vehicle. He asserted he travels on I-25 in his daily commute to and from work.

Opinion of the Board:

The Organization maintained Kreger was uncertain of Claimant's identity and characterized his testimony as unreliable on this point. In its view, Kreger must have mistaken the Bluetooth for a cell phone.

These arguments are not persuasive. Claimant himself said he does not like the Bluetooth, making it unlikely that he was holding it. Kreger testified he saw the driver hold a phone to his ear and was sure Claimant Fresquez was the driver - "without a doubt." [TR 26] The fact that Kreger was initially misinformed about the identity of the driver does not erode the credibility of his testimony; he relied on what he was told regarding the identity of the assigned driver, and once in the presence of Claimant, was able to visually identify him. Given the fact that Claimant fueled the identified vehicle on the day in question, it appears more likely than not that Claimant was indeed driving vehicle #20197 on the day in question. This is sufficient for the Carrier to meet its burden on that point.

Claimant made no assertion that he was surprised by the rule or unaware of it. Instead, his defense appeared to be a blanket assertion that he does not answer phone calls while operating company vehicles. He had no recollection regarding the day in question. However, it concerns the Board that there is no evidence of any notice to the Claimant regarding implementation of the rule against cell phones. Even if Claimant was aware that he should not use his cell phone, there is no indication of any notice that failure to comply would result in the relatively serious penalty of a Level S Record Suspension with a three-year review period.

Claimant's failure to recall an incident does not constitute a denial. The Carrier's five-day delay in inquiring about the incident was in actuality a due process violation, since no reasonable person could be expected to recall whether or not (s)he picked up a cell phone fully five days prior. However, in this case, the due process violation was not prejudicial to Claimant; Kreger's specific visualization of the cell phone in Claimant's hand is persuasive evidence that Claimant did in fact use a cell phone while driving on the morning of November 16.

The Organization next points out that fully five days passed before Claimant was put on notice of his alleged offense. In its view, this speaks volumes about the relative seriousness of this alleged offense, making the Carrier's selection of penalty grossly excessive.

Certainly, driving while using a cell phone increases the risk of vehicular accidents, and of bodily injury or even death. For this reason, the Board is not suggesting by way of this award that the Carrier is precluded from characterizing cell phone use as a safety offense. However, as the Organization points out, waiting fully five days before reacting to this rule violation cannot be harmonized with its classification as a serious safety incident warranting a Level S Record Suspension with a three-year review period. Indeed, the five-day delay in acknowledging the incident and taking action operates to effectively categorize the incident in this case as relatively non-serious. As such, the discipline taken was unduly harsh and contrary to the requisites of just cause.

AWARD:

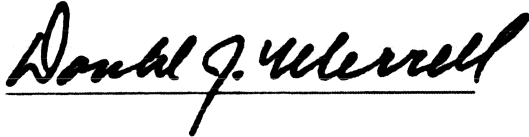
The claim is granted in part. The Level S 30-day record suspension with a 3-year review period shall be removed from Claimant's record, and shall be replaced with a Standard Formal Reprimand with a 1-year review period.

Order:

The Carrier shall comply with the terms of this Award immediately upon receipt of a fully executed copy thereof.

Patricia T. Butler

Patricia Thomas Bittel
Chair and Neutral Member

A handwritten signature in black ink, reading "Donald J. Merrell", written over a horizontal line.

Donald Merrell,
For the Carrier

A handwritten signature in black ink, reading "Gary Hart", written over a horizontal line.

Gary Hart,
For the Organization

Dated: April 12, 2014
